STATE OF MICHIGAN
COURT OF APPEALS

STACY PHOTHISAN, individually,
and as representative of a class of
similarly-situated persons and entities,

Plaintiff,

v.

CITY OF HOLLAND, MICHIGAN,
a municipal corporation, by and through
THE HOLLAND BOARD OF PUBLIC WORKS,

Defendant.

Court of Appeals Case No. 377279

Ottawa County Circuit Court
Case No. 2025-008184-CZ
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PLAINTIFF/APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

On August 29, 2025, the Ottawa County Circuit Court entered an Opinion and Order granting the motion for summary disposition filed by the City of Holland (the "City") and denying Plaintiff's cross-motion for summary disposition. The August 29, 2025 Opinion and Order adjudicated all claims for and against all parties and therefore constitutes a final order. *See* App. Ex. 1.[1] On September 12, 2025, Plaintiff/Appellant filed a timely claim of appeal of right pursuant to MCR 7.203(A)(1), which conferred jurisdiction to this Court.

[1] Exhibits referenced herein are designated as "App. Ex." and are contained in an appendix that Plaintiff/Appellant is submitting contemporaneously with this Brief. Each of the documentary exhibits in the Appendix (except for the Circuit Court's August 29, 2025 Opinion and Order) were submitted to the Circuit Court in connection with the parties' dispositive motion practice in this case. Therefore, they are properly part of the record on appeal. Unless otherwise noted, the page numbers herein reference the specific Appendix pages cited, not the pages in the original document.

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STATEMENT OF QUESTIONS PRESENTED

1. The Charter of the City of Holland, Michigan (the "City") authorizes the City's municipal electric utility to transfer certain percentages of the "net income" of the utility to the City's general fund for "the general purposes of the City." § 12.16 of the Charter provides that "[u]p to 50% of the annual net income of the board may be appropriated by the council to the general purposes of the city" and further provides that "[t]he foregoing limitation of 50% of **such** net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council." (Emphasis added.) Any other transfers in excess of those amounts must be authorized by the City's voters. Can the City transfer more than 100% of the net income of the utility to the City's general fund without voter approval?

Plaintiff answers: No.

Defendant will answer: Yes.

The Circuit Court answered: Yes.

This Court should answer: No.

2. § 12.16 of the City's Charter provides that the "foregoing limitation of 50% of **such** net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council."[2] (Emphasis added.) Well-established principles of statutory interpretation (applicable to municipal charter provisions) dictate that the word "such" means "of the character, quality, or extent *previously indicated or implied*." *Goodhue v. Dept. of Transportation*, 319 Mich. App. 526,

[2] § 12.16 of the City's Charter is Exhibit 1 to Plaintiff's Complaint (App. Ex. 2, pp. 31-39) and Exhibit 2 to Plaintiff's MPSJ (App. Ex. 3 at pp. 97-105).

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536-537, 904 N.W.2d 203 (2017) (quoting *Merriam-Webster's Collegiate Dictionary* (11th ed.)) (emphasis in original). Are the amounts that the board of public works and the City Council are authorized to appropriate for the general purposes of the City limited to 100% of the net income of the electric utility?

Plaintiff answers: Yes.

Defendant will answer: No.

The Circuit Court answered: No.

This Court should answer: Yes.

3. Plaintiff's Complaint alleges that the City had no net income in certain years, yet the City still transferred millions of dollars from its electric utility to the City's general fund without voter approval. Did the Complaint adequately allege that the City's actions violated the Charter sufficient to withstand a motion for summary disposition pursuant to MCR 2.116(C)(8)?

Plaintiff answers: Yes.

Defendant will answer: No.

The Circuit Court answered: No.

This Court should answer: Yes.

4. The highest-ranking officials of both the City and its electric utility have conceded that "**[o]nly the voters can approve an appropriation if it exceeds net income, as determined under the Charter.**" *See* March 27, 2019 Memorandum: "Establishment of Policy To Guide Planning And Execution Of Utility Transfers" (Exhibit 1 to Plaintiff's Motion for Partial Summary Disposition ("Plaintiff's MPSJ")), App. Ex. 3, pp. 88-96 (emphasis added). Did the Circuit Court err in disregarding these admissions?

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Plaintiff answers: Yes.

Defendant will answer: No.

The Circuit Court answered: No.

This Court should answer: Yes.

5. In Count III of her Complaint, Plaintiff alleged that the City's electric rates included amounts to fund the City's transfers to the City's General Fund and that those rates violated common law ratemaking requirements because the rates, viewed as a whole, were unreasonable in that they were excessive. *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 969 N.W.2d 570 (2021). Did the Complaint adequately allege that the City's inclusion of amounts to fund the transfers in its electric rates violate the common law?

Plaintiff answers: Yes.

Defendant will answer: No.

The Circuit Court answered: No.

The Court should Answer: Yes.

6. In the Circuit Court, Plaintiff brought a cross-motion for summary disposition pursuant to MCR 2.116(C)(10) as to her claim in Count I of the Complaint that the City's actions in transferring more than 100% of the net income of the Electric Utility without voter approval violated § 12.16 of the Charter. Did the Circuit Court err in denying Plaintiff's motion?

Plaintiff answers: Yes.

Defendant will answer: No.

The Circuit Court answered: No.

The Court should answer: Yes.

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STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

I. NATURE OF THE ACTION

This action challenges the retail electric rates and charges (the "Electric Rates" and "Electric Charges") imposed by the City on citizens and entities (the "Electric Customers") who/which receive electricity from the City's Electric Utility Fund (the "Electric Fund"). The City, through its Electric Fund, has systematically garnered tens of millions from its Electric Customers through its excessive rate practices.

Michigan has long recognized that a "municipally-owned utility must be built and operated, not for a corporate profit, but for the purpose of providing utility services at a reasonable cost to the citizens…" *Wolgamood v. Village of Constantine*, 302 Mich. 384, 404-405, 4 N.W.2d 697 (1942). Contrary to this principle, since at least 2019 the City has set its Electric Rates at a level far in excess of the rates that were necessary to finance the actual costs of providing electric services.

The City has grossly overcharged its Electric Customers by including in its Electric Rates an illegal charge (the "Transfer Charge") that is designed to raise millions of dollars of revenues that the Electric Fund transfers to the City's General Fund (and other City funds) to be used for "the general purposes of the City." The City has made no attempt to prove that it provides "consideration" to the Electric Fund for these gratuitous Transfers.

Purportedly relying on certain provisions in its Charter, the City allocates approximately 6.25% of its budgeted Electric Fund revenues to the Transfer Charge. That translates to about $8 million per year. Between July 1, 2021 and June 30, 2024 the City transferred over $30 million from the Electric Fund to the City's General Fund.

Plaintiff's claims are based primarily upon the following facts and circumstances:

1. § 12.16 of City's Charter (Exhibit 2 to Plaintiff's MPSD, App. Ex. 3 at p. 103) prohibits the City from transferring more than the "net income" of the Electric Utility to the General Fund without the approval of a 3/5 majority of the City's voters.

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2. The highest-ranking officials of both the City and the Electric Utility have conceded that "**[o]nly the voters can approve an appropriation if it exceeds net income, as determined under the Charter**." *See* March 27, 2019 Memorandum, Exhibit 1 to Plaintiff's MPSD, App. Ex. 3, p. 89 at fn 1 (emphasis added).

3. In the fiscal years ending June 30, 2022 through June 30, 2025, the Electric Utility had **no** budgeted "net income," yet the City, in violation of the Charter, still caused the Electric Utility to transfer tens of millions of dollars to the City's General Fund without obtaining voter approval. *See* City Budgets for FY 2022-FY 2025 (Exhibits 6-9 to Plaintiff's MPSD) App. Ex. 3 at pp. 116-127.

Nonetheless, despite the clear limitation on the City's authority to transfer funds set forth in the Charter, the Circuit Court found as a matter of law that: (a) the Charter imposed **no** limitations on the City's ability to transfer money from the Electric Fund; and (b) the City's electric rates were reasonable even though they included amounts to fund the transfers.

Plaintiff challenges these findings on appeal.

II. THE ALLEGATIONS OF THE COMPLAINT

By Charter and ordinance, the Holland Board of Public Works ("HBPW") is a department of the City established to construct, maintain, improve, and extend the electric plants and distribution systems of the City. Complaint at ¶ 11 (App. Ex. 2, p. 17).

Through the HBPW, the City maintains and operates the Electric Fund purportedly to provide "electrical energy to meet the requirements of [its] electric system customers; and to provide that energy at the lowest cost possible at a high level of reliability as needed by those customers." Complaint, ¶ 12, *citing* HBPW 2016 Mission Statement. (App. Ex. 2, p. 17.) HBPW provides electricity not only to the City of Holland but the surrounding townships of Holland Township, Park Township, Laketown Township, and Fillmore Township. Complaint, ¶ 13. (App. Ex. 2, p. 17.) The City, through the HBPW, establishes its Electrical Rates from time to time pursuant to its Charter and enacted ordinances. Complaint, ¶ 14, citing City Charter § 12.17. (App. Ex. 2, p. 18)

The Complaint alleges that the City has grossly overcharged its Electric Customers by including in its Electric Rates a cost component designed to generate millions of dollars of revenues

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that are transferred from the Electric Fund to other City funds (the "Transfer Charge"). Complaint, ¶ 16 (App. Ex. 2, p. 18.) The transferred funds, generated by the Electric Rates and Charges, are used for the general support of the City, and for purposes wholly unrelated to providing electric services. *Id.*

The Charter provision that the City claims authorizes the City's Transfer Charge (§ 12.16) provides in pertinent part:

> The **net income shall be determined by deducting from the receipts from operations and income from investments all expenses incurred and charges made or allowed for and on behalf of such utility in accordance with budget appropriations, or by appropriate action under authority of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness.**
>
> **Up to 50% of the annual net income of the board may be appropriated by the council to the general purposes of the city**. All such net income which is not so appropriated shall be placed in proper accounts or funds of the city which shall be established as reserves for future operations, replacement, extension, or improvement of such utilities.
>
> Nothing herein contained shall be interpreted to limit the power of the council to place, for any year, in such accounts or funds a larger percentage than 50% of such net income to the purposes of such utilities, in the event that such appropriation shall be requested by the board of public service [works] and be approved by seven members of the council.
> **The foregoing limitation of 50% of such net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council.** …
>
> The electors of the city may, by a 3/5 vote of the qualified electors voting on such proposal at a regular or special election, approve an appropriation of more than 50% of **the** net income for any year for general purposes, or may approve the placing of more than 50% of **the** net income for any year in the reserve accounts or funds as above provided for the purposes of such utilities, **or may approve for other municipal purposes the use of such accumulated and unallocated accounts or funds as have been established**. [Complaint, ¶ 18 (App. Ex. 2, pp. 18-19) citing Exhibit 1 to Complaint, § 12.16 (emphasis added) (App. Ex. 2, p. 37).][3]

[3] The City's Charter is also included in the record as Exhibit 2 to Plaintiff's MPSD. *See* App. Ex. 3, p. 97-105).

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Thus, pursuant to the City's Charter, the Electric Utility is permitted to transfer 50% of its **net income**, or a higher percentage of the **net income**—**but only the net income** and then only if approved by the City's Council—for the "general purposes of the city." Complaint, ¶ 19 (App. Ex. 2, p. 19).

The City prepares financial statements for its Electric Fund. These financial statements show that, in the six years preceding the filing of this Complaint, the City has systematically transferred, on an annual basis, at least $7 million per year from the Electric Fund to the City's General Fund or other City funds. Complaint, ¶ 20 (App. Ex. 2, p. 19).

The formula for determining the amount of the Transfer varies from year to year but is purportedly based upon a percentage of the Electric Fund's **budgeted revenues** (not net income) of the same fiscal year. Complaint, ¶ 21 (App. Ex. 2, p. 20). ¶¶ 22 through 26 of the Complaint specifically identify the amounts of each annual Transfer for FY 2021 through FY 2025 (App. Ex. 2, pp. 21-22).

The amounts used to support the Transfers are incorporated into the City's Electric Rates through the Transfer Charge. The City's electric customers were assessed the Transfer Charge in each and every electric bill they received.[4] Moreover, as Electric Customers of the City, Plaintiff and each member of the Class paid the Transfer Charge when they paid their electric bill. Due to the Transfer Charge alone, the City has overcharged its customers by over $40 million during the Class Period. Complaint, ¶ 27 (App. Ex. 2, p. 21).

In a memorandum dated March 27, 2019, both the City Manager and the General Manager of the HBPW advocated for the "establishment of policy to guide planning and execution of utility

[4] The City makes no attempt to justify the Transfer Charges as representing reimbursement for services provided to the Electric Fund by other City departments. To the contrary, the historical amounts of the Transfers have been determined **solely** by reference to the financial needs of the City's General Fund. Complaint, ¶ 28 (App. Ex. 2, pp. 21-22).

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transfers." In the memorandum, these authors stated (in pertinent part):

> **Increases in the transfer percentage during the early part of this period were the result of the housing market collapse in 2008 and a resetting of the taxable value of properties in Holland. This caused significant financial strain on the City's General Fund. The HBPW transfer increase tempered this impact somewhat**. During this time, the HBPW also experienced significant decline in industrial sales of electricity due to the economic recession that followed the housing crisis. The HBPW experienced a rebound in sales volume after 2011, led mostly by the economic recovery. This was coupled by a series of rate adjustments targeted to prepare for the investment in Holland Energy Park. That worked to spark significant growth, on average nearly 8.5% year over year, in the transfer payment between 2012 and 2018. By 2018, the transfer percentage had reached 5.75% of **gross electric retail sales**. [Complaint, ¶ 29 (App. Ex. 2, p. 22) and Exhibit 6 to Complaint (App. Ex. 2, p. 57) (emphasis added)[5].]

In the same memorandum, Van Beek and Koster acknowledged that "Holland's City Charter Section 12.16, Limitation on Use of Utility Funds, both outlines the method to calculate net income and limits on the use of **that income** for the general purposes of the City." (App. Ex. 2, p. 56) (emphasis added). Van Beek and Koster advised the City Council and the HBPW board that "**Only the voters can approve an appropriation if it exceeds net income, as determined under the Charter."** *Id.* (emphasis added).[6]

The formula for determining the amount of the Transfer varies from year to year but is purportedly based upon a percentage of the Electric Fund's **budgeted revenues** (not net income) of the same fiscal year. *See* Exhibit 6 to Plaintiff's Complaint, App. Ex. 2, p. 56. *See also e.g.* Exhibit 3 to Plaintiff's Complaint, App. Ex. 2, p. 46 (emphasis added).

According to the City's 2022 Certified Annual Financial Report ("CAFR"), the City's

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[5] The March 27, 2019 Memorandum is included in the record as Exhibit 6 to Plaintiff's Complaint and Exhibit 1 to Plaintiff's MPSD. The copy attached to Plaintiff's MPSD is better marked for reference. *See* App. Ex. 3, p. 89-96.

[6] Because these admissions are contained in a document attached to the Complaint, the Circuit Court was required to consider them in deciding the City's (C)(8) motion. *See El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 163; 934 NW2d 665 (2019) *citing* MCR 2.113(C). (Documents attached to the pleadings are considered a part of the pleadings for purposes of deciding a motion under MCR 2.116(C)(8)).

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General Fund received a Transfer from the Electric Fund consisting of "6.25% of the average of the previous three calendar year sales." *See* Exhibit 3 to Plaintiff's Complaint, 2022 CAFR p. 14, App. Ex. 2, p. 45. The City further reported in its 2022 CAFR that the "current formula for determining this transfer is based upon 6.25% of Electric Utility Fund budgeted revenues of the same fiscal year. Based on this formula, a $6,000,000 transfer was made to the General Fund, and a $491,380 transfer was made to the Municipal Facilities/Land Improvements Projects Fund. App. Ex. 2 p. 46. Additionally, the City receives a portion of the electric wholesale sales designated for the capital improvement fund. The total for fiscal year 2022 was $2,104,004 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2022, total transfers of $8,595,384 were made." *Id.*

According to the City's 2023 CAFR, the City's General Fund received a Transfer from the Electric Fund consisting of "6.25% of the average of the previous three calendar year sales." *See* Exhibit 4 to Plaintiff's Complaint, 2023 CAFR p. 14, App. Ex. 2, p. 49. The City further reported that "the current formula for determining this transfer is based upon 6.25% of Electric Utility Fund budgeted revenues of the same fiscal year. Based on this formula, a $6,372,000 transfer was made to the General Fund. App. Ex. 2, p. 50. Additionally, the City receives a portion of the electric wholesale sales designated for the capital improvement fund. *Id.* The total for fiscal year 2023 was $2,084,856 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2023, total transfers of $8,456,856 were made." Exhibit 4 to Plaintiff's Complaint, 2023 CAFR p. 78, App. Ex. 2, p. 50.

According to the City's 2024 CAFR, the City's General Fund received a Transfer from the Electric Fund consisting of "6.25% of the average of the previous three calendar year sales." *See* Exhibit 5 to Plaintiff's Complaint, 2024 CAFR p. 14, App. Ex. 2, p. 53. The City also reported that the "current formula for determining this transfer is based upon 6.25% of Electric Utility Fund

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budgeted revenues of the same fiscal year. Based on this formula, a $6,228,000 transfer was made to the General Fund. App. Ex. 2, p. 54. Additionally, the City receives a portion of the electric wholesale sales designated for the capital improvement fund. *Id.* The total for fiscal year 2024 was $3,413,232 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2024, total transfers of $9,641,232 were made." Exhibit 5 to Plaintiff's Complaint, 2024 CAFR p. 84, App. Ex. 2, p. 54.

The City's Transfer Charge has been imposed in violation of the City's Charter because the City's Transfer Charges have been based on varying percentages of the budgeted **gross revenues** of the Electric Fund and not on 50% — or some other percentage — of the budgeted **net income** of the Electric Fund, as required by § 12.16 of the Charter. Complaint, ¶ 30, App. Ex. 2, p. 22. The City's use of gross revenues and not budgeted net income mattered: For FY 2021 through FY 2025, the Transfer Charge was prohibited because the Electric Fund had **no** net income in any of those fiscal years. Complaint, ¶ 32, App. Ex. 2, p. 23.

III. THE PROCEEDINGS IN THE CIRCUIT COURT

On March 14, 2025, Plaintiff filed her class action complaint ("Complaint") alleging that the Transfer Charge, as imposed and collected by the City in its Electric Rates, was unlawful.

Count I of Plaintiff's Complaint asserted that the Transfer Charge violated the City's Charter by transferring monies from the Electric Fund to the City that exceeded the limitations on such transfers set forth in the Charter and sought a refund of the Transfer Charges under a theory of unjust enrichment. Count II of Plaintiff's Complaint asserted that the Revenue Bond Act of 1933, MCL 141.121 et seq., governs the City's Electric Rate practices and prohibits the charging of Rates which intentionally generate surpluses that can be devoted to non-utility purposes. Count III of the Complaint alleges that because the City's Electric Rates included the Transfer Charge as a utility expense, those overall Electric Rates have been unreasonable in violation of common-law

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ratemaking principles. Indeed, because of the Transfer Charge, the City's Electric Rates, "viewed as a whole," have been "excessive." *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 969 N.W.2d 570 (2021).

In lieu of filing an answer, on May 20, 2025, the City filed a motion for summary disposition pursuant to MCR 2.116(C)(8). *See* App. Ex. 6, pp. 264-319. The City asserted that each of Plaintiff's claims must fail for the following reasons:

1. The claim in Count I (alleging a violation of § 12.16 of the City Charter) must fail because the Transfers "were made pursuant to joint resolutions located at City Hall." City Br. at p. 1;
2. The claim in Count II (alleging a violation of the RBA) must fail because the RBA purportedly authorizes the City to use surplus funds "in its best interest." *Id.*;[7] and
3. The claim in Count III (alleging a violation of the common law requirement that municipal utility rates be "reasonable") must fail because the law presumes that the rates are reasonable and the claim is "unmoored from any standard against which the alleged unreasonableness may be assessed." *Id.* at pp. 1-2, 16.

On July 2, 2025, Plaintiff brought a cross-motion for partial summary disposition pursuant to MCR 2.116(C)(10) on Count I of Plaintiff's Complaint asking the Court to interpret and apply § 12.16 of the City's Charter to the undisputed facts and City admissions Plaintiff alleged in her Complaint. *See* App. Ex. 3, pp. 63-173.

On August 29, 2025, in an Opinion and Order, the Ottawa County Circuit Court granted the City's motion to dismiss and denied Plaintiff's motion for partial summary disposition. With regard to Count I, the Court specifically adopted the City's argument that § 12.16 of Charter authorized "the City to do exactly what Plaintiff alleges it has done." App. Ex. 1, p. 7. The Court noted that the City "accurately points out" that § 12.16 permits the "limitation of 50% of such net income" to be increased with the consent of seven members of the City's Council and the board of public works. *Id.* As such, the Court held (citing to the City's brief) that the "plain language of Section 12.16 of the

[7] The Circuit Court granted the City's motion for summary disposition as to the Revenue Bond Act claim in Count II. Plaintiff does not appeal the Court's dismissal of Count II of her Complaint.

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charter 'unambiguously provides HBPW and council with the authority to increase the amount of the appropriation made from the electric utility's fund for general purposes.'" *Id.* pp. 7-8. For the reasons discussed below, the Court's ruling dismissing Count I of Plaintiff's Complaint completely misconstrued the plain language of the City's Charter, ignored key admissions made by the City that acknowledged the City could not transfer more than 100% of **net income** and was simply erroneous as a matter of law under the (C)(8) standard.

With regard to Count III of Plaintiff's Complaint, the Court adopted the City's argument that its rates are presumed to be reasonable and there can be "nothing unjust about the City's conduct when the challenged appropriations are permitted by the City's Charter." App. Ex. 1, p. 12. Further, the Court held that Plaintiff had failed to allege that the City had violated "any cognizable standard of reasonableness, Plaintiff may not sustain a claim that the City was unjustly enriched by the electric utility transfers to the City for general purposes." App. Ex. 1, pp. 12-13. Here, again for the reasons discussed below, the Court erred as a matter of law when it dismissed Count III of Plaintiff's Complaint. The City's conduct is not condoned by the City's Charter—as admitted by its highest officials. Next, any presumption of reasonableness is rebuttable and not properly the subject of a (C)(8) motion. Finally, Plaintiff is not required to tether her claim for reasonableness to an independent "standard of reasonableness." This is not the law. Indeed, the "reasonableness" requirement is grounded in long-established common law principles, which apply in the absence of statutes or other regulations. Accordingly, this Court should reverse the Circuit Court's Opinion and Order and remand this case for further proceedings.

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ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING THE CITY'S (C)(8) MOTION FOR SUMMARY DISPOSITION AS TO THE CITY'S LIABILITY FOR VIOLATING THE CHARTER, AS ALLEGED IN COUNT I OF THE COMPLAINT.[8]

A. STANDARD OF REVIEW

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 N.W.2d 1 (2006). When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 N.W.2d 413 (2013); MCR 2.116(G)(5). *See also Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999)("All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant").

A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-60; 934 NW2d 665 (2019).

B. SUMMARY OF ARGUMENT

The City's Transfer Charge has been imposed in violation of the City's Charter because the City's Transfer Charges have been based on varying percentages of the budgeted **gross revenues** of the Electric Fund and not on 50% (or some other percentage) of the budgeted **net income** of the Electric Fund, as required by § 12.16 of the Charter.

The dispositive legal issue presented by Count I is this: **Does § 12.16 of the Charter authorize the City to transfer more than the budgeted net income of the Electric Fund for**

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[8] Plaintiff preserved the arguments presented in Section I of her argument on appeal in both her Motion for Partial Summary Disposition, App. Ex. 3, pp. 63-173 and her Response Brief in Opposition to the City's Motion to for Summary, App. Ex. 7, pp. 326-328.

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the general purposes of the City without voter approval, or must the City seek voter approval to transfer more than the budgeted net income? In her Complaint, Plaintiff alleged that the clear and unambiguous provisions of § 12.16 prohibit the City from transferring any amount more than the budgeted "net income" of the Electric Fund without voter approval. Because the City concedes it has not received voter approval for the Transfers (which exceed "net income"), the Transfers in FY 2022 through FY 2025 clearly violate the City's Charter.

The Circuit Court did not specifically address this dispositive legal issue. Instead, the Circuit Court merely held, relying upon the City's arguments, that the City could transfer more than 50% of the "net income" of the Electric Utility without voter approval. *See* App. Ex. 1, Opinion at p. 7: "The plain language of Sec. 12.16 reveals that both (1) HBPW and Council, and (2) the voters, have independent authority to appropriate more than 50% **of net income.**" (Emphasis added).

But this ruling—that the City may transfer more than 50% of the net income of the Electric Utility without voter approval—fails to meaningfully address the core allegation of Plaintiff's Complaint—to wit: Is the City authorized to transfer sums that are **more** than the annual **net income?**. Put simply, the Charter clearly gives the City the authority to transfer up to 100% of the **net income** without voter approval. But does the Charter give the City the authority to transfer **more than 100% of the net income** without voter approval? It clearly does not. As such, had the Circuit Court addressed the actual dispositive legal issue raised by Plaintiff's Complaint, the Circuit Court would have been required to find that the City could not transfer more than 100% of the "net income"—*i.e.* could not transfer a percentage of budgeted gross revenues that exceed the net income—of the Electric Utility without voter approval.

Through its Opinion, the Circuit Court effectively held that the City's appropriation for the Transfers has NO LIMITS, as long as the appropriation is approved by a unanimous vote of the Board of Public Works and seven members of the City's Council. *See* App. Ex. 1, pp. 7-8.

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Here, independent of the City's admissions, the clear and unambiguous provisions of § 12.16 preclude any finding that the Charter authorized the Transfers. When properly interpreted, § 12.16 precludes the City from transferring more than the budgeted "net income" of the Electric Fund without voter approval because: (1) the use of the term "such net income" in § 12.16 necessarily limits the Transfer to "the kind or degree already described or implied" – *i.e.*, the "net income" (*see* Plaintiff's MPSJ, *discussion* at pp. 12-15, App. Ex. 3 pp. 76-79); (2) the City's interpretation of the Charter would render material provisions of the Charter superfluous and unnecessary. *Id.*, *discussion* at p. 17, App. Ex. 3 p. 8); and (3) the Charter's use of different limiting terms in the same provision confirms that "such" net income is intended to foreclose transfers in excess of the net income of the Electric Fund without voter approval (*Id. discussion* at pp. 16-17, App. Ex. 3 pp. 80-81). Of course, to the extent that the Charter is ambiguous as to whether the Transfers were authorized, the City's admission conclusively resolves that ambiguity in Plaintiff's favor. *Id.*, *discussion* at pp. 17-18, App. Ex. 3 pp. 81-82[9] The Court should reverse the Circuit Court's order granting the City's Motion for Summary Disposition as to Count I.

C. THE LEGAL IMPLICATIONS OF THE CITY CHARTER PROVISION

Pursuant to Article 7, § 22 of the Michigan Constitution, "[u]nder general laws the *electors* of each city and village shall have the power and authority to frame, adopt and amend its charter…"

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[9] The City further argued that its interpretation of the Charter should prevail because, under Const. 1963, art 7, § 34, "the provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." City's MSD Brief at p. 6, App. Ex. 6, p. 275. But Michigan courts have repeatedly held that art. 7, § 34 has no application to a statute or charter that is clear and unambiguous. See, e.g., *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 505; 844 NW2d 470 (2014) (a liberal-construction rule was inapplicable because the statutory provision at issue was unambiguous and thus "need[ed] no construction, liberal or otherwise, to determine its meaning."); *Riverview v Sibley Limestone*, 270 Mich App 627, 631; 716 NW2d 615 (2006) (noting that "[l]aws concerning a city must be liberally construed in its favor" under Const -12- 1963, art 7, § 34, but that "the primary purpose of statutory interpretation is to give effect to legislative intent," which is determined by the statutory language if it is unambiguous).

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(Emphasis added.) Under Article 7, §. 22, "the electors of cities are vested with control over their cities' charters…" and "the electorate of a city is entitled to the final word as to whether a revised charter is to be adopted." *Sheffield v. Detroit City Clerk*, 508 Mich. 851, 853, 962 N.W.2d 157 (2021).

A city may not take any action "that contradicts limitations expressly provided in the city's charter. The charter of a city stands as its 'constitution'; it is the definition of a city's rights and obligations as a municipal entity, so far as they are not otherwise legally granted or imposed." *Bivens v. City of Grand Rapids*, 443 Mich. 391, 399, 505 N.W.2d 239 (1994).

For the reasons discussed below, the clear and unambiguous provisions of § 12.16 of the City's Charter prohibit the City from transferring any amount more than the budgeted "net income" of the Electric Fund without voter approval. Because the City concedes it has not received voter approval for the Transfers (which exceed "net income"), the Transfers in FY 2022 through FY 2025 violate the City's Charter.

D. THE RULES OF INTERPRETATION APPLICABLE TO THE CITY'S CHARTER.

As an initial matter, as the City itself argues, charter provisions are subject to the same rules of interpretation as statutes. Indeed, the City's own motion for summary disposition states:

> "The prevailing rules regarding statutory construction are well-established and extend to the construction of home rule charters." *City of Detroit v. Walker*, 445 Mich. 682, 691, 520 N.W.2d 135, 139 (1994); see also infra, p. 11-12. "The provisions [of charters] are to be read in context, with the plain and ordinary meaning given to every word [and] … judicial construction is not permitted when the language is clear and unambiguous." *Barrow v. Detroit Election Comm'n*, 305 Mich. App. 649, 663, 854 N.W.2d 489, 497 (2014). Rather, "the framers of the charter, and the people of the City … in its adoption, must be presumed to have intended that the provision be construed as it reads." *Woods v. Bd of Trustees of Policemen & Firemen Ret Sys of City of Detroit*, 108 Mich. App. 38, 43, 310 N.W.2d 39, 40 (1981). [City's MSD Brief, at pp. 8-9, App.Ex. 6, pp. 277-278].

The primary goal of judicial interpretation of statutes is to give effect to the intent of the Legislature. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). The first criterion in determining intent is the specific language of the statute. *Indenbaum v Michigan Bd of Medicine (After Remand)*, 213 Mich App 263, 270; 539 NW2d 574 (1995). The Legislature is presumed

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to have intended the meaning it plainly expressed. *Id.* In determining legislative intent, we look first at the words of the statute. *Id.* The words of the statute must be given their ordinary and plain meaning; only if the language is ambiguous may the courts look beyond the statute to determine the intent of the Legislature. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). When statutory language is clear and unambiguous, this Court must honor the legislative intent as clearly indicated in that language. *Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 538; 565 NW2d 828 (1997). No further construction is required or permitted. *Id.*

For the reasons set forth below, the Charter clearly and unambiguously precludes the City from transferring more than the amount of the Electric Fund's budgeted "net income" to the City's General Fund.[10]

E. The Circuit Court Ignored The Fact That The City's Highest-Ranking Officials Concede That Voter Approval Is Required If The Electric Fund Seeks To Transfer More Than The "Net Income" Of The Electric Fund.

As an initial matter, in finding that there were **no** limits on the ability of the City Council and the Board to transfer funds of the Electric Utility for the general purposes of the City without voter approval, the Circuit Court ignored the City's own long-standing interpretation of § 12.16. Indeed, the City's highest-ranking officials have recognized that the clear and unambiguous language of § 12.16 sets budgeted net income as the maximum amount of the annual Transfers.

The truth remains that, back in 2019, long before the City was sued, the City Manager (Keith

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[10] In the Circuit Court, the City chastised Plaintiff for not addressing the fact that the City Council and the HPBW Board passed resolutions approving the Transfers in the relevant years. *Id.* City's MSD Brief at p. 2, App. Ex. 6, pp. 271. But there is a very good reason Plaintiff did not specifically address the City Council resolutions: **they are completely irrelevant to whether the City complied with the Charter in making the Transfers**. Indeed, each resolution touted by the City in support of its motion for summary disposition actually proves its wrongdoing because the City did not have the authority to authorize such transfers. Simply, the resolutions were ineffective to authorize the Transfers as a matter of law because the amount of the Transfers exceeded the budgeted "net income" of the Electric Fund in those years. Again, as the City has conceded "**[o]nly the voters can approve an appropriation if it exceeds net income, as determined under the Charter."** App. Ex. 3, p. 89, at fn. 1.

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Van Beek) and the General Manager of the HBPW (David Koster) wrote a memorandum to the City Council and the HBPW Board regarding the annual Transfers made by the HBPW to the City. In the memorandum, Van Beek and Koster honestly advised both the City Council and the HBPW Board that the City's Charter imposed the following strict limitation on the Transfers: "**Only the voters can approve an appropriation if it exceeds net income, as determined under the Charter."** *See* App. Ex. 3, pp.89 at fn 1 (emphasis added).[11]

In the same memorandum, Van Beek and Koster acknowledged that "Holland's City Charter Section 12.16, Limitation on Use of Utility Funds, both outlines the method to calculate net income and limits on the use of **that income** for the general purposes of the City." App. Ex. 3, p. 89. (emphasis added). These concessions demonstrate that the City understood that only "net income" could be transferred for the general purposes of the City without voter approval. Thus, the City's transfer of amounts that exceed the "net income" violated the Charter.

The City could not meaningfully address these devastating admissions, so it engaged in misdirection in the Circuit Court. In its Response Brief to Plaintiff's MPSJ, the City even chastised Plaintiff for her reliance on the City's own interpretation of its Charter. Among other false or misleading statements, the City stated that Plaintiff "relies on an out-of-context footnote in a memorandum that was never circulated to HBPW or City Council." City's Brief in Response to Plaintiff's Motion for Partial Summary Disposition ("City's Response Brief") at p. 10, App. Ex. 4, pp. 188. But the City never even attempts to explain **how** Plaintiff has taken the footnote "out of context." Even worse, the face of the memorandum – showing that it was **directed** to the City Council and the HBPW Board – conclusively refutes the City's false contention that the

[11] Because these admissions are contained in a document attached to the Complaint, the Circuit Court was required to consider them in deciding the City's (C)(8) motion. *El-Khalil supra*, 504 Mich. 159-160.

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memorandum "was never circulated to HBPW or City Council."[12]

The Circuit Court's failure to credit the City's admissions by itself warrants reversal of the Circuit Court's Opinion granting the City's Motion for Summary Disposition as to the Charter Violation claim in Count I of the Complaint.

F. THE CIRCUIT COURT'S INTERPRETATION OF THE CHARTER CONTRADICTS THE CLEAR AND UNAMBIGUOUS PROVISIONS OF THE CHARTER.

Even in the absence of the dispositive City admissions, the Circuit Court still erred because it had no basis to conclude as a matter of law that the Charter could **only** be interpreted as authorizing unlimited General Fund transfers without voter approval. To the contrary, when read as a whole, the Charter clearly and unambiguously prohibits the transfer of any amounts which exceed the "net income" of the Electric Fund without voter approval.

1. The Circuit Court Simply Did Not Definitively Resolve The Dispositive Legal Issue Presented By The Charter Violation Claim – Whether the City Can Transfer More Than The Net Income Of The Electric Utility To The City's General Fund Without Voter Approval.

The Circuit Court begins its ultimate ruling on Count I by mischaracterizing Plaintiff's allegations. The Opinion states that "Plaintiff argues that the City made transfers from its Electric Fund exceeding 50% of the net income of the Electric Fund, thus violating § 12.16 of the Charter." App. Ex. 1 at p 7. Contrary to the Court's Opinion, however, Plaintiff does not challenge the City's ability to transfer more than 50% of the net income of the Electric Utility without voter approval. Instead, Plaintiff claims that the City can only transfer up to 100% of the net income without voter

[12] Interestingly, both Van Beek and Koster submitted affidavits in response to Plaintiff's Motion. App. Ex. 4, pp. 223-231 Thus, if Plaintiff truly had taken the footnote "out of context," one would think that the memo's authors—Van Beek and Koster—would attempt to explain away the devastating admissions in the footnote which have been repeatedly highlighted by Plaintiff. But tellingly, neither affidavit even discusses these admissions, much less offers an explanation of them that could possibly justify the inconsistent position the City is now taking in this case. These admissions doom the Transfer Charges.

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approval, but that the City transferred more than that amount in certain years.

In framing Plaintiff's allegations, the Circuit Court appeared to rely on a single paragraph (¶ 51) of the Complaint which alleges that "[t]he City's Transfers between July 1, 2020 and the filing of this Complaint violated the City Charter because they exceeded 50% of the net income of the Electric Fund." App. Ex. 2, p. 26. But the Circuit Court's myopic focus on this single paragraph caused the Court to ignore Plaintiff's core allegation of her Charter Violation claim that was repeated in at least three separate paragraphs – *i.e.,* that the Transfers violated the Charter because they exceeded 100% of the "net income" of the Electric Utility. *See, e.g.*, Complaint, ¶ 50, App. Ex. 2, p. 26, ("The City's Electric Fund had **no** net income since the fiscal year ending June 30, 2020. Thus, § 12.16 of the City Charter prohibited the City from transferring **any** of the Electric Fund monies to the City's General Fund or any other City fund") (emphasis in original); Complaint, ¶ 19, App. Ex. 2, p. 19, ("Thus, pursuant to the City's Charter, the Electric Utility is permitted to transfer 50% of its net income – or a higher percentage of the net income, **but only the net income** and then only if approved by the City's Council – for the "general purposes of the city") (emphasis in original); Complaint, ¶ 32, App. Ex. 2, p. 23, ("In fact, for FY 2021 through FY 2025, the Transfer Charge was prohibited because the Electric Fund had **no** net income in any of those fiscal years") (emphasis in original).

Further, the parties' briefing on the cross-motions for summary disposition demonstrated that the parties understood (1) Plaintiff conceded that the City could transfer up to 100% of net income of the Electric Utility without voter approval and (2) the core dispute was whether the amount of the Transfer could **exceed** the net income. *See e.g.* App. Ex. 3, p. 70, 75; App. Ex. 4, p. 182, 184; App. Ex. 6, p. 273, 278; App. Ex. 7, p. 326-327.

The Circuit Court's failure to address the real issue presented by the Charter Violation claim by itself compels reversal of the Circuit Court's Opinion.

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So what are we left with? By not specifically addressing whether § 12.16 allowed the City to transfer amounts **in excess of 100%** of the net income of the Electric Fund while at the same time dismissing the Charter Violation claim, the Circuit Court's Opinion necessarily rejected – without meaningful discussion – Plaintiff's contention that, while the HBPW Board and 7 members of the City Council had the authority to transfer up to 100% of the net income of the Electric Fund without voter approval, those bodies did not have the power to transfer amounts **in excess of the net income**. For the reasons discussed below, however, the Charter clearly and unambiguously prohibits the transfer of more than the "net income" of the Electric Utility without voter approval.

2. The Charter Expressly Prohibits The Transfer Of More Than The Amount Of The City's Budgeted "Net Income" Without Voter Approval.

For sure, the Charter allows the City to increase the Transfer beyond 50% of the net income without voter approval, but the Charter also makes absolutely clear that, without voter approval, the City cannot transfer more than "such" net income.

Again, the critical provision of the Charter – § 12.16 – provides in pertinent part:

> The foregoing limitation of 50% of **such** net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council. [App. Ex. 2, p. 37 (emphasis added)].

The use of the adjective "such" prior to "net income" necessarily precludes the transfer of any amount in excess of the total "net income" of the Electric Fund without voter approval because the term "such" used in conjunction with "net income" necessarily limits the maximum transfer amount without voter approval to the amount of "such net income."

In Michigan, courts may look to dictionary definitions to discern the common meaning of words used in a statute. *Spectrum Health Hosps v Farm Bureau Mut Ins Co*, 492 Mich 503, 515; 821 NW2d 117 (2012); *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). Using such definitions, the Michigan courts have expressly recognized that the adjective "such," as used in

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this context, means "of the character, quality or extent previously indicated or implied."

In *Goodhue v. Dept. of Transportation*, 319 Mich. App. 526, 904 N.W.2d 203 (2017), for example, the Court of Appeals was tasked with interpreting a statutory provision requiring a plaintiff to file a notice with the Court of Claims before filing suit against the state. In holding that the term "such notice" referred to the notice identified in the previous sentence of the statute, the Court observed:

> We also reject plaintiff's view that MCL 691.1404(2)'s use of the language "such notice" does not refer to the notice referenced in MCL 691.1404(1). The first sentence of MCL 691.1404(2) states, "*The notice* may be served…" (Emphasis added.) The second sentence then provides, "In case of the state, *such notice* shall be filed…" (Emphasis added.) Unquestionably, the reference in the second sentence refers back to the notice in the first sentence. Plaintiff claims that a dictionary definition of "such" shows that it is referring to a "similar" or "like" notice. But the most relevant definition of "such" is "of the character, quality, or extent *previously indicated or implied*." *Merriam-Webster's Collegiate Dictionary* (11th ed) (emphasis added) [319 Mich. App. At 536-537 (emphasis in original).]

Similarly, in *People v. Alexander*, 234 Mich. App. 665, 599 N.W.2d 749 (1999), this Court was again tasked with interpreting the term "such" in a statute in order to determine whether a Circuit Court could impose consecutive sentences for multiple crimes. There, the Court observed:

> A consecutive sentence may be imposed only if specifically authorized by statute. *People v Chambers,* 430 Mich. 217, 222; 421 N.W.2d 903 (1988). Thus, defendant may be sentenced consecutively only if mandated by MCL 768.7a(1); MSA 28.1030(1)(1), which provides, in relevant part:
>
> > A person who is incarcerated in a penal or reformatory institution *in this state*, or who *escapes from such an institution*, and who commits a crime during that incarceration or escape which is punishable by imprisonment in a penal or reformatory institution in this state shall, upon conviction of that crime, be sentenced as provided by law. The term of imprisonment imposed for the crime shall begin to run at the expiration of the term or terms of imprisonment which the person is serving or has become liable to serve in a penal or reformatory institution in this state. [Emphasis added.]
>
> **Addressing the plain language of the statute, the term "such" as used in the phrase "such an institution" is defined in the following manner: "being the person or thing or the person or things indicated**: *If any member be late, such member shall be suspended.*" *Random House Webster's College Dictionary* (1997). In addition, Black's Law Dictionary (6th ed, 1990) defines "such" as follows:

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> Of that kind, having particular quality or character specified. Identical with, being the same as what has been mentioned. Alike, similar, of the like kind. "Such" represents the object as already particularized in terms which are not mentioned, and is a descriptive and relative word, referring to the last antecedent.

> **These definitions suggest that "such an institution" was merely intended as a substitute for the longer "penal or reformatory institution in the state of Michigan**." Using this definition of "such," the statute allows consecutive sentencing for those who commit crimes while *in* a penal or reformatory institution in Michigan or while *on escape status from* a penal or reformatory institution in the state of Michigan. [234 Mich. App. At 677-678 (emphasis added)]

Finally, in *Detroit News v. County of Wayne*, 2022 Mich. App. LEXIS 3409 (2022) (App. Ex. 3, pp. 142-146), for example, this Court described the proper method of statutory interpretation where the term "such" modifies another term:

> The statutory language at issue is the following sentence: "All such 'service records' and employees' records shall be confidential and not open for public inspection." MCL 38.412(g). Plaintiff argues that the word "such" modifies the term "employees' records." Defendant argues that it does not. The only logical conclusion that can be drawn from a reading of the sentence is that the word "such" modifies the term "employees' records" because of the absence of a separating comma after the term "service records" and before the connective word "and." Punctuation is an important factor in determining legislative intent, and the rules of grammar are presumed to have been known to the Legislature. *Kizer v Livingston Co Board of Comm'rs*, 38 Mich App 239, 251; 195 NW2d 884 (1972). Therefore, the absence of a separating comma before the connective conjunction suggests that the word "such" was intended to modify the term "employees' records."
>
> The word "such" is not defined in the statute. Therefore, we look to the dictionary definition for its ordinary and plain meaning. *DiBenedetto, supra* at 402. **The relevant dictionary definitions of the adjective "such" include "of the kind, character, degree…indicated or implied" or "being the…things indicated."** *Random House Webster's College Dictionary* (1997). **The word "such" is properly used as an adjective when reference has previously been made to a category of persons or things, meaning "of that kind."** *Garner, A Dictionary of Modern American Usage* (Oxford University Press, 1998). Furthermore, "such" is a pointing word that must refer to a clear antecedent. *Id.* A pointing word should always have an identifiable referent. *Id.* A "pointing word" is a word like *this, that*, *these, those*, and *it*, which points directly to an antecedent. *Id.* An "antecedent" is a word, phrase, or clause that is replaced later by a pronoun or other substitute. *Random House Webster's College Dictionary* (1997). [2022 Mich. App. LEXIS 3409 at *6-9 (emphasis added)].

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What this means in this context is that "such net income" must be limited to "net income" because "net income" is "of the kind, character, degree…indicated or implied." Allowing the City to unilaterally authorize the transfer of amounts in excess of "net income" without voter approval would improperly expand the authorization beyond "such net income."

Other courts tasked with determining the meaning of "such" under similar circumstances have universally concluded that "such" is an adjective that limits the breadth of the term it modifies. For example, in *Culbertson v. Berryhill*, 586 U.S. 53 (2019), the United States Supreme Court observed.

> We "begi[n] with the language of the statute itself, and that is also where the inquiry should end, for the statute's language is plain." *Puerto Rico* v. *Franklin Cal. Tax-Free* Trust, 579 U.S. ___, ___, 136 S. Ct. 1938, 195 L. Ed. 2d 298, 307 (2016) (internal quotation marks omitted). Under §406(b), when a court "renders a judgment favorable to a claimant…who was represented before the court by an attorney," the court may award "a reasonable fee for *such representation*, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." 42 U. S. C. §406(b)(1)(A) (emphasis added). Both at the time of enactment and today, **the adjective "such" means "[o]f the kind or degree already described or implied." H. Fowler & F. Fowler, Concise Oxford Dictionary of Current English 1289 (5th ed. 1964); Black's Law Dictionary 1661 (10th ed. 2014) ("[t]hat or those; having just been mentioned"). Here, the only form of representation "already described" in §406(b) is "represent[ation] before the court by an attorney." Accordingly, the 25% cap applies only to fees for representation before the court, not the agency**. [586 U.S. at 58-59 (emphasis added)].

Similarly, in *Hebert v. Rapides Parish Policy Jury*, 974 So.2d 635 (La. 2007) (App. Ex. 3, pp. 148-160) the Louisiana Supreme Court observed that the term "such" acts to limit the scope of the terms modified by that adjective:

> As written, La. Rev. Stat. 48:35 does require DOTD to withhold payment of any funds allocated to a political subdivision for "such construction purposes" if any "such improvements" constructed by the political subdivision fail to conform to DOTD standards. The key term in this statute is the **adjective** "**such**," which is defined as "of this or that kind; having a quality just specified or to be specified." *Merriam Webster Desk Dictionary*, "such *adj*," 542 (1995). The use of the **adjective** "**such**" **is a limitation on the objects described to those of a specific kind or**

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> **quality previously specified or to be specified, giving the objects some particularity**. [974 So.2d at 651-652 (emphasis added)].[13]

Here, the same result obtains. The word "such" in the Charter "designates or limits the antecedent noun" – *i.e.*, "net income." Thus the "net income" that the City is authorized to transfer without voter approval is limited to "such" net income." *See also Leahy v. Polarstar Dev., LLC*, 223 Ore. App. 373, 195 P.3d 919 (2008) (App. Ex. 3, pp. 167-170).

3. If The Charter Granted The City Council and the HBPW The Authority To Transfer Unlimited Amounts Of The Electric Utility Funds For The General Purposes Of The City, There Would Be No Need To Tether The Transfers To The "Net Income" Of The Electric Utility.

In addition, the Circuit Court's Opinion – to the extent it authorizes unlimited Electric Utility transfers – is inconsistent with principles of statutory interpretation, because it renders parts of the Charter unnecessary and/or reads material provisions out of the Charter.

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[13] Consistently, in *Lozano v. Alvarez*, 2015 Kan. App. Unpub. LEXIS 833, 356 P.3d 1077 (Kan. App. 2015) (App. Ex. 3, pp. 162-165), the Court was tasked with interpreting the meaning of the term "such action" contained in a state statute of limitations:

> Again, K.S.A. 60-518 states: "If *any action* be commenced within due time, and the plaintiff fail in *such action* otherwise than upon the merits, and the time limited for *the same* shall have expired, the plaintiff…may commence a new action within six (6) months after such failure." (Emphasis added.) Under K.S.A. 60-518, the phrases "any action," "such action," and "the same" reference one another; the action the plaintiff commences in due time must be the same action that was dismissed otherwise than upon the merits, and the time limit to bring that same action must have expired. Such an interpretation conforms with the last antecedent rule, which states that "qualifying words are 'ordinarily confined to the last antecedent, or to the words and phrases immediately preceding.'" *Link, Inc. v. City of Hays*, 266 Kan. 648, 654, 972 P.2d 753 (1999) (quoting *Barten v. Turkey Creek Watershed Joint District No. 32*, 200 Kan. 489, 504, 438 P.2d 732 [1968]).
>
> Here, an application of the rule of the last antecedent leads to the conclusion that the word "**such**" is an **adjective**, and that it modifies the antecedent noun "action" contained in the initial conditional clause ([*I*]*f any action*) of the sentence. The **adjective** phrase "**such** action" tells us which action. Indeed, the **adjective** "**such**" is called a limiting **adjective**. It limits a noun or pronoun. As a result, the word "such" designates or limits the antecedent noun "action" contained in the aforementioned initial conditional clause of the sentence. Moreover, the pronoun "same" refers to the antecedent noun "action." Thus, the antecedent noun "action" is limited to a plaintiff's original action. [*Lozano*, 2015 Kan. App. Unpub. LEXIS at **9-10 (emphasis added).]

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When interpreting statutes, the Court "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich. 142, 146; 644 N.W.2d 715 (2002). An interpretation authorizing UNLIMITED transfers untethered to "net income" reads substantial parts of § 12.16 out of the Charter.

Notably, § 12.16 of the Charter refers to "net income" no less than **five** times and contains a highly-detailed formula for determining "net income." If the citizens of the City had intended to authorize UNLIMITED transfers untethered to the net income of the Electric Utility, there simply was no need for the Charter to contain these detailed provisions. Indeed, under the interpretation proffered by the City, the first two paragraphs (consisting of six sentences) of § 12.16 are completely unnecessary. Instead, the following provision could authorize the UNLIMITED transfers without the need for those two highly-detailed paragraphs:

> The City may appropriate any amount of electric utility funds to the general purposes of the City, provided such appropriation is approved by the Board of Public Works and seven members of the City Council.

The Court should reject the Circuit Court's interpretation of § 12.16 of the Charter because it improperly decouples the amount of the annual transfers from "net income."[14]

[14] Moreover, it is equally well-established that courts should avoid a literal construction of a statute that would produce an absurd and unjust result clearly inconsistent with the purposes and policies of the statute. *Rowell* v. *Security Steel Processing Co,*445 Mich 347; 518 N.W.2d 409 (1994); *Salas* v *Clements,*399 Mich 103, 109; 247 N.W.2d 889 (1976). As construed by the Circuit Court, the Charter grants the City Council and the HBPW unlimited authority to transfer any amount of the funds of the Electric Utility to the general purposes of the City. If, for example, the Council and the HPBW transferred all of the cash reserves of the Electric Utility, such actions would bankrupt the Utility and, at the very least, impact the ability of the Electric Utility to provide electricity to the City's inhabitants. Further, "[c]ourts should not abandon common sense when construing a statute. "*Hmeidan v State Farm Mut Auto Ins Co*, 326 Mich App 467, 478; 928 NW2d 258 (2018) (quotation marks and citation omitted).

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4. The Charter's Use Of Different Limiting Terms In § 12.16 Confirms That "Such" Net Income Is Intended To Foreclose Transfers In Excess Of The "Net Income" Of The Utility Fund Without Voter Approval.

Further, other provisions of § 12.16 further confirm that the use of "such" in referring to "net income" reflects an intentional decision to limit the transfers to the total amount of the Utility Fund's "net income" without voter approval. In this regard, the provision of § 12.16 defining the types of transfers that must be approved by the voters states in pertinent part as follows:

> The electors of the city may, by a 3/5 vote of the qualified electors voting on such proposal at a regular or special election, approve an appropriation of more than 50% of **the** net income for any year for general purposes, or may approve the placing of more than 50% of **the** net income for any year in the reserve accounts or funds as above provided for the purposes of such utilities, **or may approve for other municipal purposes the use of such accumulated and unallocated accounts or funds as have been established**. [App. Ex. 3, p. 103, § 12.16 (Emphasis added).]

In contrast to the provisions authorizing appropriations and transfers without voter approval, which are tethered to "such" net income, the voter approval provision authorizes the appropriation and transfer of more than 50% of "**the**" net income, as opposed to "**such**" net income. By reserving to the voters the right to approve transfers of more than 50% of "the" net income, while limiting the City's unilateral transfers to "such" net income, § 12.16 makes clear that, as the City's leaders have conceded: "**only the voters can approve an appropriation if it exceeds net income, as determined under the Charter**." *See* App. Ex. 3, p. 89 at fn. 1 (emphasis added).

The use of different terms in the same Charter provision further confirms that the people of the City, in the Charter, intended to apply different restrictions on the Transfers, depending upon whether the City acted with or without voter approval. This principle of statutory interpretation was summarized by the Michigan Supreme Court in *United States Fid. Ins. & Guar. Co. v. Michigan Catastrophic Claims Ass'n*, 484 Mich. 1, 15, 795 N.W.2d 101 (2009), where the Court observed:

> **When the Legislature uses different words, the words are generally intended to connote different meanings**. Simply put, "the use of different terms within similar statutes generally implies that different meanings were intended." 2A Singer & Singer, Sutherland Statutory Construction, (7th ed), § 46:6, p 252. If the

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> Legislature had intended the same meaning in both statutory provisions, it would have used the same word. [484 Mich. at 15 (emphasis added)].

Here, the Charter's use of "such" net income when defining the City's power to transfer funds without voter approval and its separate use of "the" net income when defining the power of the voters must be deemed to be intentional and the terms cannot be interpreted to mean the same thing.

5. Any Ambiguity In The Charter Is Conclusively Resolved In Plaintiff's Favor By The Admissions Of The City's High-Ranking Officials.

Finally, the best-case scenario for the City is that § 12.16 of the Charter is ambiguous as to whether the City may transfer more than the budgeted net income of the Utility Fund to the City's General Fund without voter approval. But any such ambiguity has been conclusively resolved in Plaintiff's favor by the admissions of high-ranking City officials. Again, as early as 2019, the City Manager and the General Manager of the HBPW confirmed to the Mayor and City Council:

> Holland's City Charter Section 12.16, Limitation on Use of Utility Funds, both outlines the method to calculate net income and limits on the use of **that** income for the general purposes of the City. Specifically, Council is authorized to use up to 50% of the net income of both the electric and water utilities. That amount may only be exceeded if requested by HPBW and approved by seven members of Council, or if approved by a 3/5 majority city voters.[1]
>
> 1. **Only the voters can approve an appropriation if it exceeds net income, as determined under the Charter**. [App. Ex. 2, p. 56 (emphasis added).]

The first sentence quoted above makes clear that the limits set forth in § 12.16 are limits on the use of "that" net income and thus is a concession that any transfers cannot exceed the "net income." The final sentence further confirms that the only way the City can transfer more than the net income is with voter approval. This alone destroys the City's sole substantive defense to Count I.

Once the Charter is properly construed, the City's violation emerges. For the reasons discussed below, it is undisputed that, in FY 2022 through FY 2025, the City had no budgeted "net income," and therefore the Transfers in those years were not authorized by the Charter. As a result,

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the City violated the Charter provision by having the Electric Fund make Transfers to the General Funds in those fiscal years.

II. THE CIRCUIT COURT NOT ONLY SHOULD HAVE DENIED THE CITY'S MOTION, BUT THE COURT SHOULD HAVE GRANTED PLAINTIFF'S CROSS MOTION FOR SUMMARY DISPOSITION AS TO THE CHARTER VIOLATION CLAIM IN COUNT I.[15]

The Circuit Court denied Plaintiff's cross-motion for summary disposition as to Count I. This was error because the clear and unambiguous language of the Charter and the undisputed facts demonstrated (1) that the Charter prohibited the transfer of amounts in excess of the net income of the Electric Utility without voter approval, and (2) the Electric Utility had no net income in certain years yet the City still transferred millions of dollars to the General Fund and other City funds without voter approval.

A. STANDARD OF REVIEW

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *El-Khalil supra*, 504 Mich at p. 160; *Johnson v VanderKooi*, 502 Mich 751, 761; 918 N.W.2d 785 (2018). When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 N.W.2d 344 (2016). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *VanderKooi*, 502 Mich at 761 (quotation marks, citation, and brackets omitted).

B. THE ADDITIONAL UNDISPUTED FACTS RELEVANT TO PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

The City's General Fund receives the majority of its financing from four primary sources: (a)

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[15] Plaintiff preserved the arguments presented in Section II of her argument on appeal in her Brief in Support of her Motion for Partial Summary Disposition App. Ex. 3, pp. 63-84.

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property taxes; (b) state shared revenues; (c) other fees & charges for services; and (d) an annual transfer from the City's Electric Utility Fund (the "Transfer") to the General Fund and other City funds, as purportedly authorized by City Charter provisions. *See generally,* City Budgets excerpts from FY 2022 through FY 2025. App. Ex. 3 pp. 116-127.

1. The Transfer Charge Is In The Rates Paid By The City's Electric Customers.

The amounts used to support the Transfers are incorporated into the City's Electric Rates through the Transfer Charge. At least two provisions of the Charter itself make this clear. First, § 12.11 of the Charter provides:

> § 12.11 **Same—Expenses and funds generally.**
>
> **The expenses of conducting the affairs of the board of public service [works] shall be defrayed from the revenues of the public service works of the city under its control**, or may be paid or supplemented from the general funds of the city, if the council shall so determine with the concurrence of the board of public service [works]. All funds earned, raised, or realized by the board shall be deposited with the treasurer who shall give a receipt therefor and file a copy thereof with the city auditor. The treasurer shall deposit all such receipts to the credit of the proper fund or account of the city. [App. Ex. 3 p. 102, (emphasis added).]

Second, § 12.16 of the Charter provides:

> § 12.16 **Limitation on use of utility funds.**
>
> **The receipts from the operation of the electric and water utilities and income from investments shall be applied to the purposes thereof, in accordance with the budget appropriations**, including the payment of bonds outstanding or which may be issued for the purposes of such utilities and the interest thereon. [App. Ex. 3 p. 103 (emphasis added).]

Under § 12.11, all expenses of the Electric Fund must be covered by the revenues of the Electric Fund. This confirms that the revenues to fund the Transfer necessarily were derived from Electric Rates paid by Plaintiff and the Class. Further, under § 12.16, all revenues of the Electric Fund have to be applied in accordance with budget appropriations. The Transfers are expenditures in the budget appropriations. App. Ex. 3, pp. 116-127 (budget excerpts).

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2. The Formula For Determining "Net Income."

The Charter requires the City to determine the "net income" of the Electric Fund as follows: "The net income shall be determined by deducting from the receipts from operations and income from investments **all expenses incurred and charges made or allowed for and on behalf of such utility in accordance with budget appropriations**, or by appropriate action under authority of section 9 of this chapter, **and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness**." App. Ex. 3, p. 103 (§ 12.16, emphasis added). Thus, all budgeted expenditures of the Electric Fund must be deducted from the gross revenues of the Electric Fund to determine the "net income."

The City's improper use of gross revenues instead of net income to determine the amount of the Transfer Charge violates the Charter provision. In fact, as will be demonstrated with specificity in § II(B)(3) below, for FY 2022 through FY 2025, the Transfer Charge was prohibited because the Electric Fund had **no** budgeted net income in any of those fiscal years. *See* App. Ex. 3 pp. 116-127 (budget excerpts for FY 2022 through FY 2025).

As noted, under § 12.16 of the Charter, a determination of "net income" requires an analysis of the revenues and expenses of the Electric Fund, as those terms are defined by § 12.16. *See* App. Ex. 3, p. 89 (conceding that § 12.16 "outlines the method to calculate net income"); *Id.* fn. 1 (conceding "net income" is "determined under the Charter"). Thus, the Court must assess the City's "net income" by using the definitions and guidance set forth in § 12.16.

§ 12.16 contains the following pertinent definitions:

"Revenues" means "receipts from operations and income from investments." App. Ex. 3, p. 103. "Expenses" means "**all** expenses incurred and charges made or allowed for and on behalf of such utility **in accordance with budget appropriations**, or by appropriate action under authority

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of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness." [*Id.* Emphasis added.]

3. The City's Electric Fund Had No Net Income In Fiscal Years 2022-2025.

Under § 12.16, the Electric Fund's "expenses" must be determined in accordance with budget appropriations. The analysis below, **based on the City's own approved budgets**, demonstrates that, for each of the fiscal years 2022 through 2025, the City's Electric Fund had **no budgeted net income** but instead experienced significant budgeted losses:

FY 2022 (*See* App. Ex. 3, p. 118):

Total Budgeted Electric Fund Revenues -- $98,559,239
Total Budgeted Electric Fund Expenses -- $198,156,031[16]
Budgeted Net Income – **negative $99,596,792**

FY 2023 (*See* App. Ex. 3, p. 121)

Total Budgeted Electric Fund Revenues -- $95,432,436
Total Budgeted Electric Fund Expenses -- $116,917,755
Budgeted Net Income – **negative $21,485,319**

FY 2024 (*See* App. Ex. 3, p. 124)

Total Budgeted Electric Fund Revenues -- $106,945,267
Total Budgeted Electric Fund Expenses -- $126,966,061
Budgeted Net Income – **negative $20,020,794**

FY 2025 (*See* App. Ex. 3, p. 127)

Total Budgeted Electric Fund Revenues -- $120,942,141
Total Budgeted Electric Fund Expenses -- $139,584,139
Budgeted Net Income – **negative $18,641,988**[17]

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[16] In order to determine the budgeted net income, the budgeted Transfers are excluded from the budgeted expenses. For FY 2022, when the $8,595,384 in budgeted Transfers are excluded, the budgeted expenses are reduced from $206,751,415 to $198,156,031, an amount that still dwarfs the budgeted revenues of $98,559,239.

[17] There are unique facts and circumstances that led to the expenditures of the Electric Fund greatly exceeding the Funds revenues during these specific fiscal years. Between 2014 and 2017, the City constructed

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The City's response to Plaintiff's Motion for Partial Summary Disposition advanced two principal defenses to Plaintiff's Motion: (1) the Charter does not require voter approval even if the City seeks to transfer more than the entire "net income" of the Electric Fund to the City's General Fund, and (2) even if the Charter required such voter approval, the City did not transfer more than the entire "net income" of the Electric Fund to the City's General Fund in relevant years. Plaintiff has addressed the City's first argument in § I above. The Circuit Court did not reach the City's second argument. For the reasons discussed below, the undisputed facts show that the City did in fact transfer more than the entire budgeted "net income" of the Electric Fund in relevant years.

C. The City Violated The Charter By Transferring More Than The Budgeted Net Income Of The Electric Fund to the General Fund Without Voter Approval In Fiscal Years 2022-2025.

In the Circuit Court, the City argued that, even if the Charter prohibited the transfer of amounts in excess of the net income of the Electric Fund, it still did not violate the Charter because the amount of the transfers was not in excess of the net income of the Electric Fund. But, in advancing this argument, the City relied on the purported actual – as opposed to budgeted – "net income" to justify the Transfers. This reliance is improper because (1) the Charter clearly and unambiguously requires consideration of the budgeted "net income," and (2) even if the City could use the actual "net income," in determining the Transfer amounts authorized

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a new $250 million electric generation facility – the Holland Energy Park ("HEP"). The City issued approximately $158 million in revenue bonds to initially finance the construction—admittedly, "the largest bond issue and civil project in the history of Holland." *See* App. Ex. 3, pp. 172. The balance of the construction costs was covered by cash reserves the City accumulated through earlier Electric Charges. Under the terms of the bonds, the City was authorized to pay off the borrowed amounts over 25 years, which would have spread the debt service expense over most of the 30-year minimum useful service life of the HEP. Shortly after the bonds were issued, however, the City hatched a plan to pay off the majority of the bonded amount early. The City's budgets for FY 2022 through FY 2025 include major expenditures to, among other things, retire bonded debt, which drove the net losses in those years. *See* App. Ex. 3, pp. 116-127.

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by the Charter, the City still had no actual "net income" in relevant years when all relevant expenses are considered.

1. The Charter Requires Consideration Of Only The Budgeted Net Income Of The Electric Fund, And There Was No Budgeted Net Income For FY 2022 Through FY 2025.

The City does not contest that its Electric Fund's approved budgets for FY 2022 through FY 2024 show that the Electric Fund had no "net income" if all budgeted expenses are included in the calculation. Nonetheless, the City claims that the Electric Fund actually had net income during FY 2022 through 2025. But the City's arguments improperly rely on purported **actual** financial results which are untethered to budget appropriations and as such are expressly contrary to the provisions of the City's Charter.

The Charter provision that the City claims authorizes the City's Transfer Charge (§ 12.16) provides in pertinent part:

> The **net income shall be determined by deducting from the receipts from operations and income from investments all expenses incurred and charges made or allowed for and on behalf of such utility in accordance with budget appropriations, or by appropriate action under authority of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness.** [Emphasis added.]

§ 12.16 confirms two salient facts: (1) the "net income" must be determined by reference to "budget appropriations," and (2) the City must determine the "net income" by including "all expenses incurred and charges made or allowed for on behalf of" the Electric Fund.[18] The City's arguments require the Court to disregard the express language of § 12.16.[19]

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[18] The City does not rely upon "appropriate action under authority of section 9" of Chapter 12 of the Charter. Accordingly, the first clause of that sentence – requiring consideration of "budget appropriations" – is controlling.

[19] There is a very good reason that the Charter requires consideration of the budgeted "net income" – the amount of the annual Transfer is necessarily included in the City's Budget, which is a **prospective** document. *See* budget excerpts, App. Ex. 3, pp. 116-127. It would be nonsensical to determine the amount

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2. To The Extent The Actual Financial Performance Of The Electric Fund Matters, The Transfers Still Exceeded The Properly Calculated Total Net Income Of The Electric Fund During The Relevant Years.

Even if the City could engage in this *post-hoc* adjustment of the Electric Fund's "net income," the City's financial statements confirm that, for FY 2022 through FY 2024, the City had no "net income" when **all** of the applicable and required expenses are considered. For example, the City's financial statements for FY 2022 (App. Ex. 5, pp. 253-255) confirm that the City's Electric Fund experienced a net loss when all operating and capital expenses are included in the calculation. The financial statements show that the Electric Fund had "operating income" of $16,206,183 during that fiscal year. App. Ex. 5, p. 254. But the Electric Fund also had $27,896,688 in net expenses for "capital and related financing activities" during FY 2022. When those additional expenses are considered, the City's $16+ million operating income flips to a loss in excess of $10 million. There are similar losses for FY 2023 and FY 2024.[20]

In an effort to evade the reality of its own financial statements, the City creates "net income" by excluding expenses that the Charter requires the City to include in the "net income" calculation. For example, the City claims that it "is improper to include certain capital outlay expenses that are funded from cash reserves or bonds, voluntary debt service payments, and depreciation expense." App. Ex. 4, p. 190, City Response Brief, (*citing* Van Beek Aff., ¶ 7, App. Ex. 4, p. 225). But, again, the City's contentions are contrary to the Charter, for the following reasons:

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of the Transfer in the budget for, say fiscal year 2022, and then determine the amount of the "net income" based upon the actual financial results in the City's FY 2022 financial statements – which is a **retrospective** document. But this fundamental truth apparently is lost on the City Manager, who acknowledges that the Electric Fund's "final net income calculation" "could not be obtained until the fiscal year is completed and audited, which would be many months after a budget is prepared." App. Ex. 4, p. 224, Van Beek Affidavit at ¶ 5. Because the City's Electric Fund had no budgeted "net income" in FY 2022 through FY 2025, the Charter prohibited the City from including the Transfer Charge in the City's Electric Rates

[20] *See* App. Ex. 5, pp. 257-263 (confirming that operating expenses and expenses for "capital and related financing activities" during those years exceeded the revenues of the Electric Fund).

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1. The Charter does not make a distinction between expenses (including capital outlay expenses) simply because those expenses are funded from cash reserves or bonds. Indeed, § 12.16 expressly includes within the definition of "budget appropriations" the "payment of bonds outstanding or which may be issued for the purposes of such utilities and the interest thereon." And, of course, depleting cash reserves to repay debt certainly will impact the "net income" of any business.
2. For the same reasons, the Charter does not allow "debt service payments" to be excluded from the calculation of "net income" simply because those payments might be "voluntary."
3. Finally, depreciation expense is an explicit line item in the City's budgets. App. Ex. 3, pp. 116-127. Therefore, the Charter expressly prohibits the City from omitting this expense from the calculation of budgeted "net income."

III. COUNT III OF THE COMPLAINT ADEQUATELY STATES A CLAIM FOR UNJUST ENRICHMENT BASED ON THE CITY'S VIOLATION OF THE COMMON LAW "REASONABLE" RATE REQUIREMENT.[21]

Separate and apart from the Charter Violation claim, Count III of the Complaint alleges that the City has been unjustly enriched by the Transfer Charges because, by including the Transfer Charges in the City's electric rates, those rates have been unreasonable and therefore violate well-established common law limitations on municipal utility rates.

In the Circuit Court, the City advanced two arguments in seeking summary disposition of Plaintiff's unjust enrichment claims in Count III under (C)(8). First, the City alleges that Plaintiff fails to state a viable claim for Unjust Enrichment because municipal water rates are presumed reasonable. City's MSD Brief, App. Ex. 6, at pp. 284-285. Second, the City claims that Plaintiff's claims "fail to identify any standard or authority for 'reasonableness' rendering the challenged rates unjust." *Id.* at p. 15. *See also Id.* at p. 18 (characterizing Count III as a "free standing claim" because Plaintiff "cites no 'statute, contractual provision, or ordinance establishing the underlying basis for 'reasonableness' alleged in this claim." *Id.* at p. 18, quoting *Brunet v. City of Rochester Hills*, No. 354110

[21] Plaintiff preserved the arguments presented in Section III of her argument on appeal in her Response Brief in Opposition to the City's Motion for Summary Disposition. *See* App. Ex. 7, pp. 323, 335-340.

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(Mich. App. 2021). The Circuit Court accepted both of these arguments in granting the City's motion for summary disposition as to Count III.

Contrary to the Circuit Court's Opinion, both of the City's arguments fail for the reasons set forth below.

A. The Presumption of Reasonableness Cannot Defeat An Unjust Enrichment Claim At The Pleading Stage.

1. Any Presumption Is Rebuttable, And Therefore Is Not Properly Dispositive At The Pleading Stage.

"Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable." *Trahey v. Inkster*, 311 Mich. App. 582, 594, 876 N.W.2d 582 (2015). "Yet, this presumption is just that—a presumption—and it can be overcome by the plaintiff with a showing of sufficient **evidence** to the contrary." *Shaw v. City of Dearborn*, 329 Mich. App. 640, 655; 944 N.W.2d 153 (2019) (emphasis added). The City cites no case holding that the "presumption" can defeat a plaintiff's claims on the merits **at the pleading stage**. This is not surprising, since the presumption can be rebutted with evidence, but a motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, **not whether the complaint can be factually supported**. *El-Khalil v. supra,* 504 Mich. at 159-160. Indeed, "[w]hile the lack of an **allegation** can be fatal under MCR 2.116(C)(8), the lack of **evidence** in support of the allegation cannot." *Id.* (emphasis added).

As discussed below, the Complaint's allegations rebut any "presumption of reasonableness."

2. Plaintiff Has Alleged Facts Which, If Proven, Would Rebut Any Presumption of Reasonableness.

Michigan courts enforce the common law requirement that municipal utility charges be "reasonable." *Mapleview Estates v. City of Brown City*, 258 Mich. App. 412 (2003). More recently, in *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 969 N.W.2d 570 (2021), the Court clarified the standard a plaintiff must meet in order to demonstrate that a municipal utility's rates and charges

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have been unreasonable. In *Youmans*, the Court of Appeals considered claims which alleged, among other things, that Bloomfield Township's water and sewer rates were unreasonable because they included improper cost components. Although the Court of Appeals reversed the circuit court's judgment in favor of plaintiff, it did so in a way that confirms the validity of Plaintiff's claims here:

> **Whether the Township would receive an unjust "benefit" from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were "excessive," not on whether some aspect of the Township's ratemaking methodology was improper**. [*Youmans*, 336 Mich. App. at 219 (emphasis added).]

To be "reasonable" municipal utility and other charges must be designed solely to recover the costs of providing the associated utility or other service. *See, e.g., Detroit Alliance v City of Detroit*, 507 Mich 871, 872-873; 953 NW2d 724 (2021) (Clement, J. concurring) ("I understand our law as allowing municipalities to charge *no more than* the reasonable cost of the service conferred") (emphasis in original). As the Supreme Court recently observed in assessing the "reasonableness" of certain building permit fees imposed by the City of Troy:

> "[**i]f the fees for a particular service consistently generate revenue exceeding the costs for the service, the reasonableness of the fee for that service would be suspect**." [*Mich. Ass'n of Home Builders v. City of Troy*, 504 Mich. 204, 220; 934 N.W.2d 713, 722 (2019) (quoting *Mich. Ass'n of Home Builders v. City of Troy*, No. 331708, 2017 Mich. App. LEXIS 1521 (2017)).][22]

Importantly, the City cited no case dismissing a municipal utility rate challenge at the

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[22] In the *Troy* case, the Supreme Court addressed a state statute which, like the common law principles applicable to municipal electric rates, requires municipal building permit fees to be reasonable. In reversing the Court of Appeals' determination that City of Troy's fees were reasonable, the Supreme Court relied extensively on Judge Jansen's dissent in that case. *See Troy*, 504 Mich. at 215-22. In her dissent (App. Ex. 7, pp. 363-364) Judge Jansen specifically stated that Troy's accumulation of an excessive surplus showed that the permit fees were unreasonable:

> **… I believe that a 20-25% surplus is unreasonable on its face. Indeed, defendant used its building department fees to raise $269,483 in surplus funds in 2012, $488,922 in 2013, and $325,512 in 2014, for a total of $1,083,917 directly into defendant's general fund over the course of only three years. This "surplus" is not negligible**. Common sense indicates that it is not incidental. **The amount of surplus generated, on its own, indicates that defendant is engaged in a revenue-raising venture**. [*Mich Ass'n of Home Builders v City of Troy*, 2017 Mich. App. LEXIS 1521 (2017) at *26-27 (emphasis added).]

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pleading stage. Indeed, all of the cases that the City relies on (whether published or unpublished) were decided either on the basis of a (C)(10) motion **filed after extensive discovery** (including, in most cases the submission of expert opinions) or **after a trial on the merits**. Again, this is not surprising, given that a motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil*, *supra*, 504 Mich. at 159-160.[23]

To the extent that *Trahey* requires a Plaintiff to plead that the challenged rates contain "illegal" or "improper" expenses, Plaintiff has amply alleged that the Transfer Charge is an illegal or improper expense because the amounts to fund the Transfers are included in the City Electric Rates. Those amounts are not proper expenses of the Electric Fund but rather are amounts used to finance general governmental obligations unrelated to providing electric service.

B. PLAINTIFF IS NOT REQUIRED TO "MOOR" HER UNREASONABLE RATE CLAIMS TO AN INDEPENDENT LEGAL LIMITATION ON THE RATES.

Municipal utility rates and charges have long been subject to the common law requirement that the rates and charges and that common law requirement exists independent of "statute[s], contractual provision[s]" and "ordinances."

First, none of the published cases cited by the City held that "reasonableness" can **only** be assessed by reference to such authorities. Indeed, the "reasonableness" requirement is grounded in long-established **common law principles**, which apply in the absence of statutes or other regulations. This was recognized by this Court long ago in *Walker Bros. Catering v. Detroit City Gas Co.*, 230 Mich. 564, 203 N.W. 492 (1925), where the Court observed:

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[23] *See, e.g., City of Novi v. City of Detroit*, 433 Mich. 414, 430, 446 N.W.2d 118 (1989) (trial); *Trahey v. Inkster*, 311 Mich. App. 582, 594, 876 N.W.2d 582 (2015) (trial); *Shaw v. City of Dearborn*, 329 Mich. App. 640, 655; 944 N.W.2d 153 (2019) ((C)(10) motion after discovery); *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 969 N.W.2d 570 (2021) (trial); *Bohn v. City of Taylor*, 2019 WL 360730 (Mich. App. 2019) ((C)(10) motion after discovery); *Brunet v. City of Rochester Hills*, 2021 WL 5750616 (Mich. App. 2021) ((C)(10) motion after discovery).

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> It would seem, therefore, fully established, both on principle and on authority, that in the absence of applicable regulatory legislation, **a public utility has the power to fix its own rates and charges, subject to the common-law duty that the charges must be reasonable**. In the days before general legislative regulation became usual such power was unquestioned. It was the well settled common-law situation; and the common law applied equally to individuals and to corporations and holders of franchises, unless the charter or franchise itself specifically fixed rates. **After general legislative rate regulation became normal, the common law continued where there was complete absence of legislative regulation and where there was legislative regulation which did not cover the entire subject-matter**. [230 Mich. at 572-573 (emphasis added).]

Youmans further makes clear that the common law requirements exist on their own, by requiring a plaintiff only to prove that the challenged rates, "viewed as a whole, were unreasonable inasmuch as they were "excessive." *Youmans*, 336 Mich. App. at 219. One can search *Youmans* – the most recent binding and published authority concerning the common law "reasonable" rate requirement – in vain for even a suggestion that the standard claimed by the City is applicable. The *Youmans* standard manifestly does not require that plaintiff to also "moor" its unreasonable rate claim to some independent "cognizable standard of reasonableness." City Br. at p. 15. The long-standing common-law requirement exists on its own, and Plaintiff's Complaint amply alleges that, by virtue of the Transfer Charges, the City's Electric Rates, "viewed as a whole, have been unreasonable inasmuch as they have been excessive." That is all that *Youmans* requires.

C. In Any Event, The Unreasonable Rate Claims Are Tethered To Independent Legal Limitations On The City's Rates.

In any event, Plaintiff's unreasonable rate claims are not "free standing." Those claims are informed by, among other legal restrictions, the provisions of the City's Charter discussed in § I (F) and § II, *supra*. In particular, § 12.12 prohibits the City from transferring money from the Utility Fund to any other fund of the City except as authorized by § 12.16, which itself limits transfers to the amount of the Electric Fund's "net income." Those provisions indisputably govern the City's Electric Rates and confirm that the "unreasonable rate claims" are not "free-standing."

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Finally, the City arguments ignore another obvious "source of authority" – *i.e.*, professional utility ratemaking standards which appropriately guide any analysis of the "reasonableness" of the City's rates. Courts regularly rely on such standards in applying common law requirements to municipal utility rates.[24] Accordingly, the Court should reject the City's argument – accepted by the Circuit Court -- that Count III fails to state a viable claim for "unreasonable" Electric Rates and Charges.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the Circuit Court's Opinion granting summary disposition in favor of the City as to Counts I and III of the Complaint, further reverse the Circuit Court's Opinion denying Plaintiff's motion for summary disposition as to Count I of the Complaint, and remand this matter to the Circuit Court for further proceedings consistent with this Court's decision.

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Date: January 8, 2026

[24] *See, e.g., Novi v. Detroit*, 433 Mich. 414, 420 n.6; 446 N.W.2d 118, 121 (1989) (quoting *Plymouth v Detroit*, 423 Mich. 106, 114-116; 377 N.W.2d 689 (1985) and the AWWA's Water Rates, 2d Ed., A Manual of Water Supply Practices (1972)); *Plymouth*, 423 Mich. at 116 ("The two methods most widely used are the Demand-Commodity Method and the Base-Extra Capacity Method, described in Defendant's Exhibit P, Water Rates, 2d Ed., A Manual of Water Supply Practices, American Water Works Association, 1972.").

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STATEMENT OF WORD COUNT

Pursuant to MCR 7.212(B)(3), Plaintiff's counsel states that Plaintiff's/Appellant's Brief on Appeal contains **14,616** "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).

.

/s/ Jamie Warrow
Jamie Warrow

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2026, I electronically filed the foregoing document with the Clerk of the Court using the court's electronic filing system.

/s/ Jamie Warrow
Jamie Warrow

4927-2179-7766, v. 1

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STATE OF MICHIGAN
COURT OF APPEALS

STACY PHOTHISAN, individually,
and as representative of a class of
similarly-situated persons and entities,

Plaintiff,

v.

CITY OF HOLLAND, MICHIGAN,
a municipal corporation, by and through
THE HOLLAND BOARD OF PUBLIC WORKS,

Defendant.

Court of Appeals Case No. 377279

Ottawa County Circuit Court
Case No. 2025-008184-CZ
Hon. Karen J. Miedema

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APPENDIX OF EXHIBITS IN SUPPORT OF PLAINTIFF/APPELLANT'S BRIEF ON APPEAL

VOLUME I

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APPENDIX EXHIBITS

Volume I

Appellant's App.Ex. 1	pp. 1-13	August 29, 2025 Opinion and Order on Defendant City of Holland's Motion for Summary Disposition of Plaintiff's Complaint pursuant to MCR 2.116(C)(8); Opinion and Order on Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) of Count I of Plaintiff's Complaint.
Appellant's App.Ex. 2	pp. 14-63	Plaintiff's Class Action Complaint with Exhibits

Volume II

Appellant's App.Ex. 3 (Part 1)	pp. 64-127	Plaintiff's Motion For Partial Summary Disposition as to Count I of the Complaint Under MCR.116(C)(10) and Brief in Support

Volume III

Appellant's App.Ex. 3 (Part 2)	pp. 128-173	Plaintiff's Motion For Partial Summary Disposition as to Count I of the Complaint Under MCR.116(C)(10) and Brief in Support
Appellant's App.Ex. 4	pp. 174-244	City of Holland's Response Brief in Opposition to Plaintiff's Rule 2.116(C)(10) Motion For Partial Summary Disposition as to Count I of the Complaint.
Appellant's App.Ex. 5	pp. 245-263	Plaintiff's Reply Brief in Support of Motion for Partial Summary Disposition with Exhibits
Appellant's App.Ex. 6	pp. 264-319	City's Motion to for Summary Disposition Pursuant to MCR 2.116(C)(8)
Appellant's App.Ex. 7	pp. 320-364	Plaintiff's Brief in Opposition to Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(8)

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APPENDIX EXHIBIT 1

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE 20th CIRCUIT COURT,
COUNTY OF OTTAWA

* * * * *

STACY PHOTHISAN, individually, and as a representative of a class of similarly-situated persons and entities,

Plaintiffs,

v

CITY OF HOLLAND, MICHIGAN, a Municipal corporation, by and through THE HOLLAND BOARD OF PUBLIC WORKS,

Defendant.

Case No. 25-8184-CZ

Hon. Karen J. Miedema

Opinion and Order

Opinion and Order on Defendant City of Holland's Motion for Summary Disposition of Plaintiff's Complaint pursuant to MCR 2.116(C)(8); Opinion and Order on Plaintiff's Partial Motion for Summary Disposition pursuant to MCR 2.116(C)(10) of Count I of Plaintiff's Complaint

I. Introduction

The City of Holland, Michigan, through its Board of Public Works (HBPW) (together, the City), supplies water and electric utilities to its customers in Holland and surrounding townships. The City establishes its electric rates through HBPW, pursuant to Chapter 12 of the City's Charter (Charter). The current version of the Charter was adopted in 1950 by a vote of the City's electors.

Plaintiff is an electrical customer of HBPW who claims that the City has been unjustly enriched by more than $40 million dollars by overcharging its customers from on or about 2020 to the present. Plaintiff filed this purported class-action lawsuit on or about March 14, 2025. Plaintiff's Complaint consists of three counts, which are all grounded in the belief that the City

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Plaintiff's Appendix
Page 2

does not have the authority under the Charter or the Michigan Revenue Bond Act (RBA) to transfer monies from its electric utility fund into its general fund.

Count I of plaintiff's Complaint is titled "Unjust Enrichment – Violation of City Charter Transfer Charges."[1] In this count, plaintiff argues that the City violated the Charter by "transferring monies from the Electric Fund to the City that exceeded the limitations on such transfers set forth in the Charter."[2] Plaintiff further argues in Count I that "[t]he City's Transfers between July 1, 2020 and the filing of this Complaint violated the City Charter because they exceed 50% of the net income of the Electric Fund."[3]

Count II of plaintiff's Complaint is titled "Unjust Enrichment – Violation of MCL § 141.121 Transfer Charges. In this count, plaintiff argues that "[t]he City's Charter is subject to the RBA pursuant to MCL § 117.36, which provides that '[n]o provision of any city charter shall conflict with or contravene the provisions of any general law of the state.'"[4] Plaintiff further asserts in Count II that "even if the City complied with its Charter in making the Transfers, the Transfers are still unlawful because they are prohibited by the Revenue Bond Act . . . ."[5]

Count III of plaintiff's Complaint is titled "Unjust Enrichment – Unreasonable Utility Rates Transfer Charges." In this Count, plaintiff argues that "[b]ecause the City's Electric Rates include and continue to include the Transfer Charge, those overall Rates are and have been unreasonable in violation of common-law ratemaking principles."[6]

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[1] Complaint, p 11.

[2] *Id.*

[3] *Id.*

[4] *Id.* at 13.

[5] *Id.*

[6] *Id.* at 15.

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II. Standard of Review

Summary disposition is permissible under MCR 2.116(C)(8) when the "'opposing party has failed to state a claim on which relief can be granted.'"[7] "A motion under MCR 2.116(C)8) test the legal sufficiency of the complaint."[8] "When deciding a motion brought under this section, a court considers only the pleadings."[9] "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant."[10] A (C)(8) motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery."[11]

In reviewing a motion under MCR 2.116(C)(10), the court must consider the pleadings, affidavits, depositions, admissions, and any other admissible evidence in favor of the nonmoving party.[12] While giving the adverse party the benefit of any reasonable doubt regarding the material facts, the court must determine whether there is a genuine and material factual dispute sufficient to warrant a trial.[13] A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.[14]

III. Law and Analysis

"A claim of unjust enrichment requires the complaining party to establish (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party."[15]

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[7] *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 368 (1993) (quoting MCR 2.116 (C)(8)).

[8] *Maiden* v *Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Radtke* 442 Mich at 374.

[13] *Bertrand* v *Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

[14] *West* v *General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

[15] *Karaus v Bank of NY Mellon*, 300 Mich App 9, 22-23; 831 NW2d 897 (2012).

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a. **Unjust Enrichment – Violation of the City Charter**

Issues of statutory construction presents questions of law.[16] "The primary goal of statutory interpretation is to give effect to the intent of the Legislature [, and t]his determination is accomplished by examining the plain language of the statute."[17] In addition, "'[t]he prevailing rules regarding statutory construction are well established and extend to the construction of home rule charters.'"[18] *Slis v Michigan*, 332 Mich App 312, 335-336; 956 NW2d 569 (2020) provides further instruction:

> This Courts role in construing statutory language is to discern and ascertain the intent of the Legislature, which may reasonably be inferred from the words in the statute. We must focus our analysis on the express language of the statute because it offers the most reliable evidence of legislative intent. *When statutory language is clear and unambiguous, we must apply the statute as written. A court is not permitted to read anything into an unambiguous statute that is not within the manifest intent of the Legislature. Furthermore, this Court may not rewrite the plain statutory language or substitute its own policy decisions for those decisions already made by the Legislature.*
>
> Judicial construction of a statute is only permitted when statutory language is ambiguous. A statute is ambiguous when an irreconcilable conflict exists between statutory provisions or when a statute is equally susceptible to more than one meaning. When faced with two alternative reasonable interpretations of a word in a statute, we should give effect to the interpretation that more faithfully advances the legislative purpose behind the statute. [Quotation marks and citations omitted.] [Emphasis added.]

Section 12.16 of the Charter, titled "Limitation on Use of Utility Funds," relates to the City's use of funds regarding the operation of its electric utility. In pertinent part, it states the following (emphasis added):

> The receipts from the operation of the electric and water utilities and income from investments shall be applied to the purposes thereof, in accordance with the budget appropriations, including the payment

[16] *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003).

[17] *Id.* at 526-527.

[18] The City's Brief, p 8 (quoting *City of Detroit v Walker*, 445 Mich 682, 691; 520 NW2d 135, 139 (1994)).

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of bonds outstanding or which may be issued for the purposes of such utilities and the interest thereon. The net income shall be determined by deducting from the receipts from operations and income from investments all expenses incurred and charges made or allowed for and on behalf of such utility in accordance with budget appropriations, or by appropriate action under authority of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness. *Up to 50% of the annual net income of the board may be appropriated by the council to the general purposes of the city. All such net income which is not so appropriated shall be placed in proper accounts or funds of the city which shall be established as reserves for future operations, replacement, extension, or improvement of such utilities. Nothing herein contained shall be interpreted to limit the power of the council to place, for any year, in such accounts or funds a larger percentage than 50% of such net income to the purposes of such utilities, in the event that such appropriation shall be requested by the board of public service [works] and be approved by seven members of the council.*

The foregoing limitation of 50% of such net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council.

Such funds so established as reserves for the purposes of the utilities may be invested and reinvested by the city auditor as the board of public service [works] shall direct, by and with the approval of the council, in such investments as are authorized by law for investment by fiduciaries. Said funds may be used for the purposes of such utilities upon the recommendation of the board of public service [works], by and with the consent of the council.

The electors of the city may, by a 3/5 vote of the qualified electors voting on such proposal at a regular or special election, approve an appropriation of more than 50% of the net income for any year for general purposes, or may approve the placing of more than 50% of the net income for any year in the reserve accounts or funds as above provided for the purposes of such utilities, or may approve for other municipal purposes the use of such accumulated and unallocated accounts or funds as have been established.

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Plaintiff argues that the City made transfers from its Electric Fund exceeding 50% of the net income of the Electric Fund, thus violating Section 12.16 of the Charter. In contrast, the City argues that this argument fails as a matter of law because "the Charter explicitly authorizes the City to do exactly what Plaintiff alleges it has done."[19] This Court agrees. As the City accurately points out, the second paragraph of Section 12.16 plainly states the following:

> The foregoing limitation of 50% of such net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council.[20]

Plaintiff counters that without voter approval, Section 12.16 of the Charter does not authorize the City to "transfer more than the budgeted net income of the Electric Fund for the general purposes of the City . . . ."[21] However, as the City correctly contends, the plain language of the Section 12.16 of the Charter does not state this, and plaintiff's interpretation of it is incorrect:

> The plain language of §12.16 reveals that both (1) HBPW and Council, and (2) the voters, have independent authority to appropriate more than 50% of net income. This authority is coextensive. Critically, Paragraph 4 of §12.16 does not say the voters may "exclusively" vote to appropriate "more than 100% of net income," "greater than net income," or "in excess of net income." Per Paragraph 4, an appropriation from the electric utility fund of more than 50% of net income could be approved by the voters. But an appropriation of more than 50% of net income could also be approved by the City Council and HBPW. Nothing about paragraph 2 of §12.16 constrains the voters' authority under Paragraph 4 of the section and nothing about Paragraph 4 constrains the authority of HBPW and seven Council members in Paragraph 2. Paragraphs 2 and 4 serve different purposes, but can accomplish the same thing – i.e., they authorize the increase of the limitation on appropriations.[22]

The plain language of the Section 12.16 of the Charter "unambiguously provides HBPW and Council with the authority to increase the amount of the appropriation made from the electric

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[19] The City's Brief, p 9.

[20] *Id.* (emphasis added by the City).

[21] Plaintiff's Response, p 6.

[22] The City's Reply Brief, p 2.

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utility's fund for general purposes."[23] Accordingly, Count I of plaintiff's Complaint is dismissed as a matter of law.

b. Unjust Enrichment – Violation of MCL § 141.121

A fact that is not in dispute in this case is that the City issued revenue bonds to finance its new electric generation facility, the Holland Energy Park; thus, the City's electrical rates are subject to the Michigan Revenue Bond Act (RBA). Section 21 of the RBA, MCL 141.121, states the following in pertinent part (emphasis added):

> (1) Rates for services furnished by a public improvement shall be fixed before the issuance of the bonds. The rates shall be *sufficient* to provide for all the following:
>
> (a) The payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement as may be necessary to preserve the public improvement in good repair and working order.
> (b) The payment of the interest on and the principal of bonds payable from the public improvements when the bonds become due and payable.
> (c) The creation of any reserve for the bonds as required in the ordinance.
> (d) Other expenditures and funds for the public improvement as the ordinance may require.
>
> (2) The rates shall be fixed and revised by the governing body of the borrower so as to produce the amount described in subsection (1). The borrower shall covenant and agree in the ordinance authorizing the issuance of the bonds and on the face of each bond to maintain at all times the rates for services furnished by the public improvement sufficient to provide for the amount described in subsection (1). Rates pledged for the payment of bonds that are fixed and established pursuant to a contract or lease shall not be subject to revision or change, except in the manner provided in the lease or contract.

[23] The City's Response in Opposition to Plaintiff's (C)(10) Motion, p 3.

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Plaintiff argues that subparts (a) through (d) above "require municipalities that are subject to the RBA to use funds garnered by municipal utility rates *only to support the utility itself*."[24] Plaintiff further argues that the possibility of "surpluses" is not found in the RBA. In contrast, the City argues that the word *only* is not in MCL 141.121; "[i]nstead, the word 'sufficient' is used, reflecting the Legislature's intent that a municipality secure enough funding to meet the requirements in MCL 141.121(1)(a)-(d)."[25] This Court agrees. In addition, this Court agrees with the City's contention that "[n]othing in [MCL 141.121] suggests that the Legislature intended the RBA to 'only' authorize rates 'to support the electric utility itself,' or to prohibit additional uses of electrical charge revenues, as Plaintiff claims." Accordingly, this Court finds that the plain language of the RBA does not limit what the City's utility rates may fund, contrary to plaintiff's argument.

Plaintiff next argues that the City's rates are unreasonable under the RBA because it charges its customers for their use of electricity plus an additional amount unrelated to use, which the City then transfers to its General Fund. While the RBA does not address reasonableness, plaintiff cites two Michigan Court of Appeals cases for support. First, *Mapleview Estates v City of Brown*, 258 Mich App 412; 671 NW2d 572 (2003) concludes that charges authorized under the RBA (tap-in fees, connection charges, etc.) must be reasonable. However, plaintiff fails to show how this makes the City's rates unreasonable under the RBA. Second, in *Metro Homes, Inc v Warren*, 19 Mich App 664, 671, n 5; 173 NW2d 230 (1969), the court cited an earlier Court of Appeals decision while discussing the nature of rates authorized by the RBA: "'[t]he rates, of course, must be based upon use and not special benefit or other similar criteria, unless special assessment proceedings are accepted.'"[26] Again, this Court fails to see how this case makes the City's rates unreasonable under the RBA.

Plaintiff next claims that "even if the RBA [MCL 141.122 and MCL 141.126] authorized the City to transfer 'surplus' revenues, the Complaint alleges that, during the relevant fiscal years, there was no 'surplus' to transfer."[27] However, plaintiff's Complaint does not contain this

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[24] Plaintiff's Response, p 9 (emphasis added).

[25] The City's Reply, p 3.

[26] *Smith v Township of Norton*, 2 Mich App 17; 138 NW2d 522 (1965) (quoting Chermak, The Law of Revenue Bonds (1954), pp 162, 200.

[27] Plaintiff's Response, p 11.

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argument, and "'a party is bound by their pleadings, and it is not permissible to litigate issues or claims that were not raised in the complaint.'"[28] The City accurately asserts that "[t]he actual language in MCL 141.122 illustrates the Legislature's intent to secure 'necessary' and 'sufficient' funding to maintain and operate the public improvement in good repair and working order, and to pay the principal and interest on bonds issued in connection with the public improvement . . . ."[29] MCL 141.122 states the following (emphasis added):

> Sec. 22. (1) In the authorizing ordinance the governing body of the borrower shall provide that the revenues of the public improvement be accounted for separately from the other funds and accounts of the borrower in the following order of recorded priority:
>
> (a) After provision for the payment for the next succeeding period of all current expenses of administration and operation and the current expenses for that period for maintenance *as may be necessary* to preserve the public improvement in good repair and working order.
>
> (b) There shall be next set aside a sum *sufficient* to provide for the payment of the principal of and the interest upon all bonds payable from those revenues, as and when the bonds become due and payable. This account shall be designated 'bond and interest redemption account.' In the event that the revenues of any operating year over and above those necessary for the operation and maintenance expenses shall be insufficient to pay the principal of and interest on the bonds maturing in any operating year, then an additional amount sufficient to pay the principal and interest shall be set aside out of the revenues of the next succeeding operating year, after provision for the expenses of operation and maintenance. In respect to the allocation and use of money in the bond and interest redemption account, due recognition shall be given as to priority rights, if any, between different issues or series of outstanding bonds. The public corporation may provide by ordinance that a reasonable excess amount shall be set aside in the bond and interest redemption account from time to time so as to produce and provide a reserve to meet any possible future deficiencies.

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[28] The City's Reply, p 4.

[29] *Id.*

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> (c) Next there shall be set aside, in the manner and priority provided by the ordinance, the sum or sums necessary for the additional accounts as may be required.
>
> (2) Revenues remaining, after satisfaction of subsection (1), at the end of any operating year shall be considered surplus and shall be disposed of by the governing body as provided in this act.

Regarding MCL 141.126, its plain language confirms that "the governing body has broad discretion to use the 'surplus' as it sees fit. Here, the RBA not only confirms that the governing body may elect to transfer a surplus (as framed by the RBA) to other accounts benefiting the public improvement, but also states that the governing body may elect to 'use [the surplus] for the purpose or purposes *as the governing body may determine to be for the best interests of the borrower* [i.e., the City].'"[30] MCL 141.126 states the following:

> Sec. 26. Any money remaining in the accounts for of the public improvement at the end of any operating year, which under the provisions of section 22 shall be considered surplus, may be transferred to other accounts of the public improvement or may be used for the purpose or purposes *as the governing body may determine to be for the best interests of the borrower*, unless some other disposition shall have been made in the ordinance authorizing the issuance of bonds under this act. In the event that money of the public improvement is insufficient to provide for the current expenses of the operation and maintenance account or the bond and interest redemption account, any money or securities in other accounts of the public improvement shall be transferred first to the operation and maintenance account and second to the bond and interest redemption account to the extent of any deficits in those accounts.

Accordingly, the City's transfers are lawful under the Michigan Revenue Bond Act, and Count II of plaintiff's Complaint is dismissed as a matter of law.

c. Unjust Enrichment – Unreasonable Utility Rates

This unjust enrichment claim alleges that the City's municipal rates are unreasonable based on common-law ratemaking principles. The City first asserts that this claim fails as a matter of law because Michigan precedent demonstrates that municipal rates are presumed reasonable.[31]

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[30] The City's Reply, p 4 (quoting MCL 141.126) (emphasis added).

[31] The City's Brief, p 15.

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However, the presumption of reasonableness "'is just that—a presumption—and it can be overcome by the plaintiff with a showing of sufficient **evidence** to the contrary.'"[32] The Michigan Court of Appeals provides an instructive summary on this principle:

> 'Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable. This presumption exists because courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making. However, the presumption of reasonableness may be overcome by a proper showing of evidence. The burden of proof is on the plaintiff to show that any given rate or ratemaking practice is unreasonable.'[33]

Plaintiff argues that "'if the fees for a particular service consistently generate revenue exceeding the costs for the service, the reasonableness of the fee for that service would be suspect.'"[34] In contrast, the City argues that there is nothing in the Charter or the RBA that prevents it from generating revenue that exceeds the cost of providing utilities. In other words, "[t]here can be nothing unjust about the City's conduct when the challenged appropriations are permitted by the City's Charter and by the RBA."[35] This Court agrees.

The City also argues that plaintiff fails to identify any standard or authority for reasonableness.[36] That is, plaintiff erroneously alleges that the City's rates are unreasonable because she says so, which cannot support an actionable or viable claim. In sum, "[b]ecause Plaintiff's freestanding 'unreasonable rates' claim fails to allege that the City has violated any

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[32] *Id.* (citing *Shaw v city of Dearborn*, 329 Mich App 640, 655; 944 NW3d 153 (2019) (emphasis by the City)).

[33] *Brunet v City of Rochester Hills*, unpublished case of the Court of Appeals, Issued December 2, 2021 (No. 354110) (2021 WL 5750616 at *7) (quoting *Trahey v City of Inkster*, 311 Mich App 582, 594; 876 NW2d 582 (2015) (cleaned up)).

[34] Plaintiff's Response, p 17 (quoting Mich Ass'n of Home Builders v City of Troy, 504 Mich 204, 220; 934 NW2d 713 (2019) (quotation and emphasis omitted)).

[35] The City's Reply, p 5.

[36] In its brief, the City cites *Brunet v City of Rochester Hills*, unpublished case of the Court of Appeals, Issued December 2, 2021 (No. 354110) (2021 WL 5750616), where the court cites multiple published Court of Appeals cases that stand for the principle that reasonableness must identify with a statute, contractual provision, or ordinance. See *Trahey v City of Inkster*, 311 Mich App 582, 594; 876 NW2d 582 (2015); *City of Novi v City of Detroit*, 433 Mich 414, 419; 446 NW2d 118 (1989); *City of Plymouth v City of Detroit*, 423 Mich 106, 111; 377 NW2d 689 (1985); *Meridian Twp v City of East Lansing*, 342 Mich 734, 748; 71 NW2d 234 (1955).

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cognizable standard of 'reasonableness,' Plaintiff may not sustain a claim that the City was unjustly enriched by the electric utility transfers to the City for general purposes."[37] Accordingly, this Court finds that plaintiff has not alleged anything in her Complaint that could rebut the presumption of reasonableness of the City's municipal rates and thus has not stated a viable claim in Count III.

IV. Conclusion

For the reasons stated above, this Court finds that the City's motion for summary disposition pursuant to MCR 2.116(C)(8) is GRANTED. Accordingly, Plaintiff's partial motion for summary disposition pursuant to MCR 2.116(C)(10) is DENIED.[38]

It is so ordered.

8/29/25
Date

Hon. Karen Miedema

THIS IS THE FINAL ORDER THAT CLOSES THE CASE

[37] The City's Reply. P 19

[38] Even if this Court decided to deny the City's motion for summary disposition pursuant to MCR 2.116(C)(8) regarding Count I of plaintiff's Complaint, it would have nevertheless denied plaintiff's partial motion for summary disposition pursuant to MCR 2.116(C)(10) regarding Count I. This Court agrees with the City that without appropriate discovery, plaintiff's (C)(10) motion would be premature. *Davis v City of Detroit*, 269 Mich App 376, 379; 711 NW2d 462 (2006).

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APPENDIX EXHIBIT 2

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STATE OF MICHIGAN

OTTAWA COUNTY CIRCUIT COURT

STACY PHOTHISAN, individually,
and as representative of a class of
similarly-situated persons and entities,

Plaintiff,

v.

CITY OF HOLLAND, MICHIGAN,
a municipal corporation, by and through
THE HOLLAND BOARD OF PUBLIC WORKS,

Defendant.

Case No. 2025-0000008184-CZ

Hon. JUDGE KAREN J MIEDEMA

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PLAINTIFF'S CLASS ACTION COMPLAINT AND JURY DEMAND

Plaintiff Stacy Phothisan (hereinafter, "Plaintiff"), by her attorneys, Kickham Hanley PLLC and Head Murphy Law, individually and on behalf of a class of similarly situated class members, states the following for her Class Action Complaint against the City of Holland, Michigan, a municipal corporation, by and through the Holland Board of Public Works (the "City"):

FILED IN OTTAWA COUNTY 20TH CIRCUIT COURT; 3/14/2025 12:28 PM

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INTRODUCTION

1. This is an action challenging the retail electric rates and charges (the "Electric Rates" and "Electric Charges") imposed by the City on citizens and entities (the "Electric Customers") who/which receive electricity from the City's Electric Utility Fund (the "Electric Fund"). The City, through its Electric Fund, has systematically garnered tens of millions from its Electric Customers through its excessive rate practices.

2. Michigan has long recognized that a "municipally-owned utility is built and operated, not for a corporate profit, but for the purpose of providing utility services at a reasonable cost to the citizens…" *Wolgamood v. Village of Constantine*, 302 Mich. 384, 404-405, 4 N.W.2d 697 (1942). Contrary to this principle, since at least 2019, the City has set its Electric Rates at a level far in excess of the rates that were necessary to finance the actual costs of providing electric services.

3. The City has grossly overcharged its Electric Customers by including in its Electric Rates a charge (the "Transfer Charge") that is designed to raise millions of dollars of revenues that the Electric Fund transfers to the City's General Fund (and other City funds) to be used for "the general purposes of the City." The City has made no attempt to prove that these transfers reflect the reimbursement of costs the General Fund (or any other City fund) allegedly incurs to support or provide services to the Electric Fund.

4. Relying on certain provisions in its Charter, the City allocates approximately 6.25% of its budgeted Electric Fund revenues to the Transfer Charge. That translates to about $8 million per year. Between July 1, 2020 and June 30, 2024 the City transferred over $30 million from the Electric Fund to the City's Fund.

5. In addition to violating the City's Charter, because the City's Electric Rates included the Transfer Charge, those overall Electric Rates have been unreasonable in violation of common-law ratemaking principles. Indeed, because of the Transfer Charge, the City's Electric Rates,

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"viewed as a whole," have been "excessive." *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 969 N.W.2d 570 (2021).

6. Finally, the Revenue Bond Act of 1933, MCL 141.121, governs the City's Electric Rate practices and prohibits the charging of Rates which intentionally generate surpluses that can be devoted to non-utility purposes.

7. The City's Transfer Charge, which generates electric utility revenues that the City uses for non-utility purposes, renders the City's Electric Rates unlawful pursuant to MCL 141.121.

JURISDICTION AND VENUE

8. Plaintiff is an electric customer of the City, has paid the Electric Rates and Charges, and seeks to act as a class representative for all similarly situated persons and entities.

9. The City is a municipality located in Ottawa County, Michigan.

10. Venue and Jurisdiction are proper with this Court because all parties are present here and the actions which give rise to Plaintiff's claims occurred in this County. This Court also has jurisdiction pursuant to MCR 3.501 because this is a class action.

GENERAL ALLEGATIONS CONCERNING THE CITY'S ELECTRIC UTILITY AND ELECTRIC RATES

11. By Charter and ordinance, the Holland Board of Public Works ("HBPW") is a department of the City established to construct, maintain, improve, and extend the electric plants and distribution systems of the City. *See* Exhibit 1, City Charter, § 12.4 and § 12.5.

12. Through the HBPW, the City maintains and operates an electric utility (the "Electric Utility" or "Electric Fund") purportedly to provide "electrical energy to meet the requirements of [its] electric system customers; and to provide that energy at the lowest cost possible at a high level of reliability as needed by those customers." *See e.g.* HBPW 2016 Mission Statement.

13. HBPW provides electricity not only to the City of Holland but the surrounding townships of Holland Township, Park Township, Laketown Township, and Fillmore Township.

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14. The City, through the HBPW, establishes its Electrical Rates from time to time through its Charter and enacted ordinances. *See* Exhibit 1, City Charter § 12.17.

15. The City holds a lien on the premises to which electric service is provided in order to secure payment of electric charges. Regarding this, the Charter provides:

> Except as otherwise provided or limited by state law, the city shall have as security for the collection of all charges, a lien upon the premises to which such utility services were supplied. Such liens shall become effective immediately upon the distribution or supplying of such utility service or services to such premises. [*See* Exhibit 1, Charter, § 12.18.]

ALLEGATIONS CONCERNING THE TRANSFER CHARGE

16. The City has grossly overcharged its Electric Customers by including in its Electric Rates a cost component designed to generate millions of dollars of revenues that are transferred from the Electric Fund to other City funds (the "Transfer Charge"). The transferred funds, generated by the Electric Rates and Charges, are used for the general support of the City, and for purposes wholly unrelated to providing electric services.

17. The City's General Fund receives the majority of its financing from four primary sources: (a) property taxes; (b) state shared revenues; (c) fees & charges for services; and (d) an annual transfer from the City's Electric Utility Fund (the "Transfer") to the General Fund and other City funds, as purportedly authorized by City Charter provisions. *See generally,* City Budgets from FY 2020 through FY 2025.

18. The Charter provision that purports to authorize the City's Transfer (§ 12.16) provides:

> The receipts from the operation of the electric and water utilities and income from investments shall be applied to the purposes thereof, in accordance with the budget appropriations, including the payment of bonds outstanding or which may be issued for the purposes of such utilities and the interest thereon.
>
> The **net income** shall be determined by deducting from the receipts from operations and income from investments all expenses incurred and charges made or allowed for and on behalf of such utility in accordance with budget appropriations, or by

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appropriate action under authority of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness.

Up to 50% of the annual net income of the board may be appropriated by the council to the general purposes of the city. All such net income which is not so appropriated shall be placed in proper accounts or funds of the city which shall be established as reserves for future operations, replacement, extension, or improvement of such utilities.

Nothing herein contained shall be interpreted to limit the power of the council to place, for any year, in such accounts or funds a larger percentage than 50% of such net income to the purposes of such utilities, in the event that such appropriation shall be requested by the board of public service [works] and be approved by seven members of the council.

The foregoing limitation of 50% of such net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council.

Such funds so established as reserves for the purposes of the utilities may be invested and reinvested by the city auditor as the board of public service [works] shall direct, by and with the approval of the council, in such investments as are authorized by law for investment by fiduciaries. Said funds may be used for the purposes of such utilities upon the recommendation of the board of public service [works], by and with the consent of the council.

The electors of the city may, by a 3/5 vote of the qualified electors voting on such proposal at a regular or special election, approve an appropriation of more than 50% of the net income for any year for general purposes, or may approve the placing of more than 50% of the net income for any year in the reserve accounts or funds as above provided for the purposes of such utilities, or may approve for other municipal purposes the use of such accumulated and unallocated accounts or funds as have been established. [Exhibit 1, § 12.16 (Emphasis added).]

19. Thus, pursuant to the City's Charter, the Electric Utility is permitted to transfer 50% of its net income—or a higher percentage of the net income, **but only the net income** and then only if approved by the City's Council—for the "general purposes of the city."

20. The City prepares financial statements for its Electric Fund. These financial statements show that, in the six years preceding the filing of this Complaint, the City has systematically transferred, on an annual basis, at least $7 million per year from the Electric Fund to the City's General Fund or other City funds.

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21. The formula for determining the amount of the Transfer varies from year to year but is purportedly based upon a percentage of the Electric Fund's budgeted revenues of the same fiscal year.

22. According to the City's 2021 CAFR, the City's General Fund received a Transfer from the Electric Fund consisting of "5.5% of the Electric Utility Fund budgeted revenues of the same fiscal year." *See* Exhibit 2, 2021 CAFR at p. 79. For fiscal year 2021, total Transfers of $7,968,900 were made. A $6,091,621 Transfer was made to the General Fund, and a $1,877,279 Transfer was made to the Municipal Facilities and Land Improvements Projects.

23. According to the City's 2022 CAFR, the City's General Fund received a Transfer from the Electric Fund consisting of "6.25% of the average of the previous three calendar year sales." *See* Exhibit 3, 2022 CAFR p. 14. The City further reported in its 2022 CAFR that the "current formula for determining this transfer is based upon 6.25% of Electric Utility Fund budgeted revenues of the same fiscal year. Based on this formula, a $6,000,000 transfer was made to the General Fund, and a $491,380 transfer was made to the Municipal Facilities/Land Improvements Projects Fund. Additionally, the City receives a portion of the electric wholesale sales designated for the capital improvement fund. The total for fiscal year 2022 was $2,104,004 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2022, total transfers of $8,595,384 were made." *Id.* p. 79.

24. According to the City's 2023 CAFR, the City's General Fund received a Transfer from the Electric Fund consisting of "6.25% of the average of the previous three calendar year sales." *See* Exhibit 4, 2023 CAFR p. 14. The City further reported that "the current formula for determining this transfer is based upon 6.25% of Electric Utility Fund budgeted revenues of the same fiscal year. Based on this formula, a $6,372,000 transfer was made to the General Fund. Additionally, the City receives a portion of the electric wholesale sales designated for the capital

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improvement fund. The total for fiscal year 2023 was $2,084,856 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2023, total transfers of $8,456,856 were made." *Id.* p. 78.

25. According to the City's 2024 CAFR, the City's General Fund received a Transfer from the Electric Fund consisting of "6.25% of the average of the previous three calendar year sales." *See* Exhibit 5, 2024 CAFR p. 14. The City also reported that the "current formula for determining this transfer is based upon 6.25% of Electric Utility Fund budgeted revenues of the same fiscal year. Based on this formula, a $6,228,000 transfer was made to the General Fund. Additionally, the City receives a portion of the electric wholesale sales designated for the capital improvement fund. The total for fiscal year 2024 was $3,413,232 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2024, total transfers of $9,641,232 were made." *Id.* p. 84.

26. The City continued to make the Transfers and impose the Transfer Charge in the fiscal year beginning July 1, 2024 and continues to make the Transfers and impose the Transfer Charge as of the date of the filing of this Complaint.

27. The amounts used to support the Transfers are incorporated into the City's Electric Rates through the Transfer Charge. The City's electric customers were assessed the Transfer Charge in each and every electric bill they received. Moreover, as Electric Customers of the City, Plaintiff and each member of the Class paid the Transfer Charge when they paid their electric bill. Due to the Transfer Charge alone, the City has overcharged its customers by over $40 million during the Class Periods, as defined below.

28. The City makes no attempt to justify the Transfer Charges as representing reimbursement for services provided to the Electric Fund by other City departments. To the

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contrary, the historical amounts of the Transfers have been determined **solely** by reference to the financial needs of the City's General Fund.

29. In a memorandum dated March 27, 2019, the City Manager and the General Manager of the HBPW advocated for the "establishment of policy to guide planning and execution of utility transfers." In the memorandum, the authors stated:

> The payments have been made from the HBPW electric utility. Except for two years (2009 and 2016), the payments have been limited to the percent of gross electric sales revenue. In 2009 and 2016, additional specific payments were made to support City needs. Those were $300k in 2009 for the parking deck on 7th and approximately $200k in 2016 to support the Holland Historic Trust.
>
> **Increases in the transfer percentage during the early part of this period were the result of the housing market collapse in 2008 and a resetting of the taxable value of properties in Holland. This caused significant financial strain on the City's General Fund. The HBPW transfer increase tempered this impact somewhat**. During this time, the HBPW also experienced significant decline in industrial sales of electricity due to the economic recession that followed the housing crisis. The HBPW experienced a rebound in sales volume after 2011, led mostly by the economic recovery. This was coupled by a series of rate adjustments targeted to prepare for the investment in Holland Energy Park. That worked to spark significant growth, on average nearly 8.5% year over year, in the transfer payment between 2012 and 2018. By 2018, the transfer percentage had reached 5.75% of **gross electric retail sales**. [Exhibit 6 hereto (emphasis added)].

30. The City's Transfer Charge has been imposed in violation of the City's Charter because the City's Transfer Charges have been based on varying percentages of the budgeted **gross revenues** of the Electric Fund and not on 50% of the budgeted **net income** of the Electric Fund, as required by § 12.16 of the Charter.

31. The Charter requires the City to determine the "net income" of the Electric Fund as follows: "The net income shall be determined by deducting from the receipts from operations and income from investments all expenses incurred and charges made or allowed for and on behalf of such utility in accordance with budget appropriations, or by appropriate action under authority of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such

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indebtedness." Thus, all expenses of the Electric Fund must be deducted from the gross revenues of the Electric Fund to determine the "net income."

32. The City's improper use of gross revenues instead of net income to determine the amount of the Transfer Charge violates the Charter provision. In fact, for FY 2021 through FY 2025, the Transfer Charge was prohibited because the Electric Fund had **no** net income in any of those fiscal years.

33. In addition, the City issued revenue bonds to finance the Holland Energy Park and is therefore subject to the Revenue Bond Act and its limitations on rates and charges.

34. The Revenue Bond Act, MCL § 141.121, provides in pertinent part:

> (1) Rates for services furnished by a public improvement shall be fixed before the issuance of the bonds. The rates shall be sufficient to provide for all the following: (a) The payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement as may be necessary to preserve the public improvement in good repair and working order. (b) The payment of the interest on and the principal of bonds payable from the public improvements when the bonds become due and payable. (c) The creation of any reserve for the bonds as required in the ordinance. (d) Other expenditures and funds for the public improvement as the ordinance may require.
>
> (2) **The rates shall be fixed and revised by the governing body of the borrower so as to produce the amount described in subsection (1).** The borrower shall covenant and agree in the ordinance authorizing the issuance of the bonds and on the face of each bond to maintain at all times the rates for services furnished by the public improvement sufficient to provide for the amount described in subsection (1). Rates pledged for the payment of bonds that are fixed and established pursuant to a contract or lease shall not be subject to revision or change, except in the manner provided in the lease or contract. [Emphasis added.]

35. MCL 141.121(1) subparts (a) through (d) require municipalities that are subject to the Revenue Bond Act to use funds garnered by municipal utility rates only to support the utility itself. Subpart (d) is a catch-all, but that provision expressly requires the funds to be expended "for the public improvement." Subdivision (2) requires that the rates be set only "to produce the amount described in subsection (1)." Collectively, these provisions of the Revenue Bond Act prohibit the

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charging of rates which intentionally generate surpluses that can be devoted to non-electric utility purposes.

36. The City's practice of transferring a percentage of its electric utility revenues to the City's General Fund and other funds of the City for the general purposes of the City is thus unlawful under the Revenue Bond Act because it allocates electric utility revenues to other City funds for non-electric utility purposes.

CLASS ALLEGATIONS

37. Plaintiff brings this action as a class action, pursuant to MCR 3.501, individually and on behalf of a proposed class consisting of all persons or entities which have paid the City for electrical service during the relevant Class Periods, as defined in the Prayer for Relief below.

38. The members of the Class are so numerous that joinder of all members is impracticable.

39. Plaintiff's claims are typical of the claims of members of the Class. Plaintiff is a member of the Class he seeks to represent, and Plaintiff was injured by the same wrongful conduct that injured the other members of the Class.

40. The City has acted wrongfully in the same basic manner as to the entire Class.

41. There are questions of law and fact common to all Class Members that predominate over any questions, which, if they exist, affect only individual Class Members, including:

a. Whether the Transfer Charge violates § 12.16 of the City Charter;

b. Whether the Transfer Charge renders the City's Electric Rates unreasonable under the common-law;

c. Whether the Transfer Charge is unlawful pursuant to the Revenue Bond Act, MCL § 141.121;

d. Whether the City has been unjustly enriched by collecting the Transfer

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Charge from its electric customers; and

e. Whether the City should be required to disgorge and refund revenues received through imposing the Transfer Charge upon its electric customers.

42. Plaintiff will fairly and adequately protect the interests of the Class, and Plaintiff has no interests antagonistic to those of the Class. Plaintiff is committed to the vigorous prosecution of this action and has retained competent and experienced counsel to prosecute this action.

43. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. The prosecution of separate actions would create a risk of inconsistent or varying adjudications. Furthermore, the prosecution of separate actions would substantially impair and impede the ability of individual class members to protect their interests. In addition, since individual refunds may be relatively small for most members of the class, the burden and expense of prosecuting litigation of this nature makes it unlikely that members of the class would prosecute individual actions. Plaintiff anticipates no difficulty in the management of this action as a class action.

COUNT I
UNJUST ENRICHMENT – VIOLATION OF CITY CHARTER
TRANSFER CHARGES

44. Plaintiff incorporates each of the preceding paragraphs 1 through 43 as if fully set forth herein.

45. § 12.16 of the City's Charter purports to authorize the City to transfer up to 50% of the "net income" of the Electric Fund to the City for the "general purposes of the City."

46. Pursuant to Article 7, § 22 of the Michigan Constitution, "[u]nder general laws the *electors* of each city and village shall have the power and authority to frame, adopt and amend its charter…" (Emphasis added.) Under Article 7, §. 22, "the electors of cities are vested with control over their cities' charters…" and "the electorate of a city is entitled to the final word as to whether a

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revised charter is to be adopted." *Sheffield v. Detroit City Clerk*, 508 Mich. 851, 853, 962 N.W.2d 157 (2021).

47. A city may not take any action "that contradicts limitations expressly provided in the city's charter. The charter of a city stands as its 'constitution'; it is the definition of a city's rights and obligations as a municipal entity, so far as they are not otherwise legally granted or imposed." *Bivens v. City of Grand Rapids*, 443 Mich. 391, 399, 505 N.W.2d 239 (1994).

48. The City has violated its Charter by transferring monies from the Electric Fund to the City that exceeded the limitations on such Transfers set forth in the Charter.

49. Since July 1, 2020, the City has not transferred 50% of the net income of the Electric Fund to the City but instead has transferred varying percentages of the gross revenues of the Electric Fund to the City for the "general purposes of the City."

50. The City's Electric Fund has had **no** net income since the fiscal year ending June 30, 2020. Thus, § 12.16 of the City Charter prohibited the City from transferring **any** of the Electric Fund monies to the City's General Fund or any other City fund.

51. The City's Transfers between July 1, 2020 and the filing of this Complaint violated the City Charter because they exceeded 50% of the net income of the Electric Fund.

52. As a direct and proximate result of the City's improper conduct, the City has collected millions of dollars to which it is not entitled. By paying the Transfer Charges, which are necessarily incorporated into the City's Electric Rates, Plaintiff and the Class have conferred a benefit upon the City.

53. The City has been unjustly enriched because it received Transfer Charges to which it was not entitled, and it would be unfair for the City to retain the Transfer Charges under the circumstances.

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54. The City should be required to disgorge the amounts by which it has been unjustly enriched.

COUNT II
UNJUST ENRICHMENT – VIOLATION OF MCL § 141.121
TRANSFER CHARGES

55. Plaintiff incorporates each of the preceding paragraphs 1 through 43 as if fully set forth herein.

56. The City is subject to the Revenue Bond Act because it issued revenue bonds to pay for its new electric power utility. The City's Charter is subject to the Revenue Bond Act pursuant to MCL § 117.36, which provides that "[n]o provision of any city charter shall conflict with or contravene the provisions of any general law of the state." Thus, even if the City complied with its Charter in making the Transfers, the Transfers are still unlawful because they are prohibited by the Revenue Bond Act, for the reasons set forth below.

57. MCL § 141.121(1) subparts (a) through (d) requires the City to use funds collected through the imposition of the City's Electric Rates only to support the Electric Fund itself. MCL § 141.121(2) requires the City's to set its Electric Rates only to "produce the amount described in subsection (1)." Collectively, these provisions of the Revenue Bond Act prohibit the City from charging Electrical Rates which intentionally generate surpluses that can be devoted to non-electric utility purposes.

58. The City's practice of transferring a percentage of its Electric Rate revenues to the City's General Fund and other City funds for the general purposes of the City is thus unlawful under MCL § 141.121 of the Revenue Bond Act because it allocates Electric Rate revenues for non-electric utility purposes.

59. As a direct and proximate result of the City's improper conduct, the City has collected millions of dollars to which it is not entitled. By paying the Transfer Charge, which is

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necessarily incorporated into the City's Electric Rates, Plaintiff and the Class have conferred a benefit upon the City.

60. The City has been unjustly enriched because it received Transfer Charges to which it was not entitled, and it would be unfair for the City to retain the Transfer Charges under the circumstances.

61. The City should be required to disgorge the amounts by which it has been unjustly enriched.

COUNT III
UNJUST ENRICHMENT – UNREASONABLE UTILITY RATES
TRANSFER CHARGES

62. Plaintiff incorporates each of the preceding paragraphs 1 through 43 as if fully set forth herein.

63. Because the City's Electric Rates includes and continue to include the Transfer Charge, those overall Rates are and have been unreasonable in violation of common-law ratemaking principles. Indeed, because of the Transfer Charge, the City's Electric Rates, "viewed as a whole," have been "excessive." *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 969 N.W.2d 570 (2021).

64. As a direct and proximate result of the City's improper conduct, the City has collected millions of dollars to which it is not entitled. By paying the Transfer Charge, which is necessarily incorporated into the City's Electric Rates, Plaintiff and the Class have conferred a benefit upon the City.

65. The City has been unjustly enriched because it received Transfer Charges to which it was not entitled, and it would be unfair for the City to retain the Transfer Charges under the circumstances.

66. The City should be required to disgorge the amounts by which it has been unjustly enriched.

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PRAYER FOR RELIEF

WHEREFORE Plaintiff requests that the Court grant the following relief:

A. Certify this action to be a proper class action with Plaintiff certified as Class Representative and Kickham Hanley PLLC and Head Murphy Law being designated Class Counsel;

B. Define the Class for Count I to include all persons or entities who/which have paid the City for Electric Service at any time after June 30, 2020 or who/which pay the City for Electric Service during the pendency of this action (the "Count I Class Period");

C. Define the Class for Counts II and III to include all persons or entities who/which have paid the City for Electric Service at any time in the six years preceding the filing of this suit, or who/which pay the City for Electric Service during the pendency of this action (the "Counts II and III Class Period").

D. Enter judgment in favor of Plaintiff and the Class and against the City, and order and direct the City to disgorge and refund all Transfer Charges collected during the class period and to pay into a common fund for the benefit of Plaintiff and all other members of the Class the total amount of Transfer Charges to which Plaintiff and the Class are entitled;

E. Appoint a Trustee to seize, manage and distribute in an orderly manner the common fund thus established;

F. Enjoin the City from imposing or collecting the Transfer Charges in the future;

G. Award Plaintiff and the Class the costs and expenses incurred in this action, including reasonable attorneys', accountants', and experts' fees; and

H. Grant any other appropriate relief.

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JURY DEMAND

Plaintiff, individually and on behalf of the Class, hereby demands a trial on all issues so triable.

KICKHAM HANLEY PLLC

/s/ Gregory D. Hanley
Gregory D. Hanley (P51204)
Jamie Warrow (P61521)
Edward F. Kickham (P70332)
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073
(248) 544-1500
Counsel for Plaintiff and the Class

Date: March 14, 2025

HEAD MURPHY LAW
Shawn H. Head (P72599)
Sean P. Murphy (P79255)
33533 W. 12 Mile Rd., Ste. 295
Farmington Hills, MI 48331
(248) 939-5405
Co-Counsel for Plaintiff and the Class

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2025, I electronically filed the foregoing pleadings with the Clerk of the Court using the court's electronic filing system.

/s/ Jamie Warrow
Jamie Warrow

4902-1051-0887, v. 1

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EXHIBIT – 1

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CHAPTER 12
Utility Franchises and Municipal Ownership of Utilities

Sec. 12.1. Conditions applicable to public utility franchises.

All public utility franchises granted after the adoption of this Charter, whether it be so provided in the granting ordinance or not, shall be subject to the right of the city:

(a) To repeal the same for misuse, or nonuse, or for failure to comply with the provisions thereof;

(b) To require proper and adequate extension of plant and service maintenance thereof at the highest practicable standard of efficiency;

(c) To establish reasonable standards of service and quality of products, and prevent unjust discrimination in service or rates;

(d) To require continuous and uninterrupted service to the public in accordance with the terms of the franchise throughout the entire period thereof;

(e) To impose such other regulations as may be determined by the council to be conducive to the safety, welfare, and accommodation of the public;

(f) To require the public utility to which any franchise is granted to permit joint use of its property and appurtenances located in the streets, alleys, and public places of the city, by the city, and other utilities insofar as such joint use may be reasonably practicable and upon payment of reasonable rental therefor; provided, that in the absence of agreement, upon application by the public utility, the council shall provide for arbitration of the terms and conditions of such joint use and the compensation to be paid therefor;

(g) To pay such part of the cost of improvement or maintenance of the streets, alleys, bridges, and public places of the city, as shall arise from its use thereof and to protect and save the city harmless from all damages arising from said use.

Sec. 12.2. Procedures and requirements controlling franchise ordinances, etc.

Every ordinance or resolution granting any franchise or right to occupy or use the streets, highways, bridges, or public places in the city for any purpose shall be complete in the form in which it is finally passed, and remain on file with the clerk for public inspection for at least 30 days before the final passage or adoption thereof, or approval for referral to the electorate. No exclusive or irrevocable franchise shall be granted by the city, unless such proposition shall have first received the affirmative vote of at least 3/5 of the electors of the city voting thereon at a regular or special election. No such franchise ordinance, or resolution shall be approved by the council for referral to the electorate until a public hearing has been held thereon, nor until the grantee named therein has filed with the clerk his unconditional acceptance of all terms of such franchise. No special election for such purpose shall be ordered by the council unless the expense of holding such election, as determined by the council, shall have first been paid to the treasurer by the grantee.

A franchise ordinance, or ordinance granting or authorizing the granting of a license to use or occupy the streets of the city for public utility purposes which is subject to revocation at the will

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of the city, may be enacted by the council without referral to the voters, but shall not be enacted nor become operative unless it shall have been complete in the form in which it is finally enacted and remain on file with the clerk for public inspection for at least four weeks before the final enactment thereof.

Sec. 12.3. General powers relative to municipal utilities and services. [Amend. No. 16, 11-8-1977]

The city shall possess and hereby reserves to itself all powers granted to cities by the constitution and general laws of the State of Michigan to acquire, by purchase or condemnation, the franchises, if any exist, and the property used in the operation of companies or individuals engaged in the electric, light, gas, heat, water and power business and for the purchase and condemnation of private property for any public use or purpose within the scope of the powers specified herein, to construct, own, operate, improve, enlarge, extend, repair and maintain, either within or without its corporate limits, airports, landing fields and aeronautical facilities, hospitals and public utilities, including, but not by the way of limitation, public utilities for treating and supplying water, and for supplying light, heat, power, gas, sewage treatment and garbage disposal facilities, or any of them, to the city and its inhabitants; and also to sell and deliver water, light, heat, power, gas and other public utility services, without its corporate limits to an amount not exceeding the limitations set by the state constitution. The power to supply, as herein possessed and reserved, shall include the power to extract and process water, electricity or gas from natural resources, to manufacture the same or to purchase the same from others.

Sec. 12.4. Board of public works generally—Management of electric and water utilities of the city.

The board of public works of the City of Holland, having been created, is hereby continued, and shall be known and designated as the board of public service.[1] Such board, subject only to the approval of the council, is hereby charged with the duty, power and responsibility of constructing, maintaining, improving, and extending the electric and water plants and distribution systems of the city, together with any public heating which may be a by-product thereof, and with the management, supervision, and control thereof. The title of all grounds and rights in real or personal property held, purchased, or otherwise secured by or on behalf of said board, shall be taken in the name of the City of Holland; and said water, electric and heating plants and works, and everything pertaining thereto, shall be the property of the city, and all contracts and purchases made by said board, shall be in the name of the city.

Sec. 12.5. Same—Status of board.

The board of public service [works][2] and the works, and utilities, under its management, supervision, and control, shall constitute a department of the city government.

Sec. 12.6. Same—Composition; appointment, qualifications and terms of members; filling

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1. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**
2. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

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vacancies. [Amend. No. 12, 4-7-1969]

The board of public works shall be composed of the five members of that board, who held office on the date that this Charter became law, and the city manager. Said members shall hold office for the balance of the terms for which they were elected or appointed prior to the date that this Charter became law. Thereafter, their successors shall be appointed by the mayor, with the advice and consent of the council, during the month of June of each year. Each person appointed as a member of the board of public works shall possess the qualifications required by this Charter for elective officers of the city and shall be appointed to serve for a term of five years commencing on and dating from the first day of July, next following his appointment; provided, that persons appointed to fill a vacancy shall assume office immediately upon appointment and shall hold office only for the balance of the term of the person creating such vacancy. The city manager, as a member of the board of public works, shall have the duty of attending all meetings of the board, shall be privileged to participate in all discussions and proceedings of the board, but shall not be entitled to vote on questions before the board.

Sec. 12.7. Same—Organization; officers; quorum.

Said board shall, annually during the month of July, organize and elect one of its appointed members president. A majority of the board, other than the city manager, shall constitute a quorum for the transaction of business. The clerk of the city shall be ex officio clerk of the said board, but shall have no vote therein. He shall have access to all of its records and papers.

Sec. 12.8. Same—Public service planning; annual report.

The board of public service [works][3] shall be charged and entrusted with the responsibility for the planning of improvements of, additions to, extensions of, and the operation and maintenance of the public service works of the city relating to the supplying of electricity and water to the inhabitants of the city, and within any limits provided by law, the territory surrounding the city. The board shall, annually in the month of March, make a report to the council, by filing the same with the clerk, which report shall present an analysis of the status and needs of the public service works under the board's jurisdiction and the recommendations of the board with respect thereto. Such report shall contain estimates of the costs of all improvements of, additions to, and extensions of the public services of the city which are recommended to be made during the ensuing fiscal year of the city, together with explanations thereof. The council shall have power to modify or disapprove any improvement of, addition to, or extension of the public service works of the city which may be recommended to be made in such report; provided, however, that unless the council shall modify or disapprove of any such recommended improvement, addition, or extension, or any number or combination of the same within 30 days after the date of the first meeting of the council, following the filing of such report with the clerk, such report shall be deemed to be approved by the council. Such report, as approved or modified by the council shall constitute the public service works program of the board of public service [works] for the fiscal year following that in which it is filed and it shall not again be necessary for the board to secure the approval of the council for the making of any improvement of, addition to, or extension of the public service works of the city which is made in accordance with such report as approved or

3. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

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modified by the council. Except as provided in section 12.9, the board of public service [works] shall make no improvement of, addition to, or extension of any public service work of the city in any year, except in accordance with such report as approved or modified by the council with respect to both the nature and the estimated cost thereof, unless the same shall be first approved by the council.

Sec. 12.9. Same—Budget; additional expenditures.

On or before February 15, of each year, the board of public service [works][4] shall file with the city manager for the consideration of the council, a budget proposal and a payroll schedule for the next fiscal year of the city. Such budget shall set forth estimates, in substantially the form required by this Charter for budget proposals of the city, of the amount of money, other than moneys estimated to be required for improvements of, additions to, or extensions of the public service works of the city under its control which, according to the judgment of the board, will be required for the public service works of the city during the ensuing fiscal year of the city. The budget proposal of the board of public service [works] shall be appended to and made a part of the budget proposal of the city which is submitted to the council by the city manager. The estimates of the board of public service [works], contained in its budget proposal, may be modified or adopted by the council. In the event that the council does not act upon or complete its action upon such proposed budget by the first day of June, following the filing thereof with the clerk, such proposed budget shall be presumed to have been approved by the council and shall be the budget of the board for the ensuing fiscal year of the city just as though formally approved by the council. The board of public service [works] shall administer its own budget. With the consent of the council, the board may exceed any budget appropriation or allotment where it can transfer a sufficient amount therefor from unencumbered balances within its budget. All proposed expenditures of the board of public service [works] which are not included in the board's planning report provided in section 12.8, or its budget, as approved by the council, shall be approved by the council before any obligation for such expenditures shall be incurred by the board; provided, however, that when by unanimous action of the board, it is deemed necessary for the proper functioning of any utility under the board's jurisdiction to install or construct works, or purchase material for the extension of, or addition to, any such utility beyond its yearly planning or budget report, and when the cost of such extension, addition, or purchase does not exceed the total sum of $1,000, and the money to pay the same is or will be available in the unencumbered funds of the board, then such extension, addition, or purchase may proceed without further authorization; provided, further, that the total cost of all extensions, additions, or purchases made or done under authority by this proviso shall not exceed the sum of $5,000 in any fiscal year of the city.

Sec. 12.10. Same—Employment of superintendent of utilities and other operating personnel.

Subject to budget allowances therefor, and without the necessity of the approval of the council, the board of public service [works][5] shall have power to employ a superintendent of utilities and all personnel deemed by the board to be necessary for carrying on the supervision, operation,

4. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

5. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

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maintenance, and general conduct of the public service works of the city entrusted to it by the provisions of this Charter and budget allowances therefor.

Sec. 12.11. Same—Expenses and funds generally.

The expenses of conducting the affairs of the board of public service [works][6] shall be defrayed from the revenues of the public service works of the city under its control, or may be paid or supplemented from the general funds of the city, if the council shall so determine with the concurrence of the board of public service [works]. All funds earned, raised, or realized by the board shall be deposited with the treasurer who shall give a receipt therefor and file a copy thereof with the city auditor. The treasurer shall deposit all such receipts to the credit of the proper fund or account of the city.

Sec. 12.12. Same—City auditor to provide system of accounts; board accounts generally.

Separate accounts shall be provided for and kept by the city auditor, in the form required by state law, for each public service work which is owned by the city and operated by the board. Such accounts shall show the value of any service rendered to or by such public service work or works of the city with reference to the city itself. Such accounts shall take into consideration and preserve, for the use for which the same were set aside and accumulated, all funds of the city which stand to the credit of the board of public works of the city at the time that this Charter became law. Except as otherwise provided in this Charter, all funds raised for, or realized from the operation of such public service works and utilities of the city shall remain in the accounts to which they have been allocated and no part thereof shall be transferred from or revert to any other account or fund at the close of any fiscal year.

Sec. 12.13. Same—Annual audit; other reports to council.

The cost of making the annual audit of the accounts of the board of public service [works][7] shall be defrayed from the funds of the board. The annual audit of the affairs of the board of public service [works] shall show the financial status of the affairs of the board and, as nearly as possible, the financial results of the city ownership and operation of the public service works of the city for which the board is responsible. The board shall also make such other reports and furnish such other information to the council as that body shall require by ordinance or resolution.

Sec. 12.14. Same—Purchase of water or electricity by city.

With the consent of the council, the board of public service [works][8] may purchase water or electricity from any person, firm, or corporation, municipal or private, if such purchase may be deemed by the board to be in the best interest of the city and the inhabitants thereof.

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6. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**
7. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**
8. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

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Sec. 12.15. Other city utility services.

The council shall be charged with the responsibility for constructing, maintaining, improving and extending the sewage disposal facilities, the fire alarm system, and such other utilities of the city as existed on the date this Charter became law or which may thereafter have been acquired by the city. Such facilities shall constitute one or more separate departments of the city government or may be assigned by resolution of the council to an appropriate department or division of the city government, or shall be under the administrative charge and responsibility of the city manager as the council shall determine.

Sec. 12.16. Limitation on use of utility funds.

The receipts from the operation of the electric and water utilities and income from investments shall be applied to the purposes thereof, in accordance with the budget appropriations, including the payment of bonds outstanding or which may be issued for the purposes of such utilities and the interest thereon. The net income shall be determined by deducting from the receipts from operations and income from investments all expenses incurred and charges made or allowed for and on behalf of such utility in accordance with budget appropriations, or by appropriate action under authority of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness. Up to 50% of the annual net income of the board may be appropriated by the council to the general purposes of the city. All such net income which is not so appropriated shall be placed in proper accounts or funds of the city which shall be established as reserves for future operations, replacement, extension, or improvement of such utilities. Nothing herein contained shall be interpreted to limit the power of the council to place, for any year, in such accounts or funds a larger percentage than 50% of such net income to the purposes of such utilities, in the event that such appropriation shall be requested by the board of public service [works][9] and be approved by seven members of the council.

The foregoing limitation of 50% of such net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council.

Such funds so established as reserves for the purposes of the utilities may be invested and reinvested by the city auditor as the board of public service [works] shall direct, by and with the approval of the council, in such investments as are authorized by law for investment by fiduciaries. Said funds may be used for the purposes of such utilities upon the recommendation of the board of public service [works], by and with the consent of the council.

The electors of the city may, by a 3/5 vote of the qualified electors voting on such proposal at a regular or special election, approve an appropriation of more than 50% of the net income for any year for general purposes, or may approve the placing of more than 50% of the net income for any year in the reserve accounts or funds as above provided for the purposes of such utilities, or may approve for other municipal purposes the use of such accumulated and unallocated accounts or funds as have been established.

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9. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

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Sec. 12.17. Utility rates and charges generally.

With the approval of the council, the board of public service [works][10] shall fix the rates to be charged for all public utility services under its control. The council shall fix the rates to be charged for all public utility services of the city which are not under the control of the board of public service [works]. When any person, firm, or corporation, shall fail or refuse to pay to the city any sums due on utility bills, such service upon which such delinquency exists may be shut off or discontinued by the proper board or department of the city and suit may be instituted by the city for the collection of the same in any court of competent jurisdiction.

Sec. 12.18. Lien for utility charges; collection of delinquent charges.

Except as otherwise provided, or limited by state law, the city shall have as security for the collection of all charges, a lien upon the premises to which such utility services were supplied. Such lien shall become effective immediately upon the distribution or supplying of such utility service or services to such premises.

All unpaid charges for utility services furnished to any such premises, which, on the 30th day of June of each year, have remained unpaid for a period of three months, or more, shall be reported by the city auditor to the council at the first meeting thereof in the month of July. The council thereupon shall order the publication in a newspaper published in the city, of notice to all owners of property within the city that all unpaid utility charges which have remained unpaid for a period of three months or more prior to the 30th day of June, and which have not been paid by the thirty-first day of July, shall be assessed upon the city's tax roll against the premises to which the utility services, for which the unpaid charges accrued, were supplied or furnished; and that such charges shall be collected in the same manner as the city taxes on said tax roll.

All such utility charges, which remain unpaid on the 31st day of July, shall be transferred to the city's tax roll and assessed against the premises to which the utility service, for which the unpaid charges accrued, was supplied or furnished, and shall be collected with, and in the same manner as, city taxes. If the same have remained delinquent and unpaid after the expiration of the time limited in the treasurer's warrant for the collection of taxes levied in said tax roll, such charges shall be returned to the county treasurer to be collected in the same manner as the lien created by city taxes on the delinquent tax roll of the city.

In the event that any provision of this section shall prove to be incomplete or inadequate for the carrying out of the purposes thereof, the council shall provide by ordinance such additional procedures as may be required for the collection of public utility charges, and, for such purpose, shall have all the powers granted to cities by Act No. 178 of the Public Acts of 1939, as amended.

Sec. 12.19. Disposal of plants, etc.

Except for purposes permitted by law, the city shall not sell, exchange, lease, or in any other way alien or dispose of the property, easements, income, equipment, privileges, or assets belonging to and appertaining to any utility which it may own or acquire, unless and except such proposition shall first have been submitted to the qualified electors of the city at a special city election

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10. Editor's Note: See section 12.20 of the Charter which changes the name of the "board of public service" to the "board of public works."

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called for that purpose in the manner provided in this Charter, and approved by them by a 3/5 majority vote of the electors of the city voting thereon. All contracts, negotiations, licenses, grants, leases, or other forms of transfer in violation of this provision shall be void and of no effect. The provisions of this section shall not, however, apply to the sale or exchange of any article of equipment of any city-owned utility which is worn out or useless, or which is being or has been replaced by new and improved machinery or equipment.

Sec. 12.20. Board name change, etc. [Amend. No. 1, 4-2-1951]

The name of the "board of public service" is hereby changed to the name of "board of public works," and in each place in the city Charter where the name of "board of public service" appears, the same shall be deemed to mean the "board of public works."

The board of public works shall succeed to all the property, money, contracts, rights, credits, effects, records, files, books and papers belonging to the board of public service, and shall perform all the duties, obligations and functions specified in the Charter to be performed by the board of public service.

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EXHIBIT – 2

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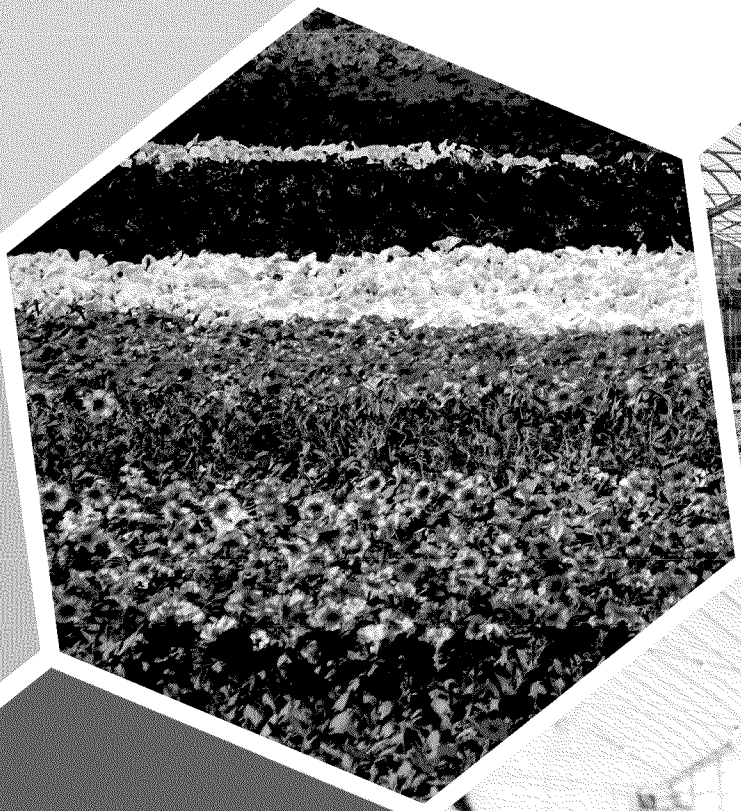
Holland
MICHIGAN



ANNUAL COMPREHENSIVE FINANCIAL REPORT FOR FISCAL YEAR END JUNE 30, 2021

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Notes to Financial Statements

The taxable value at December 31, 2020 was $1,261,251,898 which provides a City-wide valuation equivalency that allows for a uniform millage rate across all taxable properties, including tax-abated properties. The tax levy was based on the following rates:

	Millage Rate Used	Authorized Millage Rate	Authorized By
General operating	8.3000		
Street development and improvement	1.2000		
Sidewalk development and improvement	0.1500		
Municipal capital projects	0.2515		
Debt service general obligation	3.8712		
	13.7727	15.4520	1
		17.5000	City Charter
West Michigan Airport Authority	0.0965	0.1000	1 & 2

1. Formula limitation required by 1978 State Constitutional amendment.

2. Airport support agreement between City of Holland, Park Township, and City of Zeeland effective January of 2007.

Interfund Transactions

During the course of normal operations, the City has numerous transactions between funds, including expenditures and transfers of resources to provide services, construct assets, and service debt. The accompanying financial statements generally reflect operating subsidies as transfers.

Electric Utility Fund Transfers

The City Charter authorizes an annual transfer from the Electric Utility Fund to the general purposes of the City. The current formula for determining this transfer is based upon 5.5% of Electric Utility Fund budgeted revenues of the same fiscal year. For fiscal year 2021, total transfers of $7,968,900 were made. A $6,091,621 transfer was made to the General Fund, and a $1,877,279 transfer was made to the Municipal Facilities and Land Improvements Projects Fund.

Compensated Absences

Non-union City employees are granted paid time off (PTO) each pay period in varying amounts based on length of service. Public safety union employees are granted vacation and sick pay in varying amounts based on length of service. Utilities bargaining unit employees are granted paid time off on their anniversary date of hire. These benefits are compensable upon termination of employment except during resignation or discharge for disciplinary cause.

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EXHIBIT – 3

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Holland
MICHIGAN

Annual Comprehensive Audit Report for Fiscal Year End
June 30, 2022

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Long-range Financial Planning (continued)

The following table identifies the 2022 PA198 industrial tax abatements issued by the City. The value of the 2022 PA198 abatement roll is $106.9 million.

PA 198 Industrial Facilities Tax Abatements (IFT's) 2022

Company	Description of Services	Planned Investment	Projected Job Growth
By-Pas International	Manufacturing	$ 1,362,000	4
Forged by Design	Wood and Metal Products	1,350,000	8
Hudsonville Creamery and Ice Cream	Ice Cream and Dessert Products	35,537,000	0
Hyperion Automation	Automation Systems	1,505,000	12
JR Automation - 2 abatements	Automation Systems	4,425,000	99
Koops Inc.	Automation Systems	2,351,000	35
MG88 Holland Cold Storage	Warehousing and Processing	25,114,000	55
Power Manufacturing	Manufacturing	2,353,000	6
Strategic Label	Labeling Equipment and Labels	932,000	5
Sure-loc Edging	Landscape Products	1,138,000	4
Tommy's Car Wash Systems	Car Wash Systems	29,851,000	146
Trigon Steel Components	Manufacturing	197,000	7
Western Michigan Plastics	Manufacturing	824,000	6
	Total PA 198 Investment for 2022	**$ 106,939,000**	**387**

Building related fees continued to increase, driven by large industrial/commercial developments. In line with this, the City's building permit construction values increased by 40% from fiscal year 2021 ($126 million) to fiscal year 2022 ($176 million). Institutional and municipal permits totaled $13.7 million for fiscal year 2022 ($25.4 million for fiscal year 2021). The largest permit value in fiscal year 2022 was $27 million for a new LG Energy Solution production facility. Other large permits included Vision Quest's new industrial building totaling $18.7 million, Hudsonville Creamery and Ice Cream office and manufacturing buildings for $18.7 million, and a cold storage facility for Cold Link Logistics of $18.3 million.

The City's General Fund receives a transfer from the Electric Utility Fund consisting of 6.25% of the average of the previous three calendar year sales. Electric sales have increased as a result of strong manufacturing demand, resulting in increased payments to the General Fund over the past few years; however, electric rates are expected to decrease in the years ahead, which is expected to flatten the overall revenues.

Fund Balance Governmental Funds

The following comparison itemizes actual Fund Balances across all general governmental funds (excluding Component Units) and the change from the prior year:

	FUND BALANCES		
	@ June 30, 2021	@ June 30, 2022	Increase (Decrease)
General Fund	$ 5,444,359	$ 6,720,395	$1,276,036
Gen. Fund Budget Stabilization	1,601,787	1,680,510	78,723
Special Revenue Funds	6,543,225	6,803,683	260,458
Debt Service Funds	1,250,128	800,979	(449,149)
Capital Projects Funds	5,576,086	9,019,853	3,443,767
Permanent Trust Funds	2,444,278	2,309,237	(135,041)
Totals	$ 22,859,863	$27,334,657	$4,474,794

The Combined General Fund and Budget Stabilization ending fund balance totaled $8,400,905 at June 30, 2022. Of this amount, $8,393,071, or 32.2% of total expenditures plus transfers out, is unassigned.

The increase in *Fund Balance of the Special Revenue Funds* in fiscal year 2022 is due to increased revenue for Personal Property Tax (PPT) tax loss from Allegan County.

The *Fund Balance* of the *Capital Projects Funds* increased by $3,443,767 during Fiscal Year 2022 due a large donation received for future construction of a Recreation Center.

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Electric Utility Fund Transfers

The City Charter authorizes an annual transfer from the Electric Utility Fund to the general purposes of the City. The current formula for determining this transfer is based upon 6.25% of Electric Utility Fund budgeted revenues of the same fiscal year. Based on this formula, a $6,000,000 transfer was made to the General Fund, and a $491,380 transfer was made to the Municipal Facilities/Land Improvements Projects Fund. Additionally, the City receives a portion of the electric wholesale sales designated for the capital improvement fund. The total for fiscal year 2022 was $2,104,004 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2022, total transfers of $8,595,384 were made.

Compensated Absences

Non-union City employees are granted paid time off (PTO) each pay period in varying amounts based on length of service. Public safety union employees are granted vacation and sick pay in varying amounts based on length of service. Utilities bargaining unit employees are granted paid time off on their anniversary date of hire. These benefits are compensable upon termination of employment except during resignation or discharge for disciplinary cause.

Vacation hours are credited to each public safety bargaining unit employee on the anniversary date of hire. The number of hours is dependent upon years of service. Sick leave hours are credited to each employee as earned during a calendar year up to a maximum of 104 hours for police bargaining union and 145.60 for fire bargaining union. Police bargaining employees are compensated for one half, or one quarter, based on the date of hire, of total accumulated sick leave hours in excess of 720 hours for the year ended June 30, 2022. Fire bargaining employees receive no pay out upon termination for accumulated sick leave hours.

The City's policy is to recognize the cost of vacation, sick, paid time off, deferred overtime and salary-related fringe benefits associated with these compensated absences at the time the compensated absences are earned. The liabilities associated with compensated absences have been recorded in the enterprise funds for those employees compensated by those funds and in the compensated absences internal service fund for employees compensated by governmental funds.

Deferred Inflows of Resources

In addition to liabilities, the statement of financial position will sometimes report a separate section for deferred inflows of resources. This separate financial statement element, deferred inflows of resources, represents an acquisition of net assets that applies to a future period(s) and so will not be recognized as an inflow of resources (revenue) until that time. The governmental funds report unavailable revenues, which arises only under a modified accrual basis of accounting, from special assessments receivable. These amounts are deferred and recognized as an inflow of resources in the period that the amounts become available. The City also reports a deferred inflow of resources for its deferred charge on refunding, which results from the difference in the carrying value of refunded debt and its reacquisition price and is amortized over the shorter of the life of the refunded or refunding debt. In addition, the City reports deferred inflows of resources related to its pension and other postemployment benefits plans.

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EXHIBIT – 4

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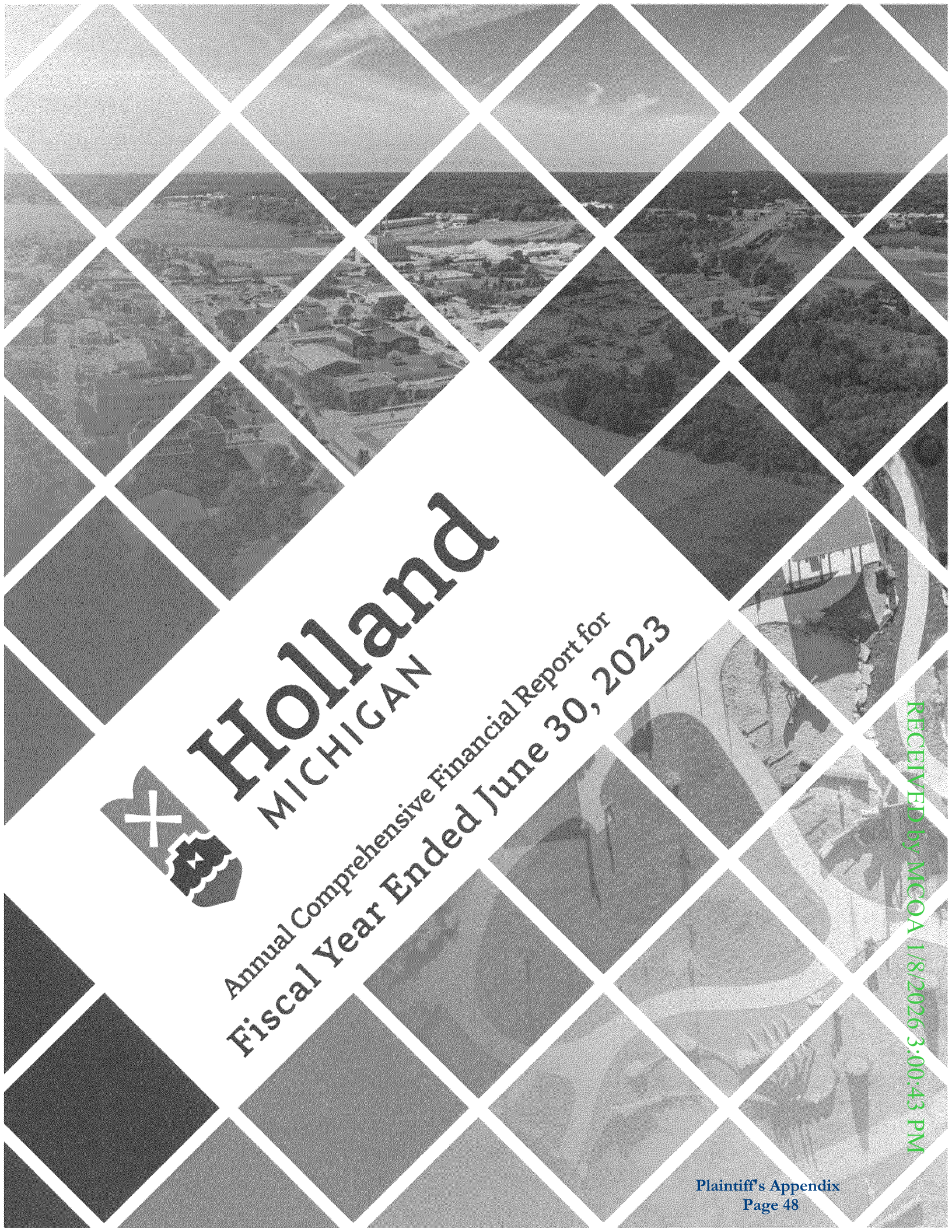

Holland
MICHIGAN

Annual Comprehensive Financial Report for Fiscal Year Ended June 30, 2023

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Long-range Financial Planning (continued)

Building related fees continued to increase, driven by large industrial/commercial developments. In line with this, the City's building permit construction values increased more than 100% from fiscal year 2022 ($176 million) to fiscal year 2023 ($535 million). The largest permit value for a project in fiscal year 2023 was $276.9 million for a new LG Energy Solution production facility. Other large permits included Resthaven Farmstead new residential project totaling $51.1 million, Homewood Suites Hotel for $20 million, Black River Flats apartments for $21 million, and Shoreline Flats apartments for $19.8 million.

The City's General Fund receives a transfer from the Electric Utility Fund consisting of 6.25% of the average of the previous three calendar year sales. Electric sales have increased as a result of strong manufacturing demand, resulting in increased payments to the General Fund over the past few years; however, electric rates are expected to decrease in the years ahead, which is expected to flatten the overall revenues.

Fund Balance Governmental Funds

The following comparison itemizes actual Fund Balances across all general governmental funds (excluding Component Units) and the change from the prior year:

	FUND BALANCES		
	@ June 30, 2022	@ June 30, 2023	Increase (Decrease)
General Fund	$ 6,720,395	$ 9,633,354	$2,912,959
Gen. Fund Budget Stabilization	1,680,510	1,775,447	94,937
Special Revenue Funds	6,803,683	9,208,697	2,405,014
Debt Service Funds	800,979	1,513,151	712,172
Capital Projects Funds	9,019,853	27,360,110	18,340,257
Permanent Trust Funds	2,309,237	2,542,739	233,502
Totals	$27,334,657	$52,033,498	$24,698,841

The Combined General Fund and Budget Stabilization ending fund balance totaled $11,408,801 at June 30, 2023. Of this amount, $11,364,184, or 39.8% of total expenditures plus transfers out, is unassigned. Property tax revenues contributed to the increase as assessed taxable value increased and an additional allocation of the City's property tax millage was directed to the General Fund for FY 2023. In addition, building permit revenues increased given additional volume and several large projects.

The increase in *Fund Balance of the Special Revenue Funds* in FY 2023 is primarily due to a large donation for the DeGraaf Nature Center.

The *Fund Balance* of the *Capital Projects Funds* increased by $18,340,257 during FY 2023 due to the receipt of $18 million in bond proceeds for the Fire Station project.

Capital Projects Governmental Funds

Capital Projects Funds expenditures, excluding interfund transfers, totaled $9,704,169 for FY 2023 compared to $8,047,420 for FY 2022. Projects exceeding $50,000 during the fiscal year included:

INFRASTRUCTURE PROJECTS (Excluding Utility Fund Share)	
6th Street Pine to Columbia	$ 1,245,859
40th Street Improvements	316,985
Street Resurfacing	1,153,675
Pine Avenue; 9th Street – Michigan Avenue	1,118,728
Country Club; 8th Street – Legion Park Drive	184,012
MUNICIPAL CAPITAL PROJECTS	
Waverly Fire Station	$ 2,876,898
Playground Equipment	301,417
City Hall – 1st Floor Renovation	411,187

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Electric Utility Fund Transfers

The City Charter authorizes an annual transfer from the Electric Utility Fund to the general purposes of the City. The current formula for determining this transfer is based upon 6.25% of Electric Utility Fund budgeted revenues of the same fiscal year. Based on this formula, a $6,372,000 transfer was made to the General Fund. Additionally, the City receives a portion of the electric wholesale sales designated for the capital improvement fund. The total for fiscal year 2023 was $2,084,856 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2023, total transfers of $8,456,856 were made.

Compensated Absences

Non-union City employees are granted paid time off (PTO) each pay period in varying amounts based on length of service. Public safety union employees are granted vacation and sick pay in varying amounts based on length of service. Utilities bargaining unit employees are granted paid time off on their anniversary date of hire. These benefits are compensable upon termination of employment except during resignation or discharge for disciplinary cause.

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The City's policy is to recognize the cost of vacation, sick, paid time off, deferred overtime and salary-related fringe benefits associated with these compensated absences at the time the compensated absences are earned. The liabilities associated with compensated absences have been recorded in the enterprise funds for those employees compensated by those funds and in the compensated absences internal service fund for employees compensated by governmental funds.

Deferred Inflows of Resources

In addition to liabilities, the statement of financial position will sometimes report a separate section for deferred inflows of resources. This separate financial statement element, deferred inflows of resources, represents an acquisition of net assets that applies to a future period(s) and so will not be recognized as an inflow of resources (revenue) until that time. The governmental funds report unavailable revenues, which arises only under a modified accrual basis of accounting, from special assessments and opioid settlement receivables. These amounts are deferred and recognized as an inflow of resources in the period that the amounts become available. In addition, the City reports deferred inflows of resources related to its other postemployment benefits plan.

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EXHIBIT – 5

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FISCAL YEAR 2024

ANNUAL COMPREHENSIVE FINANCIAL REPORT FOR FISCAL YEAR ENDED JUNE 30, 2024

Holland
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Major Revenues

Property tax is the largest source of revenue for the General Fund, representing more than 38% of total revenues. Property values have continued to rise even during the pandemic. Development interest continues to be strong with several large industrial and commercial projects in various stages of development. In addition, the City continues to prioritize affordable housing and has several residential projects in process. Property values continue to trend upward. While taxable values are limited by Michigan law, generally to the rate of inflation, numerous property sales (not limited by inflation factors) combined with new development have pushed the growth in taxable value beyond the inflation rate.

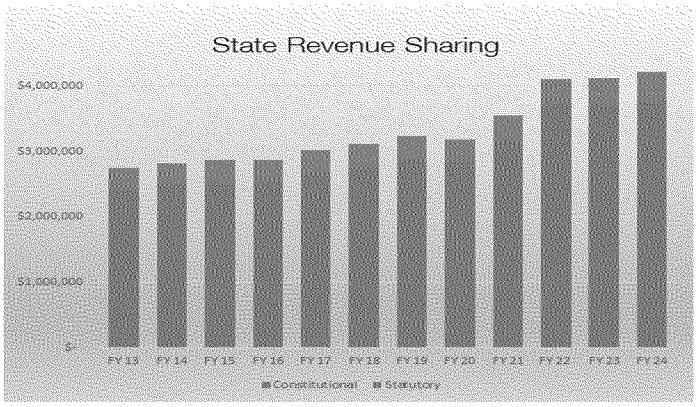
In 2012, several new public acts were passed eliminating the industrial *Personal Property Tax (PPT)* over a ten-year period. To replace the revenue source, the Local Community Stabilization Authority (LCSA) Act requires Personal Property Tax (PPT) reimbursement to municipalities. The complex calculation is designed to reimburse for the essential services (police and fire) and a portion of qualified loss. In FY 2024, the City received $3,237,941 in PPT reimbursement.

The State of Michigan provides several economic development incentive tools, including PA 198 industrial facilities certificates. The 2024 Taxable Value for properties with IFT abatements is $86,812,282 for new facility IFTs, all of which are taxed at half rate and $69,700 for rehab IFTs for which the value remains frozen. Based on 2024 PA 198 applications processed by the City, 278 new or retained jobs are anticipated to be created along with $131.1 million of new related construction and machinery.

State of Michigan PA 376 authorizes the creation of a Renaissance Zone for the purpose of fostering economic development and stimulating industrial, commercial, and residential improvements by providing certain tax credits or exemption within the zone. The City has two Renaissance Zones. The property is exempt from certain real and personal property taxes, including City operating taxes, but is not exempt from the millages voted for debt. Property within the zones have a 2024 Taxable Value of $85,910,453.

The City also supports Brownfield Redevelopments with fourteen active projects approved for tax captures at June 30, 2024. The reader is directed to the Notes to Financial Statements section (note #20) for detail information on the various tax abatements offered by the City.

Local government *Revenue Sharing* received from the State of Michigan varies from year to year. The constitutional portion is based on a specific percentage of sales tax revenues. The City, Village, and Township Revenue Sharing (CVTRS) is an incentive-based program for which the City has met the requirements annually. Revenues have leveled off in the past two years as consumers shift spending back to services (non-taxable) following sharp increases in the purchase of goods during the pandemic.



Building related fees remained strong, driven by large industrial/commercial developments. Permits issued for industrial and commercial projects totaled $211 million, residential projects $49 million and institutional and municipal $59 million.

The City's General Fund receives a transfer from the Electric Utility Fund consisting of 6.25% of the average of the previous three calendar year sales. Electric sales have increased as a result of strong manufacturing demand, resulting in increased payments to the General Fund over the past few years; however, electric rates are expected to decrease in the years ahead, which is expected to flatten the overall revenues.

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Electric Utility Fund Transfers

The City Charter authorizes an annual transfer from the Electric Utility Fund to the general purposes of the City. The current formula for determining this transfer is based upon 6.25% of Electric Utility Fund budgeted revenues of the same fiscal year. Based on this formula, a $6,228,000 transfer was made to the General Fund. Additionally, the City receives a portion of the electric wholesale sales designated for the capital improvement fund. The total for fiscal year 2024 was $3,413,232 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2024, total transfers of $9,641,232 were made.

Compensated Absences

Non-union City employees are granted paid time off (PTO) each pay period in varying amounts based on length of service. Public safety union employees are granted vacation and sick pay in varying amounts based on length of service. Utilities bargaining unit employees are granted paid time off on their anniversary date of hire. These benefits are compensable upon termination of employment except during resignation or discharge for disciplinary cause.

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Deferred Inflows of Resources

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EXHIBIT – 6

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Holland
MICHIGAN

MEMORANDUM

To: Mayor DeBoer, Members of City Council, and Holland Board of Public Works Directors

From: City Manager Van Beek and HBPW General Manager Koster

RE: Establishment of policy to guide planning and execution of utility transfers

Date: March 27, 2019

Introduction

Holland's City Charter Section 12.16, Limitation on Use of Utility Funds, both outlines the method to calculate net income and limits on the use of that income for the general purposes of the City. Specifically, Council is authorized to use up to 50% of the net income of both the electric and water utilities. That amount may only be exceeded if requested by the HBPW and approved by seven members of Council, or if approved by a 3/5 majority of city voters[1].

For at least the last couple of decades, a proxy has been used to establish this payment commonly known as the "BPW Transfer Payment". That proxy uses a percent of gross electric sales revenue (not net income) to determine the transfer level, which is then confirmed annually by resolution of the HBPW Board of Directors and the City Council at their respective meetings in July, the first month of the fiscal year. The process of using a proxy has been consistent in the recent past, and has been successful in generating a set amount that both entities can reliably use in budgets. Recently, the amount of the transfer has increased significantly, due to the percentage used and increases in electric sales growth and electric rates. Now, a number of issues are looming which add more complexity and uncertainty to the transfer payment. Those issues include stagnant or decreasing electric sales volume, electric rate decreases and new "off system" or wholesale sales, made possible through investment in additional electric generating supply resources.

[1] Only the voters can approve an appropriation if it exceeds net income, as determined under the Charter.

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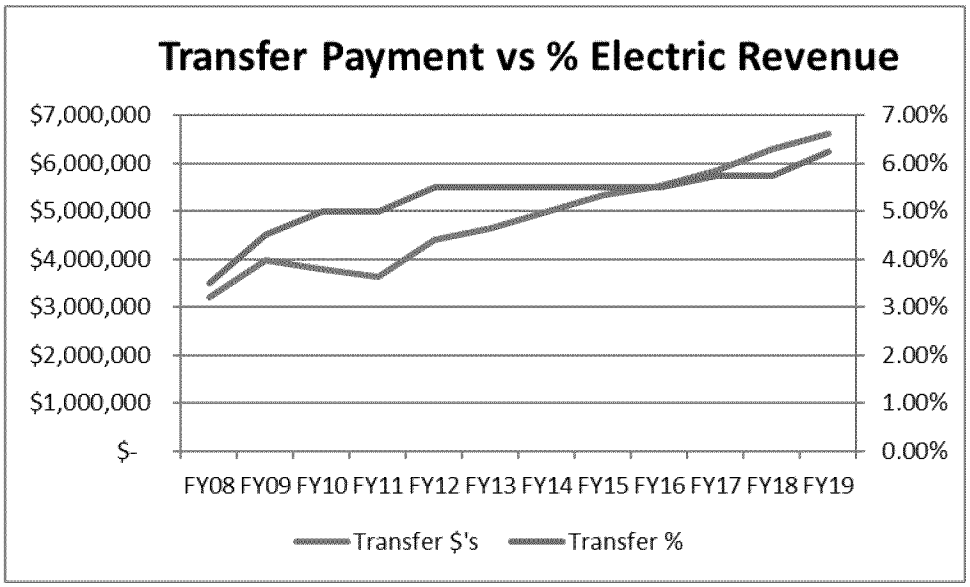
The goal is to develop policy and procedure to guide both governing bodies and their respective staff in the planning of future transfers to the City from the HBPW.

Background

The chart below shows the transfer from the HBPW over the past twelve years.



The payments have been made from the HBPW electric utility. Except for two years (2009 and 2016), the payments have been limited to the percent of gross electric sales revenue. In 2009 and 2016, additional specific payments were made to support City needs. Those were $300k in 2009 for the parking deck on 7th and approximately $200k in 2016 to support the Holland Historic Trust.

Increases in the transfer percentage during the early part of this period were the result of the housing market collapse in 2008 and a resetting of the taxable value of properties in Holland. This caused significant financial strain on the City's General Fund. The HBPW transfer increase tempered this impact somewhat. During this time, the HBPW also experienced significant decline in industrial sales of electricity due to the economic recession that followed the housing crisis. The HBPW experienced a rebound in sales volume after 2011, led mostly by the economic recovery. This was coupled by a series of rate adjustments targeted to prepare for the investment in Holland Energy Park. That worked to spark a significant growth, on average nearly 8.5% year over year, in the transfer payment between 2012 and 2018. By 2018, the transfer percentage had reached 5.75% of gross electric retail sales.

While the Charter provides the ability to use up to 50% of the net income of the both the electric and water industry, the actual use has consistently been less than that amount. The chart below shows the use as a percent of both the electric and water utility net income for the past seven years. During that period the range of budgeted transfers as a percent of net income has gone from a high of 39.3% in 2012 to a low of 19.8% in 2017, with an average of 29.3%.

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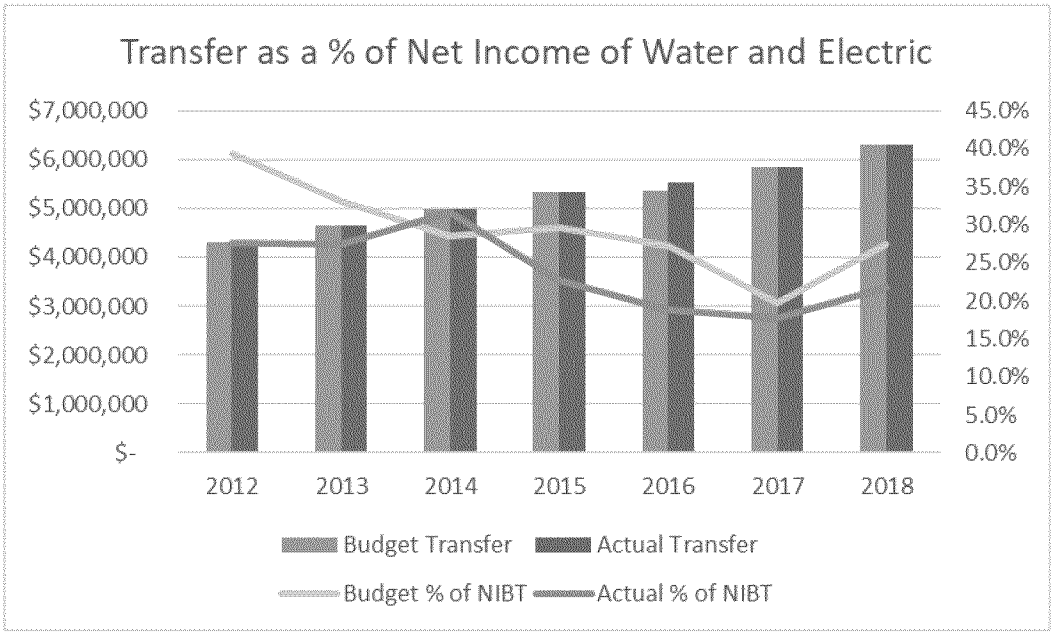

The American Public Power Association (APPA), the national trade organization for municipal electric systems, routinely surveys its members to determine the trends in transfer payments to their respective city owners. The most recent survey was conducted in 2016 and published in March 2018. It is attached for reference. From the survey, the median transfer amounted to 5.6% of electric operating revenues. This result is bounded by a first quartile of 3.2% and a third quartile of 8.9%. By comparison, investor-owned utilities, like Consumers Energy, were found to have paid a median of 4.4% to state and local governments in that same period. The APPA median was the same 5.6% in the previous survey performed in 2014. In 2016, the transfer in Holland was 5.5%.

For the FY 2019 budget preparation, some of the factors influencing the transfer payment began to become apparent. For one, HBPW staff recommended rate decreases for all electric customers, with most relief coming in the industrial rates. This was due to continued low natural gas prices and the increased efficiency of Holland's generation portfolio, along with increased competition in the industrial sales sector due to investor-owned utility rate decreases and the increased cost effectiveness of customer-owned generation. Additionally, a weak summer sales season in calendar year 2017 meant that the forward look for transfers to the city were flat or declining over the next 5-year period. After considerable discussion with City staff and the HBPW Board Budget Subcommittee, a recommendation was presented within the fiscal year 2018 budget to raise the transfer payment from 5.75% to 6.25% and to base the sales revenue on the average of the last three calendar years to avoid the impact of the weak summer sales within the single calendar year. Up to that point, only the most recent full calendar year had been used to determine the revenues to which the transfer percentage would apply. Even with this adjustment, the prospective transfer amounts are expected to be relatively flat over the next five years. Below is the five-year forecast for the electric utility.

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Holland Board of Public Works
5 Year Projections
Electric Utility Only

FISCAL YEAR	Actual FY2017	Forecast FY2018	Proposed Budget FY2019	Projection FY2020	Projection FY2021	Projection FY2022	Projection FY2023
REVENUES							
Readiness to Serve	$ -	$ 5,629,705	$ 5,629,705	$ 5,629,705	$ 5,629,705	$ 5,629,705	$ 5,629,705
Commodity & Delivery	105,828,637	98,259,766	98,322,884	95,088,057	95,844,515	95,113,931	94,387,084
Wholesale	-	-	546,000	1,888,560	1,322,400	1,322,400	1,322,400
Street Lights	746,088	658,959	695,493	695,588	695,588	695,588	695,588
Renewable Energy	1,717,633	88,422	-	-	-	-	-
Energy Optimization	1,325,979	1,397,257	1,458,131	1,452,931	1,455,408	1,457,905	1,460,422
Other Fees	650,122	569,429	595,000	595,595	596,191	596,787	597,384
Additional Revenue	-	-	(6,604,754)	-	(1,504,514)	(1,494,823)	-
TOTAL REVENUES	$ 110,268,458	$ 106,603,539	$ 101,242,409	$ 105,350,436	$ 104,039,293	$ 103,321,493	$ 104,092,584
% INCREASE (RECOMMENDATION TO MEET TARGET)			-5.7%	0.0%	-1.5%	-1.5%	0.0%
OPERATING EXPENSES							
Purchased Power	$ 36,148,617	$ 17,588,025	$ 18,969,679	$ 19,043,335	$ 20,360,125	$ 18,589,477	$ 18,992,607
Fuel	5,848,239	16,477,412	13,099,183	13,316,474	13,898,334	17,266,877	17,873,254
External Resource Debt and O and M	10,660,272	8,206,724	3,477,836	3,193,176	3,679,606	3,104,402	2,538,337
Non Fuel Production and Maintenance	5,951,876	7,334,948	7,919,122	7,958,718	7,998,512	8,038,504	8,078,697
Distribution	4,027,177	4,428,181	4,826,114	4,850,245	4,874,496	4,898,868	4,923,363
Conservation Electric	1,281,180	1,288,833	1,297,245	1,310,218	1,316,769	1,323,353	1,329,970
Administrative & General	6,430,363	7,935,899	8,146,286	8,309,212	8,475,396	8,644,904	8,817,802
Depreciation	7,371,077	15,379,294	15,100,105	15,272,490	13,556,702	13,584,437	13,640,461
TOTAL OPERATING EXPENSES	$ 77,713,800	$ 78,639,316	$ 73,735,571	$ 73,253,867	$ 74,159,940	$ 76,450,822	$ 76,194,491
OPERATING INCOME	$ 32,554,657	$ 27,964,223	$ 27,506,838	$ 32,096,570	$ 29,879,353	$ 27,870,672	$ 27,898,093
NON-OPERATING REVENUE/(EXPENSE)							
Investment Earnings	$ 384,509	$ 455,370	$ 644,460	$ 700,000	$ 750,000	$ 120,000	$ 120,000
Bond Issuance (Expense)	93	-	-	-	-	-	-
Bond Interest (Expense)	(220,647)	(6,607,234)	(6,726,078)	(6,414,489)	(6,394,540)	(1,904,753)	(1,679,546)
Other Income(Expense)	(3,056,817)	256,524	166,722	166,722	166,722	166,722	138,935
TOTAL NON-OPERATING REVENUE/(EXPENSE)	$ (2,892,862)	$ (5,895,341)	$ (5,914,896)	$ (5,547,767)	$ (5,477,818)	$ (1,618,031)	$ (1,420,611)
Contribution to the City	5,850,000	6,296,016	6,606,000	6,664,900	6,438,000	6,426,000	6,372,000
NET INCOME	$ 23,811,795	$ 15,772,866	$ 14,985,943	$ 19,884,303	$ 17,963,536	$ 19,826,641	$ 20,105,482
NET INCOME TARGET	$ 13,793,050	$ 13,563,122	$ 12,297,737	$ 12,458,968	$ 14,982,739	$ 12,223,787	$ 12,299,138
RETURN ON NET PLANT	7.6%	5.2%	5.1%	7.0%	6.6%	7.5%	7.8%
COVERAGE RATIO	2.56	3.11	4.86	5.71	3.09	4.41	4.44
TOTAL CASH BALANCE:	$ 113,873,715	$ 97,551,528	$ 109,092,629	$ 138,562,307	$ 159,757,601	$ 90,383,634	$ 113,759,051
RESTRICTED: INTERNAL DESIGNATED	$ 28,523,078	$ 24,844,441	$ 26,901,385	$ 24,780,299	$ 26,030,183	$ 21,012,663	$ 20,864,037
RESTRICTED: 3RD PARTY	$ 24,103,632	$ 28,632,478	$ 28,610,402	$ 28,653,305	$ 28,656,969	$ 28,657,889	$ 28,662,087
CASH GENERALLY AVAILABLE BALANCE:	$ 61,247,005	$ 44,074,609	$ 53,580,842	$ 85,128,703	$ 105,070,448	$ 40,713,082	$ 64,232,927
ADDITIONAL PRINCIPAL			$ 9,660,000			$ 91,090,000	
PRINCIPAL PAYMENT	$ 5,428,141	$ 5,527,241	$ 849,982	$ 866,363	$ 5,871,384	$ 6,095,045	$ 6,290,526
CAPITAL EXPENDITURE	$ 23,406,559	$ 41,947,106	$ 8,034,965	$ 4,820,752	$ 4,453,560	$ 5,600,000	$ 4,080,000

As currently outlined the transfer payment is forecasted to decline from $6.606 MM to $6.372 MM by FY 2023. This is impacted by rate decreases planned in FY 2021 and FY 2022, coupled with minimal retail sales volume growth It should be noted, however, that due to the increase of the transfer percentage to 6.25% all five of these years are higher than FY 2017 actuals.

As mentioned previously, there is a new revenue source that is made possible through the increased investment in new generation supply. "Off system" or wholesale electric revenue comes from two types of transactions, capacity and energy.

Capacity sales are made when the Holland BPW has more generation capacity under contract or ownership than it has an obligation to have. Each year, Holland must show that it has enough capacity to meet its native load plus a reserve margin. To the extent that Holland has more that, it sells capacity from its resources outside of Holland (Campbell 3, Belle River, landfill gas, wind and solar). These sales are limited to those resources due to certain reliability compliance objectives too detailed for this memo. Capacity sales are usually made a year or more in advance. So, the amount of revenue associated with

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those types of transactions are fairly well known going into a fiscal year. Amounts for the next few years are shown on the five-year forecast above in the "wholesale" revenue line.

Energy electric sales are the other type of wholesale revenue. These revenues come from energy diverted from the resources outside of Holland when the value exceeds the increased cost of ramping up internal generation. These types of transactions are very short term, usually committed on the day ahead or on the actual day of operation. These commitments are not made ahead due to the risk of generation equipment availability and the risk of committing fuel too far ahead of knowing the wholesale electric energy value. Therefore, wholesale energy sales volumes are very uncertain and can vary significantly from month to month or year to year. Additionally, the margins on wholesale energy sales are often very small. So, transfer policy can affect the viability of a transaction, potentially turning something that brings net value to the utility into something uneconomical.

During a joint study session of the City Council and HBPW Board in early calendar 2017, a consensus was reached that the annual transfer should remain based on retail sales and that this issue be revisited at the conclusion of FY 2018 to see what impact the wholesale sales had on the net income of the electric utility. Staff now has an understanding of the impact and is prepared to make a recommendation regarding the use of those funds.

The Process to Establish Good Policy and Procedures

The background information has been provided to set the stage for the creation of transfer payment policy and procedures, which both the HBPW Board and City Council can adopt. Having a framework to guide planning and budgeting benefits both parties by creating stability and predictability to future financial plans. Both the HBPW General Manager and the City Manager believe that a subcommittee process composed of both staff and policymakers will be useful in creating this framework. What follows is a list of goals for the policy framework. This initial list may certainly be adjusted during the subcommittee process.

- Consists of both policy and procedure
- Drives toward multi-year (3-5 year at least) planning
- Avoids using the HBPW for "one-off" projects
- Considers the financial viability of both organizations
- Considers benchmarks in the industry as guideposts
- Considers the concentration of revenue risk the transfer source means to the City operations
- Differentiates between retail and wholesale sales revenue both in terms of how the transfer is determined as well as how the transfer is used

The HBPW General Manager and City Manager have created this proposed framework over the course of several months. Below is a rough timeline of those efforts.

- Staff only (GM, CM and both Finance Directors) met to flesh out goals and begin to create a skeleton structure to the policy and procedure documents – Late December 2018 and throughout January 2019

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- Broadened discussion to subset of policymakers from both entities and finalize a recommended framework – March 1, 2019
- Presented the framework to the full governing bodies – During respective study sessions in March
- HBPW approved FY 2020 budget in March based on the proposed framework
- Sometime before the end of Fiscal Year 2019, both entities would resolve to establish and utilize the framework going forward

Draft Policy Document

Purpose and Summary:

With this policy the City Council and Board of Public Works establish a set of principles to identify utility fund transfers to the City for its purposes in accordance with Charter provisions in Section 12.16, Limitation on Use of Utility Funds.

Policy:

Within the provisions of the City Charter, the City Council and Holland Board of Public Works commit to plan and execute transfers of utility funds in accordance with the following set of guiding principles.

1. Both the City and its Board of Public Works are codependent on each other's financial viability. As such, transfers should consider the short and long term impact on both organizations ability to carry out their core mission and to provide excellent services to both the citizens of Holland and the customers of the Holland Board of Public Works.
2. The transfer amounts should represent a reasonable dividend to the City as the owner of the utility. Therefore, industry metrics representing the median should be consulted for similarly situated utility-city transfers. Further, quartiles from this comparative data should provide guideposts to ensure the transfer stays within industry norms.
3. It is important to recognize that the Holland Board of Public Works electric and water utilities are exposed to market changes that could impact sales volumes, revenues and net income levels. Therefore, transfer amounts should consider the concentration of risk that its revenue stream means to the city so as to reduce the risk of industry disruptions on future cash flows.
4. Funds from utility operations can come from both retail and wholesale sales. It is important to recognize that the predictability and impact on net income can vary greatly between those two sources. As such, the transfer process should differentiate between those sources both in terms of how the transfer level is determined as well as how the City uses the funds.
5. Both the city and utility benefit from assurances that come from long range planning. Therefore, transfers should be planned on a five-year horizon. Fiscal discipline should be exercised to ensure that the planned levels can be relied upon.
6. The Holland Board of Public Works operates as an enterprise with a mission to provide competitive, reliable, and innovative utility solutions to the greater Holland area in a socially, environmentally, and financially responsible manner. Responding to "one-off" project or program needs within the City of Holland subjects the utility to a values-based judgment, which

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is most appropriately left to the City Council. Therefore, the transfer planning should avoid processes that respond to "one-off" issues.

7. A procedure shall be established, which puts into practice the principles expressed through this policy.

Draft Procedure Document

Purpose and Summary:

This procedure provides the process of planning and executing transfers between the Holland Board of Public Works and City in accordance with principles established through joint policy (name it) and within Charter limitations.

Procedure:

The City Manager and Board of Public Works General Manager will ensure that the following procedure is carried in alignment with the above referenced policy. Both individuals are responsible to provide budget and forecast recommendations that result from the process herein.

1. Early in the 1st Quarter of each calendar year, both entities will meet to review the latest five-year forecast for each respective organization.
2. Additionally at that time, metrics will be shared, which best represent the state of service provision for each entity.
3. Using industry metrics on transfer levels as a guide, the entities will affirm or revise the process used to establish the first four years of transfers, as identified in the prior year's plan. For example, questions such as "does a percentage of retail sales revenue continue to provide the best plan for transfers?" and "what percentage of net income gained from wholesale sales should be transferred?" will be answered.
4. The entities will establish the process for determining the transfer in year five.
5. Revised five year plans will be used for the respective budget submissions along with reports showing how the plan adheres to the principles established in policy (name it).
6. At the first meeting in July, resolutions will be presented for adoption to both the Board of Public Works Directors and City Council establishing the amount of the transfer for that fiscal year and transfer timing and intervals that will be used.
7. After the financial audit of the previous fiscal year is performed, the staff will report if net income before transfer was less than the amount transferred in order to ensure compliance with Charter limitations.
8. This process is repeated annually

Proposed process

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- BPW transfer is established for the next fiscal year as 6.25% of the average retail sales revenue from the electric utility for the most recent three (3) calendar years. We'll refer to this as "transfer from retail operations."
- The impact of wholesale electric sales on net income is evaluated after the completion of the calendar year.
- The incremental net income from wholesale sales will be determined and transferred to the City in the same net income percentage as the "transfer from retail operations" as calculated for the next budget year. This amount is prorated and transferred to the City along with the "transfer from retail operations" over the twelve (12) months of the next fiscal year.
- For the wholesale net income amount only, an optional capital program for regional initiatives is proposed. An amount limited to the difference between 50% of the net income from wholesale sales and the calculated City percentage can be made available using the same five-year forecast utilized for the transfer from retail operations. The amount would be strictly limited for capital purposes in which the City is a partner.
- Specific Example:
    - For Fiscal Year 2020, the transfer is $6,713,748, which is 6.25% of the average of the previous three calendar years' retail electric sales revenue ($107.4 Million).
    - The transfer has represented approximately 30% of the net income before transfers.
    - Wholesale revenue for the most recent **calendar year** improved the net income of the electric utility by $1.88 Million
    - Therefore, the transfer budget associated with wholesale revenue impact would be 30% of the $1.88 Million, or $564,000 additional.
    - The difference between 50% and 30% is 20%. If utilized, of the $1.88 million of additional net income from wholesale sales, 50% or $942K would stay with the BPW, $564K would be used for capital purposes by the City only, and $378K would be available and utilized only if a regional partnership qualifies as outlined.
        - For example, a new regional recreation center is built and the $378,000 could be used for capital purposes including bond costs. Additionally, if a regional fire contract or authority would be formed the $378,000 could be used towards the purchase of a fire truck.
- The incremental transfer associated with net income from wholesale sales would **not** be used for general operation fund, but rather be put into funds such as municipal capital improvement, debt retirement, or other non-operational funds.

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STATE OF MICHIGAN
COURT OF APPEALS

STACY PHOTHISAN, individually,
and as representative of a class of
similarly-situated persons and entities,

Plaintiff,

v.

CITY OF HOLLAND, MICHIGAN,
a municipal corporation, by and through
THE HOLLAND BOARD OF PUBLIC WORKS,

Defendant.

Court of Appeals Case No. 377279

Ottawa County Circuit Court
Case No. 2025-008184-CZ
Hon. Karen J. Miedema

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APPENDIX OF EXHIBITS IN SUPPORT OF PLAINTIFF/APPELLANT'S BRIEF ON APPEAL

VOLUME II

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APPENDIX EXHIBITS

Volume I

Appellant's App.Ex. 1	pp. 1-13	August 29, 2025 Opinion and Order on Defendant City of Holland's Motion for Summary Disposition of Plaintiff's Complaint pursuant to MCR 2.116(C)(8); Opinion and Order on Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) of Count I of Plaintiff's Complaint.
Appellant's App.Ex. 2	pp. 14-63	Plaintiff's Class Action Complaint with Exhibits

Volume II

Appellant's App.Ex. 3 (Part 1)	pp. 64-127	Plaintiff's Motion For Partial Summary Disposition as to Count I of the Complaint Under MCR.116(C)(10) and Brief in Support

Volume III

Appellant's App.Ex. 3 (Part 2)	pp. 128-173	Plaintiff's Motion For Partial Summary Disposition as to Count I of the Complaint Under MCR.116(C)(10) and Brief in Support
Appellant's App.Ex. 4	pp. 174-244	City of Holland's Response Brief in Opposition to Plaintiff's Rule 2.116(C)(10) Motion For Partial Summary Disposition as to Count I of the Complaint.
Appellant's App.Ex. 5	pp. 245-263	Plaintiff's Reply Brief in Support of Motion for Partial Summary Disposition with Exhibits
Appellant's App.Ex. 6	pp. 264-319	City's Motion to for Summary Disposition Pursuant to MCR 2.116(C)(8)
Appellant's App.Ex. 7	pp. 320-364	Plaintiff's Brief in Opposition to Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(8)

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APPENDIX EXHIBIT 3

Part 1

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STATE OF MICHIGAN
OTTAWA COUNTY CIRCUIT COURT

STACY PHOTHISAN, individually, and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF HOLLAND, MICHIGAN, a municipal corporation, by and through THE HOLLAND BOARD OF PUBLIC WORKS,

Defendant.

Case No. 2025-008184-CZ

Hon. Karen J. Miedema

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PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION AS TO COUNT I OF THE COMPLAINT UNDER MCR 2.116(C)(10) AND BRIEF IN SUPPORT

Plaintiff Stacy Phothisan ("Plaintiff"), by her attorneys, Kickham Hanley PLLC and Head Murphy Law, individually and on behalf of a class of similarly situated class members, moves the Court, pursuant to MCR 2.116(C)(10), for partial summary disposition as to the liability of the City of Holland, Michigan, a municipal corporation, by and through the Holland Board of Public Works (the "City") for the violation of its Charter, as alleged in Count I of the Complaint. In support of the Motion, Plaintiff relies upon the following Brief in Support:

FILED IN OTTAWA COUNTY 20TH CIRCUIT COURT; 7/2/2025 8:44 AM

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BRIEF IN SUPPORT

I. INTRODUCTION

This action challenges the retail electric rates and charges (the "Electric Rates" and "Electric Charges") imposed by the City on citizens and entities (the "Electric Customers") who/which receive electricity from the City's Electric Utility Fund (the "Electric Fund"). The City, through its Electric Fund, has systematically garnered tens of millions from its Electric Customers through its excessive rate practices.

Michigan has long recognized that a "municipally-owned utility must be built and operated, not for a corporate profit, but for the purpose of providing utility services at a reasonable cost to the citizens…" *Wolgamood v. Village of Constantine*, 302 Mich. 384, 404-405, 4 N.W.2d 697 (1942). Contrary to this principle, since at least 2019 the City has set its Electric Rates at a level far in excess of the rates that were necessary to finance the actual costs of providing electric services.

The City has grossly overcharged its Electric Customers by including in its Electric Rates an illegal charge (the "Transfer Charge") that is designed to raise millions of dollars of revenues that the Electric Fund transfers to the City's General Fund (and other City funds) to be used for "the general purposes of the City." The City has made no attempt to prove that it provides "consideration" to the Electric Fund for these gratuitous Transfers.

Purportedly relying on certain provisions in its Charter, the City allocates approximately 6.25% of its budgeted Electric Fund revenues to the Transfer Charge. That translates to about $8 million per year. Between July 1, 2021 and June 30, 2024 the City transferred over $30 million from the Electric Fund to the City's General Fund.

This motion asks the Court to interpret and apply a provision of the City's Charter—§ 12.16—and is based primarily upon the following undisputed facts and circumstances:

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1. § 12.16 of City's Charter (Exhibit 2 hereto) prohibits the City from transferring more than the "net income" of the Electric Utility to the General Fund without the approval of a 3/5 majority of the City's voters.

2. The highest-ranking officials of both the City and the Electric Utility have conceded that "**[o]nly the voters can approve an appropriation if it exceeds net income, as determined under the Charter**." *See* Exhibit 1 hereto (emphasis added).

3. In the fiscal years ending June 30, 2022 through June 30, 2025, the Electric Utility had **no** budgeted "net income," yet the City, in violation of the Charter, still caused the Electric Utility to transfer tens of millions of dollars to the City's General Fund without obtaining voter approval. *See* Exhibits 6-9 hereto.

Below, Plaintiff provides detailed and undisputed evidence – gleaned from the City's own documentary admissions – confirming the foregoing facts and circumstances. One document in particular – the minutes of the March 6, 2023 HBPW board of directors meeting – by itself compels a grant of summary disposition in favor of Plaintiff as to the claims in Count I for violation of the City's Charter. *See* Exhibit 3 hereto. The relevant portion of those meeting minutes are as follows:

A 3.6% rate increase is proposed for FY 2024.

Summary of Operating and Capital Budget ($000)				
	Operating Revenue	Operating Expense	Net Income	Capital
Electric	$ 104,354	$ 93,385	$ (1,074)	$ 17,579
Broadband	2,198	2,246	(34)	9,263
Water	13,893	10,813	2,749	8,373
Wastewater	13,445	12,715	900	9,354
Administration				1,199

> **The contribution to the City is proposed at $9,641,232, an increase of $1,184,376 over FY 2023.** This amount is calculated at 6.25% of the average of the prior three calendar years' retail electric revenues plus 50% of the prior year electric wholesale net marginal income. Detailed FY 2024 operating and capital budget documents are attached." [Exhibit 3 hereto (emphasis added)].

The foregoing March 6, 2023 meeting minutes, in one fell swoop, confirm two salient and dispositive facts: (1) that the City itself knew and understood that the Electric Fund was budgeted to have **no** net income during fiscal year 2024, and (2) that the City's budget **still** included a $9.6

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million transfer from the Electric Fund to the General Fund. Given the admissions of the highest-ranking officers of both the City and the HPBW that "[o]nly the voters can approve an appropriation if it exceeds net income, as determined under the Charter," one cannot conceive of a more blatant and transparent violation of § 12.16 of the City's Charter than that evidenced by the referenced meeting minutes.

Plaintiff is an electric customer of the City who has paid the Transfer Charges. By this motion, Plaintiff seeks an order finding and declaring that the City is liable for its Charter violation, as alleged in Count I of the Complaint.[1]

II. STATEMENT OF UNDISPUTED FACTS

A. HOLLAND'S MUNICIPAL ELECTRIC UTILITY

By Charter and ordinance, the Holland Board of Public Works ("HBPW") is a department of the City established to construct, maintain, improve, and extend the electric plants and distribution systems of the City. *See* Exhibit 2, City Charter, § 12.4 and § 12.5.

Through the HBPW, the City maintains and operates the Electric Fund purportedly to provide "electrical energy to meet the requirements of [its] electric system customers; and to provide that energy at the lowest cost possible at a high level of reliability as needed by those customers." *See* Exhibit 4, HBPW 2016 Mission Statement. (Emphasis added.) HBPW provides electricity not only to the City of Holland but the surrounding townships of Holland Township, Park Township, Laketown Township, and Fillmore Township. *See* Exhibit 5 hereto. The City, through the HBPW,

[1] In addition to the claims in Count I alleging a violation of the City's Charter, Count II of the Complaint alleges that the Revenue Bond Act of 1933, MCL 141.121 et seq., governs the City's Electric Rate practices and prohibits the charging of Rates which intentionally generate surpluses that can be devoted to non-utility purposes. Count III of the Complaint alleges that because the City's Electric Rates included the Transfer Charge as a utility expense, those overall Electric Rates have been unreasonable in violation of common-law ratemaking principles. Indeed, because of the Transfer Charge, the City's Electric Rates, "viewed as a whole," have been "excessive." *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 969 N.W.2d 570 (2021). Counts II and III are not based on a violation of the City's Charter and therefore are not the subject of this motion.

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establishes its Electrical Rates from time to time pursuant to its Charter and enacted ordinances. *See* Exhibit 2, City Charter § 12.17.

B. THE CITY'S TRANSFER CHARGE

The City has grossly overcharged its Electric Customers by including in its Electric Rates a cost component designed to generate millions of dollars of revenues that are transferred from the Electric Fund to other City funds (the "Transfer Charge"). The transferred funds, generated by the Electric Rates and Charges, are used for the general support of the City, and for purposes wholly unrelated to providing electric services.

The City's General Fund receives the majority of its financing from four primary sources: (a) property taxes; (b) state shared revenues; (c) other fees & charges for services; and (d) an annual transfer from the City's Electric Utility Fund (the "Transfer") to the General Fund and other City funds, as purportedly authorized by City Charter provisions. *See generally,* City Budgets excerpts from FY 2022 through FY 2025. Exhibits 6-9 hereto.

The Charter provision that the City claims authorizes the City's Transfer Charge (§ 12.16) provides:

> The receipts from the operation of the electric and water utilities and income from investments shall be applied to the purposes thereof, in accordance with the budget appropriations, including the payment of bonds outstanding or which may be issued for the purposes of such utilities and the interest thereon.
>
> The **net income shall be determined by deducting from the receipts from operations and income from investments all expenses incurred and charges made or allowed for and on behalf of such utility in accordance with budget appropriations, or by appropriate action under authority of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness.**
>
> **Up to 50% of the annual net income of the board may be appropriated by the council to the general purposes of the city**. All such net income which is not so appropriated shall be placed in proper accounts or funds of the city which shall be established as reserves for future operations, replacement, extension, or improvement of such utilities.

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> Nothing herein contained shall be interpreted to limit the power of the council to place, for any year, in such accounts or funds a larger percentage than 50% of such net income to the purposes of such utilities, in the event that such appropriation shall be requested by the board of public service [works] and be approved by seven members of the council.
>
> **The foregoing limitation of 50% of such net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council**.
>
> Such funds so established as reserves for the purposes of the utilities may be invested and reinvested by the city auditor as the board of public service [works] shall direct, by and with the approval of the council, in such investments as are authorized by law for investment by fiduciaries. Said funds may be used for the purposes of such utilities upon the recommendation of the board of public service [works], by and with the consent of the council.
>
> The electors of the city may, by a 3/5 vote of the qualified electors voting on such proposal at a regular or special election, approve an appropriation of more than 50% of **the** net income for any year for general purposes, or may approve the placing of more than 50% of **the** net income for any year in the reserve accounts or funds as above provided for the purposes of such utilities, **or may approve for other municipal purposes the use of such accumulated and unallocated accounts or funds as have been established**. [Exhibit 2, § 12.16 (emphasis added).]

Thus, pursuant to the City's Charter, the Electric Utility is permitted to transfer 50% of its net income, or a higher percentage of the net income—**but only the net income** and then only if approved by the City's Council—for the "general purposes of the city." The City understands that it cannot transfer more than the net income of the Electric Utility without voter approval. *See* Exhibit 1 hereto (acknowledging that "[o]nly the voters can approve an appropriation if it exceeds net income, as determined under the Charter") (emphasis added).

The City prepares financial statements for its Electric Fund. These financial statements show that, in the six years preceding the filing of this Complaint, the City has systematically transferred, on an annual basis, at least $7 million per year from the Electric Fund to the City's General Fund or other City funds.

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The formula for determining the amount of the Transfer varies from year to year but is purportedly based upon a percentage of the Electric Fund's **budgeted revenues** (not net income) of the same fiscal year. *See* Exhibit 1 hereto.

According to the City's 2022 Certified Annual Financial Report ("CAFR"), the City's General Fund received a Transfer from the Electric Fund consisting of "6.25% of the average of the previous three calendar year sales." *See* Exhibit 10, 2022 CAFR p. 14. The City further reported in its 2022 CAFR that the "current formula for determining this transfer is based upon 6.25% of Electric Utility Fund budgeted revenues of the same fiscal year. Based on this formula, a $6,000,000 transfer was made to the General Fund, and a $491,380 transfer was made to the Municipal Facilities/Land Improvements Projects Fund. Additionally, the City receives a portion of the electric wholesale sales designated for the capital improvement fund. The total for fiscal year 2022 was $2,104,004 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2022, total transfers of $8,595,384 were made." *Id.* p. 79.

According to the City's 2023 CAFR, the City's General Fund received a Transfer from the Electric Fund consisting of "6.25% of the average of the previous three calendar year sales." *See* Exhibit 11, 2023 CAFR p. 14. The City further reported that "the current formula for determining this transfer is based upon 6.25% of Electric Utility Fund budgeted revenues of the same fiscal year. Based on this formula, a $6,372,000 transfer was made to the General Fund. Additionally, the City receives a portion of the electric wholesale sales designated for the capital improvement fund. The total for fiscal year 2023 was $2,084,856 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2023, total transfers of $8,456,856 were made." *Id.* p. 78.

According to the City's 2024 CAFR, the City's General Fund received a Transfer from the Electric Fund consisting of "6.25% of the average of the previous three calendar year sales." *See* Exhibit 12, 2024 CAFR p. 14. The City also reported that the "current formula for determining this

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transfer is based upon 6.25% of Electric Utility Fund budgeted revenues of the same fiscal year. Based on this formula, a $6,228,000 transfer was made to the General Fund. Additionally, the City receives a portion of the electric wholesale sales designated for the capital improvement fund. The total for fiscal year 2024 was $3,413,232 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2024, total transfers of $9,641,232 were made." *Id.* p. 84.[2]

The amounts used to support the Transfers are incorporated into the City's Electric Rates through the Transfer Charge. At least two provisions of the Charter itself make this clear. First, § 12.11 of the Charter provides:

> § 12.11 **Same—Expenses and funds generally.**
>
> **The expenses of conducting the affairs of the board of public service [works] shall be defrayed from the revenues of the public service works of the city under its control**, or may be paid or supplemented from the general funds of the city, if the council shall so determine with the concurrence of the board of public service [works]. All funds earned, raised, or realized by the board shall be deposited with the treasurer who shall give a receipt therefor and file a copy thereof with the city auditor. The treasurer shall deposit all such receipts to the credit of the proper fund or account of the city. [Exhibit 2, (emphasis added).]

Second, § 12.16 of the Charter provides:

> § 12.16 **Limitation on use of utility funds.**
>
> **The receipts from the operation of the electric and water utilities and income from investments shall be applied to the purposes thereof, in accordance with the budget appropriations**, including the payment of bonds outstanding or which may be issued for the purposes of such utilities and the interest thereon. [Exhibit 2 hereto (emphasis added).]

Under § 12.11, all expenses of the Electric Fund must be covered by the revenues of the Electric Fund. This confirms that the revenues to fund the Transfer necessarily were derived from Electric Rates paid by Plaintiff and the Class. Further, under § 12.16, all revenues of the Electric

[2] According to the City's budget, the City planned to Transfer $9,163,402 from the Electric Fund to the General Fund and other funds of the City during the fiscal year ending June 30, 2025. *See* Exhibit 9 hereto.

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Fund have to be applied in accordance with budget appropriations. The Transfers are expenditures in the budget appropriations. *See* Exhibits 6-9 hereto (budget excerpts).

By virtue of the above, the City's electric customers were assessed the Transfer Charge in each and every electric bill they received. Moreover, as Electric Customers of the City, Plaintiff and each member of the Class paid the Transfer Charge when they paid their electric bill. Due to the Transfer Charge alone, the City has overcharged its customers by over $40 million during the Class Periods, as defined below.

The City makes no attempt to justify the Transfer Charges as representing reimbursement for services provided to the Electric Fund by other City departments. To the contrary, the historical amounts of the Transfers have been determined **solely** by reference to the financial needs of the City's General Fund. In a memorandum dated March 27, 2019, the City Manager and the General Manager of the HBPW advocated for the "establishment of policy to guide planning and execution of utility transfers." In the memorandum, the authors stated:

> The payments have been made from the HBPW electric utility. Except for two years (2009 and 2016), the payments have been limited to the percent of gross electric sales revenue**. In 2009 and 2016, additional specific payments were made to support City needs.** Those were $300k in 2009 for the parking deck on 7th and approximately $200k in 2016 to support the Holland Historic Trust.
>
> **Increases in the transfer percentage during the early part of this period were the result of the housing market collapse in 2008 and a resetting of the taxable value of properties in Holland. This caused significant financial strain on the City's General Fund. The HBPW transfer increase tempered this impact somewhat**. During this time, the HBPW also experienced significant decline in industrial sales of electricity due to the economic recession that followed the housing crisis. The HBPW experienced a rebound in sales volume after 2011, led mostly by the economic recovery. This was coupled by a series of rate adjustments targeted to prepare for the investment in Holland Energy Park. That worked to spark significant growth, on average nearly 8.5% year over year, in the transfer payment between 2012 and 2018. By 2018, the transfer percentage had reached 5.75% of **gross electric retail sales**. [Exhibit 1 hereto (emphasis added)].

C. THE CITY'S VIOLATION OF ITS CHARTER

The City's Transfer Charge has been imposed in violation of the City's Charter because the

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City's Transfer Charges have been based on varying percentages of the budgeted **gross revenues** of the Electric Fund and not on 50% (or some other percentage) of the budgeted **net income** of the Electric Fund, as required by § 12.16 of the Charter.

The Charter requires the City to determine the "net income" of the Electric Fund as follows: "The net income shall be determined by deducting from the receipts from operations and income from investments **all expenses incurred and charges made or allowed for and on behalf of such utility in accordance with budget appropriations**, or by appropriate action under authority of section 9 of this chapter, **and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness**." Exhibit 2 hereto (emphasis added). Thus, all budgeted expenditures of the Electric Fund must be deducted from the gross revenues of the Electric Fund to determine the "net income."

The City's improper use of gross revenues instead of net income to determine the amount of the Transfer Charge violates the Charter provision. In fact, as will be demonstrated with specificity in § III.D below, for FY 2022 through FY 2025, the Transfer Charge was prohibited because the Electric Fund had **no** budgeted net income in any of those fiscal years. *See* Exhibits 6-9 (budget excerpts for FY 2022 through FY 2025).

III. PLAINTIFF IS ENTITLED TO SUMMARY DISPOSITION AS TO THE CITY'S LIABILITY FOR VIOLATING THE CHARTER, AS ALLEGED IN COUNT I OF THE COMPLAINT.

A. THE LEGAL IMPLICATIONS OF THE CITY CHARTER PROVISION

Pursuant to Article 7, § 22 of the Michigan Constitution, "[u]nder general laws the *electors* of each city and village shall have the power and authority to frame, adopt and amend its charter…" (Emphasis added.) Under Article 7, §. 22, "the electors of cities are vested with control over their

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cities' charters…" and "the electorate of a city is entitled to the final word as to whether a revised charter is to be adopted." *Sheffield v. Detroit City Clerk*, 508 Mich. 851, 853, 962 N.W.2d 157 (2021).

A city may not take any action "that contradicts limitations expressly provided in the city's charter. The charter of a city stands as its 'constitution'; it is the definition of a city's rights and obligations as a municipal entity, so far as they are not otherwise legally granted or imposed." *Bivens v. City of Grand Rapids*, 443 Mich. 391, 399, 505 N.W.2d 239 (1994).

The dispositive legal issue presented by this Motion is this: **Does § 12.16 authorize the City to transfer more than the budgeted net income of the Electric Fund for the general purposes of the City without voter approval, or must the City seek voter approval to transfer more than the budgeted net income?** For the reasons discussed below, the clear and unambiguous provisions of § 12.16 of the City's Charter prohibit the City from transferring any amount more than the budgeted "net income" of the Electric Fund without voter approval. Because the City concedes it has not received voter approval for the Transfers (which exceed "net income"), the Transfers in FY 2022 through FY 2025 violate the City's Charter.

B. THE RULES OF INTERPRETATION APPLICABLE TO THE CITY'S CHARTER.

As an initial matter, as the City itself argues, charter provisions are subject to the same rules of interpretation as statutes. Indeed, the City's own pending motion for summary disposition states:

> "The prevailing rules regarding statutory construction are well-established and extend to the construction of home rule charters." *City of Detroit v. Walker*, 445 Mich. 682, 691, 520 N.W.2d 135, 139 (1994); see also infra, p. 11-12. "The provisions [of charters] are to be read in context, with the plain and ordinary meaning given to every word [and] … judicial construction is not permitted when the language is clear and unambiguous." *Barrow v. Detroit Election Comm'n*, 305 Mich. App. 649, 663, 854 N.W.2d 489, 497 (2014). Rather, "the framers of the charter, and the people of the City … in its adoption, must be presumed to have intended that the provision be construed as it reads." *Woods v. Bd of Trustees of Policemen & Firemen Ret Sys of City of Detroit*, 108 Mich. App. 38, 43, 310 N.W.2d 39, 40 (1981). [City Brief filed 5/25/25 at pp. 8-9].

The primary goal of judicial interpretation of statutes is to give effect to the intent of the Legislature. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). The first

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criterion in determining intent is the specific language of the statute. *Indenbaum v Michigan Bd of Medicine (After Remand)*, 213 Mich App 263, 270; 539 NW2d 574 (1995). The Legislature is presumed to have intended the meaning it plainly expressed. *Id.* In determining legislative intent, we look first at the words of the statute. *Id.* The words of the statute must be given their ordinary and plain meaning; only if the language is ambiguous may the courts look beyond the statute to determine the intent of the Legislature. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). When statutory language is clear and unambiguous, this Court must honor the legislative intent as clearly indicated in that language. *Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 538; 565 NW2d 828 (1997). No further construction is required or permitted. *Id.*

For the reasons set forth below, the Charter clearly and unambiguously precludes the City from transferring more than the amount of the Electric Fund's budgeted "net income" to the City's General Fund.

C. THE CITY'S JUSTIFICATION FOR THE TRANSFERS CONTRADICTS THE CLEAR AND UNAMBIGUOUS PROVISIONS OF THE CHARTER.

Again, the critical provision of the Charter – § 12.16 – provides in pertinent part:

> The foregoing limitation of 50% of **such** net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council. [Exhibit 2 hereto (emphasis added)].

In its motion for summary disposition, the City bizarrely argues that the City's appropriation for the Transfers has NO LIMITS, as long as the appropriation is approved by a unanimous vote of the Board of Public Works and seven members of the City's Council *See* City's Motion for Summary Disposition at p. 1. As discussed below, however, the City is wrong – and its proposed interpretation of § 12 is untenable -- for several independently-dispositive reasons

1. The Charter Expressly Prohibits The Transfer Of More Than The Amount Of The City's Budgeted "Net Income" Without Voter Approval.

For sure, the Charter allows the City to increase the Transfer beyond 50% of the net income

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without voter approval, but the Charter also makes absolutely clear that, without voter approval, the City cannot transfer more than "such" net income.

The use of the adjective "such" prior to "net income" necessarily precludes the transfer of any amount in excess of the total "net income" of the Electric Fund without voter approval because the term "such" used in conjunction with "net income" necessarily limits the maximum transfer amount without voter approval to the amount of "such net income."

In Michigan, courts may look to dictionary definitions to discern the common meaning of words used in a statute. Using such definitions, the Michigan courts have expressly recognized that the adjective "such," as used in this context, means "of that kind." In *Detroit News v. County of Wayne*, 2022 Mich. App. LEXIS 3409 (2022) (Exhibit 13 hereto), for example, the Court of Appeals described the proper method of statutory interpretation where the term "such" modifies another term:

> The statutory language at issue is the following sentence: "All such 'service records' and employees' records shall be confidential and not open for public inspection." MCL 38.412(g). Plaintiff argues that the word "such" modifies the term "employees' records." Defendant argues that it does not. The only logical conclusion that can be drawn from a reading of the sentence is that the word "such" modifies the term "employees' records" because of the absence of a separating comma after the term "service records" and before the connective word "and." Punctuation is an important factor in determining legislative intent, and the rules of grammar are presumed to have been known to the Legislature. *Kizer v Livingston Co Board of Comm'rs*, 38 Mich App 239, 251; 195 NW2d 884 (1972). Therefore, the absence of a separating comma before the connective conjunction suggests that the word "such" was intended to modify the term "employees' records."
>
> The word "such" is not defined in the statute. Therefore, we look to the dictionary definition for its ordinary and plain meaning. *DiBenedetto, supra* at 402. **The relevant dictionary definitions of the adjective "such" include "of the kind, character, degree…indicated or implied" or "being the…things indicated."** *Random House Webster's College Dictionary* (1997). **The word "such" is properly used as an adjective when reference has previously been made to a category of persons or things, meaning "of that kind."** *Garner, A Dictionary of Modern American Usage* (Oxford University Press, 1998). Furthermore, "such" is a pointing word that must refer to a clear antecedent. *Id.* A pointing word should always have an identifiable referent. *Id.* A "pointing word" is a word like *this, that, these, those*, and *it*, which points directly to an antecedent. *Id.* An "antecedent" is a

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> word, phrase, or clause that is replaced later by a pronoun or other substitute. *Random House Webster's College Dictionary* (1997). A reading of the sentence in question points directly to two antecedents: the "service records" in the immediately preceding paragraph, and the "roster of the employees of the county, together with a record of service, military or naval experience and such other matters as may have a bearing on promotion, transfer or discharge" in the immediately preceding sentence. Because it is clear that the term "service records" in the sentence at issue refers to the "service records" defined in the preceding paragraph in the statute, the only conclusion to be made is that the term "employees' records" in the sentence at issue is the term that the Legislature chose to describe the second antecedent. Contrary to defendant's contention that the term "employees' records" was not defined in the statute, we conclude that a plain reading of the statute shows that it is defined, albeit indirectly. [2022 Mich. App. LEXIS 3409 at *6-9 (emphasis added)].

What this means in this context is that "such net income" must be limited to "net income" because "net income" is "of the kind, character, degree … indicated or implied." Allowing the City to unilaterally authorize the transfer of amounts in excess of "net income" without voter approval would improperly expand the authorization beyond "such net income."

Other courts tasked with determining the meaning of "such" under similar circumstances have universally concluded that "such" is an adjective that limits the breadth of the term it modifies. For example, in *Culbertson v. Berryhill*, 586 U.S. 53 (2019), the United States Supreme Court observed.

> We "begi[n] with the language of the statute itself, and that is also where the inquiry should end, for the statute's language is plain." *Puerto Rico* v. *Franklin Cal. Tax-Free* Trust, 579 U.S. ___, ___, 136 S. Ct. 1938, 195 L. Ed. 2d 298, 307 (2016) (internal quotation marks omitted). Under §406(b), when a court "renders a judgment favorable to a claimant…who was represented before the court by an attorney," the court may award "a reasonable fee for *such representation*, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." 42 U. S. C. §406(b)(1)(A) (emphasis added). Both at the time of enactment and today, **the adjective "such" means "[o]f the kind or degree already described or implied." H. Fowler & F. Fowler, Concise Oxford Dictionary of Current English 1289 (5th ed. 1964); Black's Law Dictionary 1661 (10th ed. 2014) ("[t]hat or those; having just been mentioned"). Here, the only form of representation "already described" in §406(b) is "represent[ation] before the court by an attorney." Accordingly, the 25% cap applies only to fees for representation before the court, not the agency**. [586 U.S. at 58-59 (emphasis added)].

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Similarly, in *Hebert v. Rapides Parish Policy Jury*, 974 So.2d 635 (La. 2007) (Exhibit 14 hereto) the Louisiana Supreme Court observed that the term "such" acts to limit the scope of the terms modified by that adjective:

> As written, La. Rev. Stat. 48:35 does require DOTD to withhold payment of any funds allocated to a political subdivision for "such construction purposes" if any "such improvements" constructed by the political subdivision fail to conform to DOTD standards. The key term in this statute is the **adjective** "**such**," which is defined as "of this or that kind; having a quality just specified or to be specified." *Merriam Webster Desk Dictionary*, "such *adj*," 542 (1995). The use of the **adjective** "**such**" **is a limitation on the objects described to those of a specific kind or quality previously specified or to be specified, giving the objects some particularity**. [974 So.2d at 651-652 (emphasis added)].[3]

Here, the same result obtains. The word "such" in the Charter "designates or limits the antecedent noun" – *i.e.*, "net income." Thus the "net income" that the City is authorized to transfer without voter approval is limited to "such" net income." *See also Leahy v. Polarstar Dev., LLC*, 223 Ore. App. 373, 195 P.3d 919 (2008) (Exhibit 16 hereto).

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[3] Consistently, in *Lozano v. Alvarez*, 2015 Kan. App. Unpub. LEXIS 833, 356 P.3d 1077 (Kan. App. 2015) (Exhibit 15 hereto), the Court was tasked with interpreting the meaning of the term "such action" contained in a state statute of limitations:

> Again, K.S.A. 60-518 states: "If *any action* be commenced within due time, and the plaintiff fail in *such action* otherwise than upon the merits, and the time limited for *the same* shall have expired, the plaintiff…may commence a new action within six (6) months after such failure." (Emphasis added.) Under K.S.A. 60-518, the phrases "any action," "such action," and "the same" reference one another; the action the plaintiff commences in due time must be the same action that was dismissed otherwise than upon the merits, and the time limit to bring that same action must have expired. Such an interpretation conforms with the last antecedent rule, which states that "qualifying words are 'ordinarily confined to the last antecedent, or to the words and phrases immediately preceding.'" *Link, Inc. v. City of Hays*, 266 Kan. 648, 654, 972 P.2d 753 (1999) (quoting *Barten v. Turkey Creek Watershed Joint District No. 32*, 200 Kan. 489, 504, 438 P.2d 732 [1968]).
>
> Here, an application of the rule of the last antecedent leads to the conclusion that the word "**such**" is an **adjective**, and that it modifies the antecedent noun "action" contained in the initial conditional clause ([*I*]*f any action*) of the sentence. The **adjective** phrase "**such** action" tells us which action. Indeed, the **adjective** "**such**" is called a limiting **adjective**. It limits a noun or pronoun. As a result, the word "such" designates or limits the antecedent noun "action" contained in the aforementioned initial conditional clause of the sentence. Moreover, the pronoun "same" refers to the antecedent noun "action." Thus, the antecedent noun "action" is limited to a plaintiff's original action. [*Lozano*, 2015 Kan. App. Unpub. LEXIS at **9-10 (emphasis added).]

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2. The Charter's Use Of Different Limiting Terms In The Same Provision Confirms That "Such" Net Income Is Intended To Foreclose Transfers In Excess Of The "Net Income" Of The Utility Fund Without Voter Approval.

Other provisions of § 12.16 further confirm that the use of "such" in referring to "net income" reflects an intentional decision to limit the transfers to the total amount of the Utility Fund's "net income" without voter approval. In this regard, the provision of § 12.16 defining the types of transfers that must be approved by the voters states in pertinent part as follows:

> The electors of the city may, by a 3/5 vote of the qualified electors voting on such proposal at a regular or special election, approve an appropriation of more than 50% of **the** net income for any year for general purposes, or may approve the placing of more than 50% of **the** net income for any year in the reserve accounts or funds as above provided for the purposes of such utilities, **or may approve for other municipal purposes the use of such accumulated and unallocated accounts or funds as have been established**. [Exhibit 2, § 12.16 (Emphasis added).]

In contrast to the provisions authorizing appropriations and transfers without voter approval, which are tethered to "such" net income, the voter approval provision authorizes the appropriation and transfer of more than 50% of "**the**" net income, as opposed to "**such**" net income. By reserving to the voters the right to approve transfers of more than 50% of "the" net income, while limiting the City's unilateral transfers to "such" net income, § 12.16 makes clear that, as the City's leaders have conceded: "**only the voters can approve an appropriation if it exceeds net income, as determined under the Charter.**" *See* Exhibit 1 hereto at fn. 1 (emphasis added).

The use of different terms in the same Charter provision further confirms that the people of the City, in the Charter, intended to apply different restrictions on the Transfers, depending upon whether the City acted with or without voter approval. This principle of statutory interpretation was summarized by the Michigan Supreme Court in *United States Fid. Ins. & Guar. Co. v. Michigan Catastrophic Claims Ass'n*, 484 Mich. 1, 15, 795 N.W.2d 101 (2009), where the Court observed:

> **When the Legislature uses different words, the words are generally intended to connote different meanings**. Simply put, "the use of different terms within similar statutes generally implies that different meanings were intended." 2A Singer & Singer, Sutherland Statutory Construction, (7th ed), § 46:6, p 252. If the

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> Legislature had intended the same meaning in both statutory provisions, it would have used the same word. [484 Mich. at 15 (emphasis added)].

Here, the Charter's use of "such" net income when defining the City's power to transfer funds without voter approval and its separate use of "the" net income when defining the power of the voters must be deemed to be intentional and the terms cannot be interpreted to mean the same thing.

3. The City's Interpretation Of The Charter Would Render Material Provisions Of The Charter Superfluous, In Violation Of Fundamental Principles Of Statutory Interpretation.

Further, if the City had unlimited power to transfer an unlimited amount of Electric Utility funds to the General Fund without voter approval, the voter approval provisions of the last paragraph of § 12.16 would be rendered superfluous. It is axiomatic that "[w]hen interpreting a **statute**, we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *People v Rea*, 500 Mich 422, 427-428; 902 N.W.2d 362 (2017) (citation and quotation marks omitted). There simply would be no need to address voter approval at all if no voter approval was ever needed. But, read as whole, § 12.16 can only be construed to require voter approval for any transfer that exceeds the "net income" of the Electric Fund. Moreover, the City's proposed interpretation of § 12.16 – that the City can transfer unlimited amounts of money from its Electric Fund to the General Fund – is foreclosed by the very title of § 12.16 – namely, "Limitation on use of Utility Funds." The City's proposed interpretation would eviscerate any "limitations" on the use of Utility Funds, an interpretation that is simply not sustainable.

4. Any Ambiguity In The Charter Is Conclusively Resolved In Plaintiff's Favor By The Admissions Of The City's High-Ranking Officials.

Finally, even if § 12.16 of the Charter was ambiguous as to whether the City may transfer more than the budgeted net income of the Utility Fund to the City's General Fund without voter

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approval, that ambiguity has been conclusively resolved in Plaintiff's favor by the admissions of high-ranking City officials. Again, as early as 2019, the City Manager and the General Manager of the HBPW confirmed to the Mayor and City Council:

> Holland's City Charter Section 12.16, Limitation on Use of Utility Funds, both outlines the method to calculate net income and limits on the use of **that** income for the general purposes of the City. Specifically, Council is authorized to use up to 50% of the net income of both the electric and water utilities. That amount may only be exceeded if requested by HPBW and approved by seven members of Council, or if approved by a 3/5 majority city voters.[1]
>
> 1. **Only the voters can approve an appropriation if it exceeds net income, as determined under the Charter**. [Exhibit 1 hereto (emphasis added)]

The first sentence quoted above makes clear that the limits set forth in § 12.16 are limits on the use of "that" net income and thus is a concession that any transfers cannot exceed the "net income." The final sentence further confirms that the only way the City can transfer more than the net income is with voter approval. This alone destroys the City's sole substantive defense to Count I.

Once the Charter is properly construed, the City's violation emerges. For the reasons discussed below, it is undisputed that, in FY 2022 through FY 2025, the City had no budgeted "net income," and therefore the Transfers in those years were not authorized by the Charter. As a result, the City violated the Charter provision by having the Electric Fund make Transfers to the General Funds in those fiscal years.

D. The Transfers In FY 2022 Through FY 2025 Violated § 12.16 Of The City's Charter

As noted, under § 12.16 of the Charter, a determination of "net income" requires an analysis of the revenues and expenses of the Electric Fund, as those terms are defined by § 12.16. *See* Exhibit 1 hereto at p. 1 (conceding that § 12.16 "outlines the method to calculate net income"); *Id.* at p. 1, fn. 1 (conceding "net income" is "determined under the Charter"). Thus, the Court must assess the City's "net income" by using the definitions and guidance set forth in § 12.16.

§ 12.16 contains the following pertinent definitions:

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"Revenues" means "receipts from operations and income from investments." *Id.*

"Expenses" means "**all** expenses incurred and charges made or allowed for and on behalf of such utility **in accordance with budget appropriations**, or by appropriate action under authority of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness." [Emphasis added.]

Under § 12.16, the Electric Fund's "expenses" must be determined in accordance with budget appropriations. The analysis below, **based on the City's own approved budgets**, demonstrates that, for each of the fiscal years 2022 through 2025, the City's Electric Fund had **no budgeted net income** but instead experienced significant budgeted losses:

FY 2022 (Exhibit 6 hereto):

Total Budgeted Electric Fund Revenues -- $98,559,239
Total Budgeted Electric Fund Expenses -- $198,156,031[4]
Budgeted Net Income – **negative $99,596,792**

FY 2023 (Exhibit 7 hereto)

Total Budgeted Electric Fund Revenues -- $95,432,436
Total Budgeted Electric Fund Expenses -- $116,917,755
Budgeted Net Income – **negative $21,485,319**

FY 2024 (Exhibit 8 hereto)

Total Budgeted Electric Fund Revenues -- $106,945,267
Total Budgeted Electric Fund Expenses -- $126,966,061
Budgeted Net Income – **negative $20,020,794**

FY 2025 (Exhibit 9 hereto)

Total Budgeted Electric Fund Revenues -- $120,942,141
Total Budgeted Electric Fund Expenses -- $139,584,139
Budgeted Net Income – **negative $18,641,988**[5]

[4] In order to determine the budgeted net income, the budgeted Transfers are excluded from the budgeted expenses. For FY 2022, when the $8,595,384 in budgeted Transfers are excluded, the budgeted expenses are reduced from $206,751,415 to $198,156,031, an amount that still dwarfs the budgeted revenues of $98,559,239.

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CONCLUSION

In sum, the evidence in this case shows:

1. The City's Charter prohibits the transfer of more than the "net income" of the Electric Fund to the City's General Fund without voter approval;

2. Between FY 2022 and FY 2025, the City's Electric Fund had no "net income," yet the City still transferred tens of millions of dollars from the Electric Fund to the General Fund;

3. The Transfers between FY 2022 and FY 2025 were not approved by 3/5 of the City's voters; and, therefore,

4. The City violated § 12.16 by making the Transfers in FY 2022 through FY 2025.

For all of the foregoing reasons, Plaintiff requests that the Court grant Plaintiff's Motion for Summary Disposition as to Count I of the Complaint.

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Date: July 2, 2025

[5] There are unique facts and circumstances that led to the expenditures of the Electric Fund greatly exceeding the Funds revenues during these specific fiscal years. Between 2014 and 2017, the City constructed a new $250 million electric generation facility – the Holland Energy Park ("HEP"). The City issued approximately $158 million in revenue bonds to initially finance the construction—admittedly, "the largest bond issue and civil project in the history of Holland." *See* Exhibit 17. The balance of the construction costs was covered by cash reserves the City accumulated through earlier Electric Charges. Under the terms of the bonds, the City was authorized to pay off the borrowed amounts over 25 years, which would have spread the debt service expense over most of the 30-year minimum useful service life of the HEP. Shortly after the bonds were issued, however, the City hatched a plan to pay off the majority of the bonded amount early. The City's budgets for FY 2022 through FY 2025 include major expenditures to, among other things, retire bonded debt, which drove the net losses in those years. *See* Exhibits 6-9.

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2025, I electronically filed the foregoing document with the Clerk of the Court using the court's electronic filing system.

/s/ Jamie Warrow
Jamie Warrow

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STATE OF MICHIGAN
OTTAWA COUNTY CIRCUIT COURT

STACY PHOTHISAN, individually,
and as representative of a class of
similarly-situated persons and entities,

Plaintiff,

v.

CITY OF HOLLAND, MICHIGAN,
a municipal corporation, by and through
THE HOLLAND BOARD OF PUBLIC WORKS,

Defendant.

Case No. 2025-008184-CZ

Hon. Karen J. Miedema

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INDEX OF EXHIBITS TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION AS TO COUNT I OF THE COMPLAINT UNDER MCR 2.116(C)(10)

Exhibit No.	Description
1.	March 27, 2019 Memorandum: "Establishment of Policy To Guide Planning And Execution Of Utility Transfers"
2.	City Charter, Chapter 12
3.	March 6, 2023 HBPW Board of Directors Meeting Minutes
4.	HBPW 2016 Mission Statement
5.	HBPW Website Page
6.	City Budget FY 2022

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7. City Budget FY 2023
8. City Budget FY 2024
9. City Budget FY 2025
10. City's 2022 CAFR
11. City's 2023 CAFR
12. City's 2024 CAFR
13. *Detroit News v. County of Wayne*, 2022 Mich. App. LEXIS 3409 (2022)
14. *Hebert v. Rapides Parish Policy Jury*, 974 So.2d 635 (La. 2007)
15. *Lozano v. Alvarez*, 2015 Kan. App. Unpub. LEXIS 833, 356 P.3d 1077 (Kan. App. 2015)
16. *Leahy v. Polarstar Dev., LLC*, 223 Ore. App. 373, 195 P.3d 919 (2008)
17. City Press Release re. Construction of Electric Utility

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EXHIBIT – 1

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MEMORANDUM

To: Mayor DeBoer, Members of City Council, and Holland Board of Public Works Directors

From: City Manager Van Beek and HBPW General Manager Koster

RE: Establishment of policy to guide planning and execution of utility transfers

Date: March 27, 2019

Introduction

Holland's City Charter Section 12.16, Limitation on Use of Utility Funds, both outlines the method to calculate net income and limits on the use of that income for the general purposes of the City. Specifically, Council is authorized to use up to 50% of the net income of both the electric and water utilities. That amount may only be exceeded if requested by the HBPW and approved by seven members of Council, or if approved by a 3/5 majority of city voters[1].

For at least the last couple of decades, a proxy has been used to establish this payment commonly known as the "BPW Transfer Payment". That proxy uses a percent of gross electric sales revenue (not net income) to determine the transfer level, which is then confirmed annually by resolution of the HBPW Board of Directors and the City Council at their respective meetings in July, the first month of the fiscal year. The process of using a proxy has been consistent in the recent past, and has been successful in generating a set amount that both entities can reliably use in budgets. Recently, the amount of the transfer has increased significantly, due to the percentage used and increases in electric sales growth and electric rates. Now, a number of issues are looming which add more complexity and uncertainty to the transfer payment. Those issues include stagnant or decreasing electric sales volume, electric rate decreases and new "off system" or wholesale sales, made possible through investment in additional electric generating supply resources.

[1] Only the voters can approve an appropriation if it exceeds net income, as determined under the Charter.

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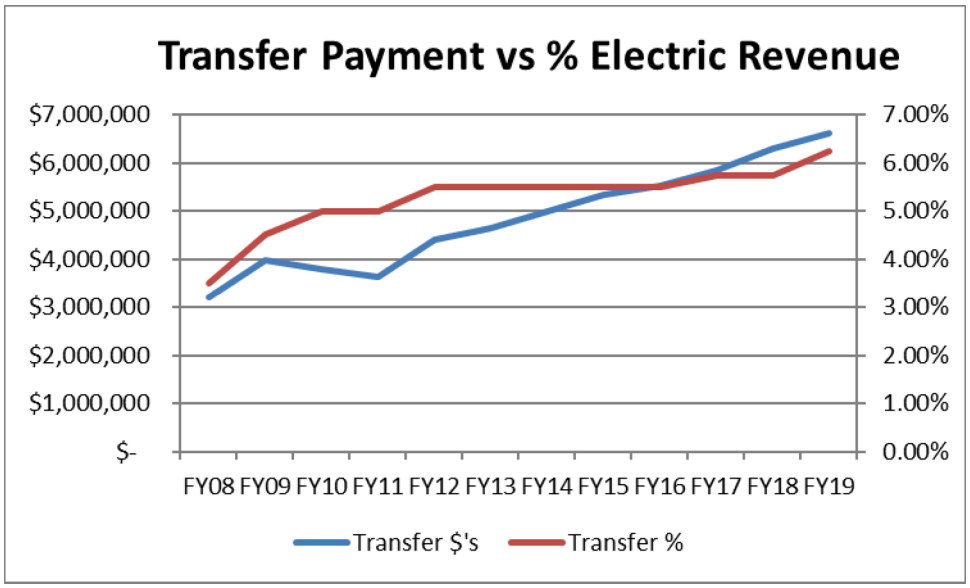
The goal is to develop policy and procedure to guide both governing bodies and their respective staff in the planning of future transfers to the City from the HBPW.

Background

The chart below shows the transfer from the HBPW over the past twelve years.



The payments have been made from the HBPW electric utility. Except for two years (2009 and 2016), the payments have been limited to the percent of gross electric sales revenue. In 2009 and 2016, additional specific payments were made to support City needs. Those were $300k in 2009 for the parking deck on 7th and approximately $200k in 2016 to support the Holland Historic Trust.

Increases in the transfer percentage during the early part of this period were the result of the housing market collapse in 2008 and a resetting of the taxable value of properties in Holland. This caused significant financial strain on the City's General Fund. The HBPW transfer increase tempered this impact somewhat. During this time, the HBPW also experienced significant decline in industrial sales of electricity due to the economic recession that followed the housing crisis. The HBPW experienced a rebound in sales volume after 2011, led mostly by the economic recovery. This was coupled by a series of rate adjustments targeted to prepare for the investment in Holland Energy Park. That worked to spark a significant growth, on average nearly 8.5% year over year, in the transfer payment between 2012 and 2018. By 2018, the transfer percentage had reached 5.75% of gross electric retail sales.

While the Charter provides the ability to use up to 50% of the net income of the both the electric and water industry, the actual use has consistently been less than that amount. The chart below shows the use as a percent of both the electric and water utility net income for the past seven years. During that period the range of budgeted transfers as a percent of net income has gone from a high of 39.3% in 2012 to a low of 19.8% in 2017, with an average of 29.3%.

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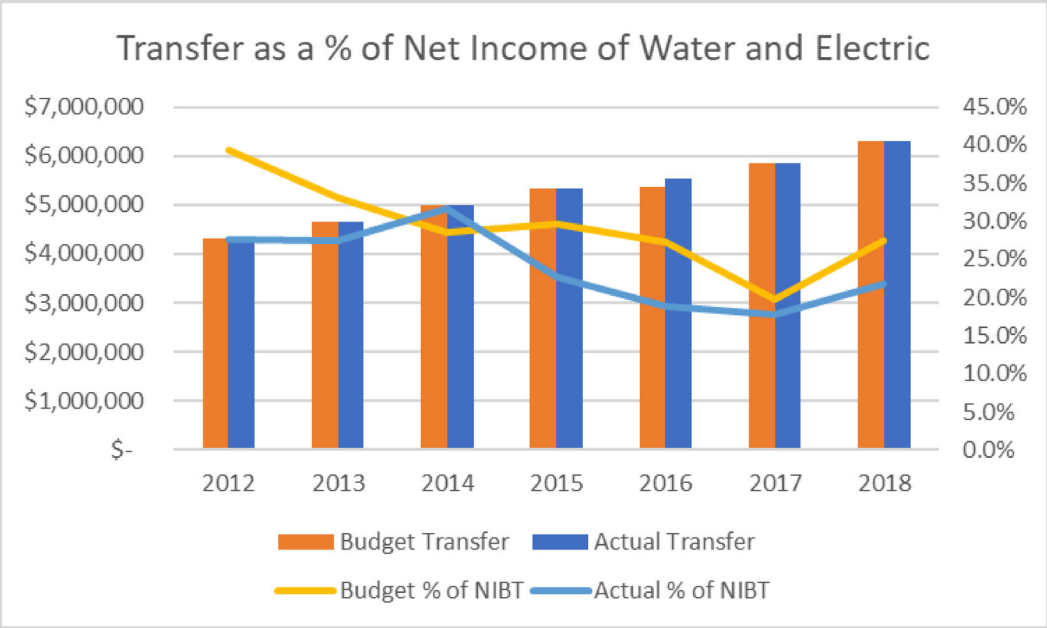

The American Public Power Association (APPA), the national trade organization for municipal electric systems, routinely surveys its members to determine the trends in transfer payments to their respective city owners. The most recent survey was conducted in 2016 and published in March 2018. It is attached for reference. From the survey, the median transfer amounted to 5.6% of electric operating revenues. This result is bounded by a first quartile of 3.2% and a third quartile of 8.9%. By comparison, investor-owned utilities, like Consumers Energy, were found to have paid a median of 4.4% to state and local governments in that same period. The APPA median was the same 5.6% in the previous survey performed in 2014. In 2016, the transfer in Holland was 5.5%.

For the FY 2019 budget preparation, some of the factors influencing the transfer payment began to become apparent. For one, HBPW staff recommended rate decreases for all electric customers, with most relief coming in the industrial rates. This was due to continued low natural gas prices and the increased efficiency of Holland's generation portfolio, along with increased competition in the industrial sales sector due to investor-owned utility rate decreases and the increased cost effectiveness of customer-owned generation. Additionally, a weak summer sales season in calendar year 2017 meant that the forward look for transfers to the city were flat or declining over the next 5-year period. After considerable discussion with City staff and the HBPW Board Budget Subcommittee, a recommendation was presented within the fiscal year 2018 budget to raise the transfer payment from 5.75% to 6.25% and to base the sales revenue on the average of the last three calendar years to avoid the impact of the weak summer sales within the single calendar year. Up to that point, only the most recent full calendar year had been used to determine the revenues to which the transfer percentage would apply. Even with this adjustment, the prospective transfer amounts are expected to be relatively flat over the next five years. Below is the five-year forecast for the electric utility.

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Holland Board of Public Works
5 Year Projections
Electric Utility Only

FISCAL YEAR	Actual FY2017	Forecast FY2018	Proposed Budget FY2019	Projection FY2020	Projection FY2021	Projection FY2022	Projection FY2023
REVENUES							
Readiness to Serve	$ -	$ 5,629,705	$ 5,629,705	$ 5,629,705	$ 5,629,705	$ 5,629,705	$ 5,629,705
Commodity & Delivery	105,828,637	98,259,766	98,322,834	95,088,057	95,844,515	95,113,931	94,387,084
Wholesale	-	-	546,000	1,888,560	1,322,400	1,322,400	1,322,400
Street Lights	746,088	658,959	695,493	695,588	695,588	695,588	695,588
Renewable Energy	1,717,633	88,422	-	-	-	-	-
Energy Optimization	1,325,979	1,397,257	1,458,131	1,452,931	1,455,408	1,457,905	1,460,422
Other Fees	650,122	569,429	595,000	595,595	596,191	596,787	597,384
Additonal Revenue	-	-	(6,004,754)	-	(1,504,514)	(1,494,823)	-
TOTAL REVENUES	$ 110,268,458	$ 106,603,539	$ 101,242,409	$ 105,350,436	$ 104,039,293	$ 103,321,493	$ 104,092,584
% INCREASE (RECOMMENDATION TO MEET TARGET)			-5.7%	0.0%	-1.5%	-1.5%	0.0%
OPERATING EXPENSES							
Purchased Power	$ 36,148,617	$ 17,588,025	$ 18,969,679	$ 19,043,335	$ 20,360,125	$ 18,589,477	$ 18,992,607
Fuel	5,843,239	16,477,412	13,999,183	13,316,474	13,898,334	17,266,877	17,873,254
External Resource Debt and O and M	10,660,272	8,206,724	3,477,836	3,193,176	3,679,606	3,104,402	2,538,337
Non Fuel Production and Maintenance	5,951,876	7,334,948	7,919,122	7,958,718	7,998,512	8,038,504	8,078,697
Distribution	4,027,177	4,428,181	4,826,114	4,850,245	4,874,496	4,898,868	4,923,363
Conservation Electric	1,281,180	1,288,833	1,297,245	1,310,218	1,316,769	1,323,353	1,329,970
Administrative & General	6,430,363	7,935,899	8,146,286	8,309,212	8,475,396	8,644,904	8,817,802
Depreciation	7,371,077	15,379,294	15,100,105	15,272,490	13,556,702	13,584,437	13,640,461
TOTAL OPERATING EXPENSES	$ 77,713,800	$ 78,639,316	$ 73,735,571	$ 73,253,867	$ 74,159,940	$ 75,450,822	$ 76,194,491
OPERATING INCOME	$ 32,554,657	$ 27,964,223	$ 27,506,838	$ 32,096,570	$ 29,879,353	$ 27,870,672	$ 27,898,093
NON-OPERATING REVENUE/(EXPENSE)							
Investment Earnings	$ 384,509	$ 455,370	$ 644,460	$ 700,000	$ 750,000	$ 120,000	$ 120,000
Bond Issuance (Expense)	93	-	-	-	-	-	-
Bond Interest (Expense)	(220,647)	(6,607,234)	(6,726,078)	(6,414,489)	(6,394,540)	(1,904,753)	(1,679,546)
Other Income(Expense)	(3,056,817)	256,524	166,722	166,722	166,722	166,722	138,935
TOTAL NON-OPERATING REVENUE/(EXPENSE)	$ (2,892,862)	$ (5,895,341)	$ (5,914,896)	$ (5,547,767)	$ (5,477,818)	$ (1,618,031)	$ (1,420,611)
Contribution to the City	5,850,000	6,296,016	6,606,000	6,664,500	6,438,000	6,426,000	6,372,000
NET INCOME	$ 23,811,795	$ 15,772,866	$ 14,985,943	$ 19,884,303	$ 17,963,536	$ 19,826,641	$ 20,105,482
NET INCOME TARGET	$ 13,793,050	$ 13,663,122	$ 12,297,737	$ 12,458,968	$ 14,982,739	$ 12,223,787	$ 12,299,138
RETURN ON NET PLANT	7.6%	5.2%	5.1%	7.0%	6.6%	7.5%	7.8%
COVERAGE RATIO	2.56	3.11	4.86	5.71	3.09	4.41	4.44
TOTAL CASH BALANCE:	$ 113,873,715	$ 97,551,528	$ 109,092,629	$ 138,562,307	$ 159,757,601	$ 90,383,634	$ 113,759,051
RESTRICTED: INTERNAL DESIGNATED	$ 28,523,078	$ 24,844,441	$ 26,901,385	$ 24,780,299	$ 26,030,183	$ 21,012,663	$ 20,864,037
RESTRICTED: 3RD PARTY	$ 24,103,632	$ 28,632,478	$ 28,610,402	$ 28,653,305	$ 28,656,969	$ 28,657,889	$ 28,662,087
CASH GENERALLY AVAILABLE BALANCE:	$ 61,247,005	$ 44,074,609	$ 53,580,842	$ 85,128,703	$ 105,070,448	$ 40,713,082	$ 64,232,927
ADDITIONAL PRINCIPAL			$ 9,660,000			$ 91,090,000	
PRINCIPAL PAYMENT	$ 5,428,141	$ 5,527,241	$ 849,982	$ 866,363	$ 5,871,384	$ 6,095,045	$ 6,290,526
CAPITAL EXPENDITURE	$ 23,406,559	$ 41,947,106	$ 8,034,965	$ 4,820,752	$ 4,453,560	$ 5,600,000	$ 4,080,000

As currently outlined the transfer payment is forecasted to decline from $6.606 MM to $6.372 MM by FY 2023. This is impacted by rate decreases planned in FY 2021 and FY 2022, coupled with minimal retail sales volume growth It should be noted, however, that due to the increase of the transfer percentage to 6.25% all five of these years are higher than FY 2017 actuals.

As mentioned previously, there is a new revenue source that is made possible through the increased investment in new generation supply. "Off system" or wholesale electric revenue comes from two types of transactions, capacity and energy.

Capacity sales are made when the Holland BPW has more generation capacity under contract or ownership than it has an obligation to have. Each year, Holland must show that it has enough capacity to meet its native load plus a reserve margin. To the extent that Holland has more that, it sells capacity from its resources outside of Holland (Campbell 3, Belle River, landfill gas, wind and solar). These sales are limited to those resources due to certain reliability compliance objectives too detailed for this memo. Capacity sales are usually made a year or more in advance. So, the amount of revenue associated with

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those types of transactions are fairly well known going into a fiscal year. Amounts for the next few years are shown on the five-year forecast above in the "wholesale" revenue line.

Energy electric sales are the other type of wholesale revenue. These revenues come from energy diverted from the resources outside of Holland when the value exceeds the increased cost of ramping up internal generation. These types of transactions are very short term, usually committed on the day ahead or on the actual day of operation. These commitments are not made ahead due to the risk of generation equipment availability and the risk of committing fuel too far ahead of knowing the wholesale electric energy value. Therefore, wholesale energy sales volumes are very uncertain and can vary significantly from month to month or year to year. Additionally, the margins on wholesale energy sales are often very small. So, transfer policy can affect the viability of a transaction, potentially turning something that brings net value to the utility into something uneconomical.

During a joint study session of the City Council and HBPW Board in early calendar 2017, a consensus was reached that the annual transfer should remain based on retail sales and that this issue be revisited at the conclusion of FY 2018 to see what impact the wholesale sales had on the net income of the electric utility. Staff now has an understanding of the impact and is prepared to make a recommendation regarding the use of those funds.

The Process to Establish Good Policy and Procedures

The background information has been provided to set the stage for the creation of transfer payment policy and procedures, which both the HBPW Board and City Council can adopt. Having a framework to guide planning and budgeting benefits both parties by creating stability and predictability to future financial plans. Both the HBPW General Manager and the City Manager believe that a subcommittee process composed of both staff and policymakers will be useful in creating this framework. What follows is a list of goals for the policy framework. This initial list may certainly be adjusted during the subcommittee process.

- Consists of both policy and procedure
- Drives toward multi-year (3-5 year at least) planning
- Avoids using the HBPW for "one-off" projects
- Considers the financial viability of both organizations
- Considers benchmarks in the industry as guideposts
- Considers the concentration of revenue risk the transfer source means to the City operations
- Differentiates between retail and wholesale sales revenue both in terms of how the transfer is determined as well as how the transfer is used

The HBPW General Manager and City Manager have created this proposed framework over the course of several months. Below is a rough timeline of those efforts.

- Staff only (GM, CM and both Finance Directors) met to flesh out goals and begin to create a skeleton structure to the policy and procedure documents – Late December 2018 and throughout January 2019

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- Broadened discussion to subset of policymakers from both entities and finalize a recommended framework – March 1, 2019
- Presented the framework to the full governing bodies – During respective study sessions in March
- HBPW approved FY 2020 budget in March based on the proposed framework
- Sometime before the end of Fiscal Year 2019, both entities would resolve to establish and utilize the framework going forward

Draft Policy Document

Purpose and Summary:

With this policy the City Council and Board of Public Works establish a set of principles to identify utility fund transfers to the City for its purposes in accordance with Charter provisions in Section 12.16, Limitation on Use of Utility Funds.

Policy:

Within the provisions of the City Charter, the City Council and Holland Board of Public Works commit to plan and execute transfers of utility funds in accordance with the following set of guiding principles.

1. Both the City and its Board of Public Works are codependent on each other's financial viability. As such, transfers should consider the short and long term impact on both organizations ability to carry out their core mission and to provide excellent services to both the citizens of Holland and the customers of the Holland Board of Public Works.
2. The transfer amounts should represent a reasonable dividend to the City as the owner of the utility. Therefore, industry metrics representing the median should be consulted for similarly situated utility-city transfers. Further, quartiles from this comparative data should provide guideposts to ensure the transfer stays within industry norms.
3. It is important to recognize that the Holland Board of Public Works electric and water utilities are exposed to market changes that could impact sales volumes, revenues and net income levels. Therefore, transfer amounts should consider the concentration of risk that its revenue stream means to the city so as to reduce the risk of industry disruptions on future cash flows.
4. Funds from utility operations can come from both retail and wholesale sales. It is important to recognize that the predictability and impact on net income can vary greatly between those two sources. As such, the transfer process should differentiate between those sources both in terms of how the transfer level is determined as well as how the City uses the funds.
5. Both the city and utility benefit from assurances that come from long range planning. Therefore, transfers should be planned on a five-year horizon. Fiscal discipline should be exercised to ensure that the planned levels can be relied upon.
6. The Holland Board of Public Works operates as an enterprise with a mission to provide competitive, reliable, and innovative utility solutions to the greater Holland area in a socially, environmentally, and financially responsible manner. Responding to "one-off" project or program needs within the City of Holland subjects the utility to a values-based judgment, which

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is most appropriately left to the City Council. Therefore, the transfer planning should avoid processes that respond to "one-off" issues.

7. A procedure shall be established, which puts into practice the principles expressed through this policy.

Draft Procedure Document

Purpose and Summary:

This procedure provides the process of planning and executing transfers between the Holland Board of Public Works and City in accordance with principles established through joint policy (name it) and within Charter limitations.

Procedure:

The City Manager and Board of Public Works General Manager will ensure that the following procedure is carried in alignment with the above referenced policy. Both individuals are responsible to provide budget and forecast recommendations that result from the process herein.

1. Early in the 1st Quarter of each calendar year, both entities will meet to review the latest five-year forecast for each respective organization.
2. Additionally at that time, metrics will be shared, which best represent the state of service provision for each entity.
3. Using industry metrics on transfer levels as a guide, the entities will affirm or revise the process used to establish the first four years of transfers, as identified in the prior year's plan. For example, questions such as "does a percentage of retail sales revenue continue to provide the best plan for transfers?" and "what percentage of net income gained from wholesale sales should be transferred?" will be answered.
4. The entities will establish the process for determining the transfer in year five.
5. Revised five year plans will be used for the respective budget submissions along with reports showing how the plan adheres to the principles established in policy (name it).
6. At the first meeting in July, resolutions will be presented for adoption to both the Board of Public Works Directors and City Council establishing the amount of the transfer for that fiscal year and transfer timing and intervals that will be used.
7. After the financial audit of the previous fiscal year is performed, the staff will report if net income before transfer was less than the amount transferred in order to ensure compliance with Charter limitations.
8. This process is repeated annually

Proposed process

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- BPW transfer is established for the next fiscal year as 6.25% of the average retail sales revenue from the electric utility for the most recent three (3) calendar years. We'll refer to this as "transfer from retail operations."
- The impact of wholesale electric sales on net income is evaluated after the completion of the calendar year.
- The incremental net income from wholesale sales will be determined and transferred to the City in the same net income percentage as the "transfer from retail operations" as calculated for the next budget year. This amount is prorated and transferred to the City along with the "transfer from retail operations" over the twelve (12) months of the next fiscal year.
- For the wholesale net income amount only, an optional capital program for regional initiatives is proposed. An amount limited to the difference between 50% of the net income from wholesale sales and the calculated City percentage can be made available using the same five-year forecast utilized for the transfer from retail operations. The amount would be strictly limited for capital purposes in which the City is a partner.
- Specific Example:
    - For Fiscal Year 2020, the transfer is $6,713,748, which is 6.25% of the average of the previous three calendar years' retail electric sales revenue ($107.4 Million).
    - The transfer has represented approximately 30% of the net income before transfers.
    - Wholesale revenue for the most recent **calendar year** improved the net income of the electric utility by $1.88 Million
    - Therefore, the transfer budget associated with wholesale revenue impact would be 30% of the $1.88 Million, or $564,000 additional.
    - The difference between 50% and 30% is 20%. If utilized, of the $1.88 million of additional net income from wholesale sales, 50% or $942K would stay with the BPW, $564K would be used for capital purposes by the City only, and $378K would be available and utilized only if a regional partnership qualifies as outlined.
        - For example, a new regional recreation center is built and the $378,000 could be used for capital purposes including bond costs. Additionally, if a regional fire contract or authority would be formed the $378,000 could be used towards the purchase of a fire truck.
- The incremental transfer associated with net income from wholesale sales would **not** be used for general operation fund, but rather be put into funds such as municipal capital improvement, debt retirement, or other non-operational funds.

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EXHIBIT – 2

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CHAPTER 12

Utility Franchises and Municipal Ownership of Utilities

Sec. 12.1. Conditions applicable to public utility franchises.

All public utility franchises granted after the adoption of this Charter, whether it be so provided in the granting ordinance or not, shall be subject to the right of the city:

(a) To repeal the same for misuse, or nonuse, or for failure to comply with the provisions thereof;

(b) To require proper and adequate extension of plant and service maintenance thereof at the highest practicable standard of efficiency;

(c) To establish reasonable standards of service and quality of products, and prevent unjust discrimination in service or rates;

(d) To require continuous and uninterrupted service to the public in accordance with the terms of the franchise throughout the entire period thereof;

(e) To impose such other regulations as may be determined by the council to be conducive to the safety, welfare, and accommodation of the public;

(f) To require the public utility to which any franchise is granted to permit joint use of its property and appurtenances located in the streets, alleys, and public places of the city, by the city, and other utilities insofar as such joint use may be reasonably practicable and upon payment of reasonable rental therefor; provided, that in the absence of agreement, upon application by the public utility, the council shall provide for arbitration of the terms and conditions of such joint use and the compensation to be paid therefor;

(g) To pay such part of the cost of improvement or maintenance of the streets, alleys, bridges, and public places of the city, as shall arise from its use thereof and to protect and save the city harmless from all damages arising from said use.

Sec. 12.2. Procedures and requirements controlling franchise ordinances, etc.

Every ordinance or resolution granting any franchise or right to occupy or use the streets, highways, bridges, or public places in the city for any purpose shall be complete in the form in which it is finally passed, and remain on file with the clerk for public inspection for at least 30 days before the final passage or adoption thereof, or approval for referral to the electorate. No exclusive or irrevocable franchise shall be granted by the city, unless such proposition shall have first received the affirmative vote of at least 3/5 of the electors of the city voting thereon at a regular or special election. No such franchise ordinance, or resolution shall be approved by the council for referral to the electorate until a public hearing has been held thereon, nor until the grantee named therein has filed with the clerk his unconditional acceptance of all terms of such franchise. No special election for such purpose shall be ordered by the council unless the expense of holding such election, as determined by the council, shall have first been paid to the treasurer by the grantee.

A franchise ordinance, or ordinance granting or authorizing the granting of a license to use or occupy the streets of the city for public utility purposes which is subject to revocation at the will

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of the city, may be enacted by the council without referral to the voters, but shall not be enacted nor become operative unless it shall have been complete in the form in which it is finally enacted and remain on file with the clerk for public inspection for at least four weeks before the final enactment thereof.

Sec. 12.3. General powers relative to municipal utilities and services. [Amend. No. 16, 11-8-1977]

The city shall possess and hereby reserves to itself all powers granted to cities by the constitution and general laws of the State of Michigan to acquire, by purchase or condemnation, the franchises, if any exist, and the property used in the operation of companies or individuals engaged in the electric, light, gas, heat, water and power business and for the purchase and condemnation of private property for any public use or purpose within the scope of the powers specified herein, to construct, own, operate, improve, enlarge, extend, repair and maintain, either within or without its corporate limits, airports, landing fields and aeronautical facilities, hospitals and public utilities, including, but not by the way of limitation, public utilities for treating and supplying water, and for supplying light, heat, power, gas, sewage treatment and garbage disposal facilities, or any of them, to the city and its inhabitants; and also to sell and deliver water, light, heat, power, gas and other public utility services, without its corporate limits to an amount not exceeding the limitations set by the state constitution. The power to supply, as herein possessed and reserved, shall include the power to extract and process water, electricity or gas from natural resources, to manufacture the same or to purchase the same from others.

Sec. 12.4. Board of public works generally—Management of electric and water utilities of the city.

The board of public works of the City of Holland, having been created, is hereby continued, and shall be known and designated as the board of public service.[1] Such board, subject only to the approval of the council, is hereby charged with the duty, power and responsibility of constructing, maintaining, improving, and extending the electric and water plants and distribution systems of the city, together with any public heating which may be a by-product thereof, and with the management, supervision, and control thereof. The title of all grounds and rights in real or personal property held, purchased, or otherwise secured by or on behalf of said board, shall be taken in the name of the City of Holland; and said water, electric and heating plants and works, and everything pertaining thereto, shall be the property of the city, and all contracts and purchases made by said board, shall be in the name of the city.

Sec. 12.5. Same—Status of board.

The board of public service [works][2] and the works, and utilities, under its management, supervision, and control, shall constitute a department of the city government.

Sec. 12.6. Same—Composition; appointment, qualifications and terms of members; filling

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1. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**
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vacancies. [Amend. No. 12, 4-7-1969]

The board of public works shall be composed of the five members of that board, who held office on the date that this Charter became law, and the city manager. Said members shall hold office for the balance of the terms for which they were elected or appointed prior to the date that this Charter became law. Thereafter, their successors shall be appointed by the mayor, with the advice and consent of the council, during the month of June of each year. Each person appointed as a member of the board of public works shall possess the qualifications required by this Charter for elective officers of the city and shall be appointed to serve for a term of five years commencing on and dating from the first day of July, next following his appointment; provided, that persons appointed to fill a vacancy shall assume office immediately upon appointment and shall hold office only for the balance of the term of the person creating such vacancy. The city manager, as a member of the board of public works, shall have the duty of attending all meetings of the board, shall be privileged to participate in all discussions and proceedings of the board, but shall not be entitled to vote on questions before the board.

Sec. 12.7. Same—Organization; officers; quorum.

Said board shall, annually during the month of July, organize and elect one of its appointed members president. A majority of the board, other than the city manager, shall constitute a quorum for the transaction of business. The clerk of the city shall be ex officio clerk of the said board, but shall have no vote therein. He shall have access to all of its records and papers.

Sec. 12.8. Same—Public service planning; annual report.

The board of public service [works][3] shall be charged and entrusted with the responsibility for the planning of improvements of, additions to, extensions of, and the operation and maintenance of the public service works of the city relating to the supplying of electricity and water to the inhabitants of the city, and within any limits provided by law, the territory surrounding the city. The board shall, annually in the month of March, make a report to the council, by filing the same with the clerk, which report shall present an analysis of the status and needs of the public service works under the board's jurisdiction and the recommendations of the board with respect thereto. Such report shall contain estimates of the costs of all improvements of, additions to, and extensions of the public services of the city which are recommended to be made during the ensuing fiscal year of the city, together with explanations thereof. The council shall have power to modify or disapprove any improvement of, addition to, or extension of the public service works of the city which may be recommended to be made in such report; provided, however, that unless the council shall modify or disapprove of any such recommended improvement, addition, or extension, or any number or combination of the same within 30 days after the date of the first meeting of the council, following the filing of such report with the clerk, such report shall be deemed to be approved by the council. Such report, as approved or modified by the council shall constitute the public service works program of the board of public service [works] for the fiscal year following that in which it is filed and it shall not again be necessary for the board to secure the approval of the council for the making of any improvement of, addition to, or extension of the public service works of the city which is made in accordance with such report as approved or

3. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

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modified by the council. Except as provided in section 12.9, the board of public service [works] shall make no improvement of, addition to, or extension of any public service work of the city in any year, except in accordance with such report as approved or modified by the council with respect to both the nature and the estimated cost thereof, unless the same shall be first approved by the council.

Sec. 12.9. Same—Budget; additional expenditures.

On or before February 15, of each year, the board of public service [works][4] shall file with the city manager for the consideration of the council, a budget proposal and a payroll schedule for the next fiscal year of the city. Such budget shall set forth estimates, in substantially the form required by this Charter for budget proposals of the city, of the amount of money, other than moneys estimated to be required for improvements of, additions to, or extensions of the public service works of the city under its control which, according to the judgment of the board, will be required for the public service works of the city during the ensuing fiscal year of the city. The budget proposal of the board of public service [works] shall be appended to and made a part of the budget proposal of the city which is submitted to the council by the city manager. The estimates of the board of public service [works], contained in its budget proposal, may be modified or adopted by the council. In the event that the council does not act upon or complete its action upon such proposed budget by the first day of June, following the filing thereof with the clerk, such proposed budget shall be presumed to have been approved by the council and shall be the budget of the board for the ensuing fiscal year of the city just as though formally approved by the council. The board of public service [works] shall administer its own budget. With the consent of the council, the board may exceed any budget appropriation or allotment where it can transfer a sufficient amount therefor from unencumbered balances within its budget. All proposed expenditures of the board of public service [works] which are not included in the board's planning report provided in section 12.8, or its budget, as approved by the council, shall be approved by the council before any obligation for such expenditures shall be incurred by the board; provided, however, that when by unanimous action of the board, it is deemed necessary for the proper functioning of any utility under the board's jurisdiction to install or construct works, or purchase material for the extension of, or addition to, any such utility beyond its yearly planning or budget report, and when the cost of such extension, addition, or purchase does not exceed the total sum of $1,000, and the money to pay the same is or will be available in the unencumbered funds of the board, then such extension, addition, or purchase may proceed without further authorization; provided, further, that the total cost of all extensions, additions, or purchases made or done under authority by this proviso shall not exceed the sum of $5,000 in any fiscal year of the city.

Sec. 12.10. Same—Employment of superintendent of utilities and other operating personnel.

Subject to budget allowances therefor, and without the necessity of the approval of the council, the board of public service [works][5] shall have power to employ a superintendent of utilities and all personnel deemed by the board to be necessary for carrying on the supervision, operation,

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4. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

5. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

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maintenance, and general conduct of the public service works of the city entrusted to it by the provisions of this Charter and budget allowances therefor.

Sec. 12.11. Same—Expenses and funds generally.

The expenses of conducting the affairs of the board of public service [works][6] shall be defrayed from the revenues of the public service works of the city under its control, or may be paid or supplemented from the general funds of the city, if the council shall so determine with the concurrence of the board of public service [works]. All funds earned, raised, or realized by the board shall be deposited with the treasurer who shall give a receipt therefor and file a copy thereof with the city auditor. The treasurer shall deposit all such receipts to the credit of the proper fund or account of the city.

Sec. 12.12. Same—City auditor to provide system of accounts; board accounts generally.

Separate accounts shall be provided for and kept by the city auditor, in the form required by state law, for each public service work which is owned by the city and operated by the board. Such accounts shall show the value of any service rendered to or by such public service work or works of the city with reference to the city itself. Such accounts shall take into consideration and preserve, for the use for which the same were set aside and accumulated, all funds of the city which stand to the credit of the board of public works of the city at the time that this Charter became law. Except as otherwise provided in this Charter, all funds raised for, or realized from the operation of such public service works and utilities of the city shall remain in the accounts to which they have been allocated and no part thereof shall be transferred from or revert to any other account or fund at the close of any fiscal year.

Sec. 12.13. Same—Annual audit; other reports to council.

The cost of making the annual audit of the accounts of the board of public service [works][7] shall be defrayed from the funds of the board. The annual audit of the affairs of the board of public service [works] shall show the financial status of the affairs of the board and, as nearly as possible, the financial results of the city ownership and operation of the public service works of the city for which the board is responsible. The board shall also make such other reports and furnish such other information to the council as that body shall require by ordinance or resolution.

Sec. 12.14. Same—Purchase of water or electricity by city.

With the consent of the council, the board of public service [works][8] may purchase water or electricity from any person, firm, or corporation, municipal or private, if such purchase may be deemed by the board to be in the best interest of the city and the inhabitants thereof.

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6. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**
7. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**
8. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

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Sec. 12.15. Other city utility services.

The council shall be charged with the responsibility for constructing, maintaining, improving and extending the sewage disposal facilities, the fire alarm system, and such other utilities of the city as existed on the date this Charter became law or which may thereafter have been acquired by the city. Such facilities shall constitute one or more separate departments of the city government or may be assigned by resolution of the council to an appropriate department or division of the city government, or shall be under the administrative charge and responsibility of the city manager as the council shall determine.

Sec. 12.16. Limitation on use of utility funds.

The receipts from the operation of the electric and water utilities and income from investments shall be applied to the purposes thereof, in accordance with the budget appropriations, including the payment of bonds outstanding or which may be issued for the purposes of such utilities and the interest thereon. The net income shall be determined by deducting from the receipts from operations and income from investments all expenses incurred and charges made or allowed for and on behalf of such utility in accordance with budget appropriations, or by appropriate action under authority of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness. Up to 50% of the annual net income of the board may be appropriated by the council to the general purposes of the city. All such net income which is not so appropriated shall be placed in proper accounts or funds of the city which shall be established as reserves for future operations, replacement, extension, or improvement of such utilities. Nothing herein contained shall be interpreted to limit the power of the council to place, for any year, in such accounts or funds a larger percentage than 50% of such net income to the purposes of such utilities, in the event that such appropriation shall be requested by the board of public service [works][9] and be approved by seven members of the council.

The foregoing limitation of 50% of such net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council.

Such funds so established as reserves for the purposes of the utilities may be invested and reinvested by the city auditor as the board of public service [works] shall direct, by and with the approval of the council, in such investments as are authorized by law for investment by fiduciaries. Said funds may be used for the purposes of such utilities upon the recommendation of the board of public service [works], by and with the consent of the council.

The electors of the city may, by a 3/5 vote of the qualified electors voting on such proposal at a regular or special election, approve an appropriation of more than 50% of the net income for any year for general purposes, or may approve the placing of more than 50% of the net income for any year in the reserve accounts or funds as above provided for the purposes of such utilities, or may approve for other municipal purposes the use of such accumulated and unallocated accounts or funds as have been established.

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9. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

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Sec. 12.17. Utility rates and charges generally.

With the approval of the council, the board of public service [works][10] shall fix the rates to be charged for all public utility services under its control. The council shall fix the rates to be charged for all public utility services of the city which are not under the control of the board of public service [works]. When any person, firm, or corporation, shall fail or refuse to pay to the city any sums due on utility bills, such service upon which such delinquency exists may be shut off or discontinued by the proper board or department of the city and suit may be instituted by the city for the collection of the same in any court of competent jurisdiction.

Sec. 12.18. Lien for utility charges; collection of delinquent charges.

Except as otherwise provided, or limited by state law, the city shall have as security for the collection of all charges, a lien upon the premises to which such utility services were supplied. Such lien shall become effective immediately upon the distribution or supplying of such utility service or services to such premises.

All unpaid charges for utility services furnished to any such premises, which, on the 30th day of June of each year, have remained unpaid for a period of three months, or more, shall be reported by the city auditor to the council at the first meeting thereof in the month of July. The council thereupon shall order the publication in a newspaper published in the city, of notice to all owners of property within the city that all unpaid utility charges which have remained unpaid for a period of three months or more prior to the 30th day of June, and which have not been paid by the thirty-first day of July, shall be assessed upon the city's tax roll against the premises to which the utility services, for which the unpaid charges accrued, were supplied or furnished; and that such charges shall be collected in the same manner as the city taxes on said tax roll.

All such utility charges, which remain unpaid on the 31st day of July, shall be transferred to the city's tax roll and assessed against the premises to which the utility service, for which the unpaid charges accrued, was supplied or furnished, and shall be collected with, and in the same manner as, city taxes. If the same have remained delinquent and unpaid after the expiration of the time limited in the treasurer's warrant for the collection of taxes levied in said tax roll, such charges shall be returned to the county treasurer to be collected in the same manner as the lien created by city taxes on the delinquent tax roll of the city.

In the event that any provision of this section shall prove to be incomplete or inadequate for the carrying out of the purposes thereof, the council shall provide by ordinance such additional procedures as may be required for the collection of public utility charges, and, for such purpose, shall have all the powers granted to cities by Act No. 178 of the Public Acts of 1939, as amended.

Sec. 12.19. Disposal of plants, etc.

Except for purposes permitted by law, the city shall not sell, exchange, lease, or in any other way alien or dispose of the property, easements, income, equipment, privileges, or assets belonging to and appertaining to any utility which it may own or acquire, unless and except such proposition shall first have been submitted to the qualified electors of the city at a special city election

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10. **Editor's Note: See section 12.20 of the Charter which changes the name of the "board of public service" to the "board of public works."**

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called for that purpose in the manner provided in this Charter, and approved by them by a 3/5 majority vote of the electors of the city voting thereon. All contracts, negotiations, licenses, grants, leases, or other forms of transfer in violation of this provision shall be void and of no effect. The provisions of this section shall not, however, apply to the sale or exchange of any article of equipment of any city-owned utility which is worn out or useless, or which is being or has been replaced by new and improved machinery or equipment.

Sec. 12.20. Board name change, etc. [Amend. No. 1, 4-2-1951]

The name of the "board of public service" is hereby changed to the name of "board of public works," and in each place in the city Charter where the name of "board of public service" appears, the same shall be deemed to mean the "board of public works."

The board of public works shall succeed to all the property, money, contracts, rights, credits, effects, records, files, books and papers belonging to the board of public service, and shall perform all the duties, obligations and functions specified in the Charter to be performed by the board of public service.

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EXHIBIT – 3

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Board of Directors Regular Meeting

HOLLAND BOARD OF PUBLIC WORKS
625 HASTINGS AVENUE
HOLLAND, MICHIGAN

March 6, 2023
4:00 p.m.

Meeting Agenda

1. **Call to Order**
2. **Approval of the Agenda**
3. **Consent Agenda**
   A. Minutes for Approval
   2023-02-06 Minutes
   2023-02-27 Minutes
4. **Communications from the Audience**
5. **Major Projects Update**
6. **Regular Agenda Items**
   A. 40 Ton Condenser Unit Replacement and Ice Bank Storage Removal
   Recommendation - 40 Ton Condenser Unit Replacement and Ice Bank Storage Removal
   2023-03-06 Grand Rapids Industrial Process Service Inc Bid
   B. FY 2024 Budget and Rate Recommendations
   Recommendation - FY 2024 Budget and Rate Recommendations
   2023-03-06 FY 2024 Budget Book Board Version
   2023-03-06 Proposed FY 2024 Rate Schedules Electric
   2023-03-06 Proposed FY 2024 Rate Schedules Water Wastewater Surcharges
7. **Other Business, if needed**
8. **Communication from the General Manager**
9. **Communications From the Board**

Adjourn

AUDIENCE PARTICIPATION:

Members of the audience may address the Board of Directors during public hearings and under “Communications from the Audience”. Audience participation includes stating name and address and limiting speaking time to five minutes.The City of Holland will provide necessary services and auxiliary aids, such as signers for the hearing impaired and audiotapes of printed materials, to individuals with disabilities, upon receipt of seven days prior notice. Person with disabilities requiring auxiliary aids services should contact the City of Holland by writing or calling: Human Relations c/o City Clerk’s Office Esther Fifelski,
270 S River Avenue Holland, MI 49423 Telephone (616) 355-1328.
Document(s) available for translation upon request

La Ciudad de Holland proporcionara servicios necesarios y ayudas auxiliaries, tales como personas que usan leguaje de señas aquellos con discapacidad auditiva y Cintas de audio de materiales impresos, a las personas con discapacidad, con un aviso previo de siete días

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de anticipación. Las personas con discapacidades que necesiten servicios de ayudas auxiliaries deben ponerse en contacto con la Ciudad de Holland escribiendo o llamando a:Human Relations c/o City Clerk's Office,a comunicándose con
270 S River Avenue, Holland, MI 49423, telefono (616) 355-1328.
Documento(s) en traducción disponible(s) a peticion.

Posted: 2023.03.02 @ 625 Hastings Avenue

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OFFICE OF THE GENERAL MANAGER
BOARD OF PUBLIC WORKS
HOLLAND, MICHIGAN

To:	**BPW Board of Directors**
Date:	**2023-03-06**
Subject:	**FY 2024 Budget and Rate Recommendations**

Finance Department

Introduction:

As required by Holland's City Charter and in accordance with best business practices, Holland Board of Public Works develops and submits an annual operating and capital budget for approval and inclusion in the General City Budget each fiscal year. This recommendation represents HBPW's proposed budget for the fiscal year ending June 30, 2024.

Recommendation:

Approve the FY 2024 budget and associated rate adjustments and forward to the City Council for inclusion in their resolution approving the budget for FY 2024.

Description:

The budget for FY 2024 has been prepared by staff and reviewed in detail by the HBPW Board Budget Committee.

The FY 2024 budget includes proposed rate adjustments for each of the corresponding utilities. During the process of developing the budget, the operating and capital needs of the utilities were evaluated, and a financial plan established to meet those specific needs.

For FY 2024, the major expense categories and respective portions of the consolidated expense budget are:

- 36% Fuel and Purchased Power
- 19% Wages & Benefits
- 15% Depreciation

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- 12% Other Operating Expenses
- 7% Maintenance Supplies/Services
- 7% Contribution to the City
- 2% Conservation Programs - Electric
- 1% Insurance
- 1% Interest on Bonds

Electric Utility
FY 2024 revenues are expected to increase by 8.3% over the FY 2023 budget, due to rate and volumetric increases. Fuel and purchased power costs are expected to increase about 7.5%. All other expenses are expected to increase about 16.8%, with two of the big drivers being external resource debt and O&M (MPPA) up 75.9% due to reconfiguring the Belle River coal plant to burn natural gas, and the decommissioning costs of the Campbell plant, and internal plant maintenance costs up 13.1%. Capital projects for FY 2024 total $17.6 million, of which $9.5 million (54%) are for distribution system improvements. All of the capital projects are internally funded.

A 3.5% rate increase is proposed.

Broadband
With the recent millage approved for expansion of the shared gigabit service, the Broadband utility expects a rapid increase in new customers. Operating costs are budgeted to increase about 56% as staff capacity is ramped up to facilitate system expansion. Capital expenditures for FY 2024 are budgeted at $9.3 million, with all but $700k slated for the expanded services.

No rate increase is proposed for FY 2024.

Water
Water utility revenues are expected to increase 5.8% over the FY 2023 budget. Operating expenses are budgeted to increase 12.4%, driven by higher unit volume and significant chemical cost increases. The Water utility will expend about 51% of its operating budget on chemicals, production, and distribution expenses. Included in this amount is $780k for lead service line replacements. The capital plan, totaling $8.4 million, includes $1.3 million for initial work on alternative chemical storage solutions for the water treatment plant, $6.1 million for distribution system replacements/improvements, and $240k for new field vehicles.

A 5.0% rate increase is proposed for FY 2024

Wastewater
The Wastewater utility is expected to see a 4% increase in operating revenues over the FY 2023 budget, mostly due to a proposed 3.6% rate increase. The utility will expend 46% of its operating budget on chemicals, treatment, and collections expenses, down slightly from the FY

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2023 budget. Capital projects will total about $9.4 million in FY 2024. About 68% of this amount, $6.4 million, will be spent on reclamation facility improvements and the final effort on the anaerobic digester. The remaining $3 million is for collection system rehab/repairs including $1.9 million related to lift stations.

A 3.6% rate increase is proposed for FY 2024.

Summary of Operating and Capital Budget ($000)				
	Operating Revenue	Operating Expense	Net Income	Capital
Electric	$ 104,354	$ 93,385	$ (1,074)	$ 17,579
Broadband	2,198	2,246	(34)	9,263
Water	13,893	10,813	2,749	8,373
Wastewater	13,445	12,715	900	9,354
Administration				1,199

The contribution to the City is proposed at $9,641,232, an increase of $1,184,376 over FY 2023. This amount is calculated at 6.25% of the average of the prior three calendar years' retail electric revenues plus 50% of the prior year electric wholesale net marginal income.

Detailed FY 2024 operating and capital budget documents are attached.

Respectfully submitted,

David G. Koster
General Manager

Strategic Directive:
2. HBPW will follow fiscal policies that ensure the long-term stability of finances, cash reserves, rates, and workforce.

Attachments:
2023-03-06 FY 2024 Budget Book Board Version
2023-03-06 Proposed FY 2024 Rate Schedules Electric
2023-03-06 Proposed FY 2024 Rate Schedules Water Wastewater Surcharges

Report prepared by: *Charles Warren, Finance Director*

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EXHIBIT – 4

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MISSION STATEMENT

POWER SUPPLY
To provide electrical energy to meet the requirements of electric system customers; and to provide that energy at the lowest cost possible at a high level of reliability as needed by those customers.

ELECTRIC TRANSMISSION & DISTRIBUTION
To provide a reliable delivery system for electricity utilizing a team of individuals who are leaders in the delivery of safe, reliable, and efficient electric power and are committed to customer satisfaction.

FISCAL YEAR 2016 ACTION PLAN

POWER SUPPLY

- **To continue the construction of the new natural gas fired combined cycle power plant to meet the demand growth of customers' load.**
- **Upgrade control systems on two of the peaking duty combustion turbine generators to improve reliability and efficiency of the units.**
- **Optimize the workforce, dispatching of internal generation sources, and maintenance and capital expenditures to reflect the changing market supplied power prices.**

BROADBAND

- **To provide broadband services to HBPW and City departments and to customers throughout the local community that is cost effective and reliable.**
- **To continue to expand the broadband distribution system working with the business community.**
-

ELECTRIC TRANSMISSION & DISTRIBUTION

- **To generate and maintain the electric transmission and distribution systems to ensure a superior level of reliability to our customers.**
- **To continue to improve the ability of our employees to respond promptly and effectively to problems affecting our customers.**
- **To install new meters which are compatible with the Advanced Metering Infrastructure (AMI.)**
- **To provide responsible management of capital investment and operational expenses to ensure that our customers and community are served by the most reasonable cost provider of utility services while investing in a reliable system, supported by an efficient and productive workforce.**
- **Upgrade various distribution circuits to provide reliable distribution to new commercial enterprises.**

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EXHIBIT – 5

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How We Generate Electricity

Holland's primary source of power is Holland Energy Park, our combined cycle natural gas power plant.

Holland BPW generates, transmits and distributes electricity to approximately **30,000 customers** within the City of Holland, Park Township, Holland Township, Laketown Township and Fillmore Township. Our electricity comes from a diverse portfolio of locally generated and externally purchased electric generation from a variety of sources including natural gas, coal and renewable sources.

Holland Energy Park (HEP) uses **Combined Cycle Technology**, increasing our facility's efficiency over the typical combustion power plant. The exhaust gas from two 50 MW natural

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EXHIBIT – 6

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Electronic Version

Holland
MICHIGAN

FISCAL YEAR
2022
ADOPTED BUDGET

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Overview

Mandated by chapter 12 of the City Charter, the Electric Utility Fund provides accountability for a municipally owned electric generating facility and distribution system that supplies electrical power to residential, commercial, industrial and other users. Fiber Optics (broadband) is also supplied to a limited customer base. The City has entered into agreements with several of the surrounding governmental jurisdictions to supply electrical power to various residential, commercial and industrial areas outside the City.

Budget Summary

Description	FY 2019 Actual	FY 2020 Actual	FY 2021 Amended Budget	FY 2021 Revised Estimate	FY 2022 Adopted Budget	Change in Budget FY 21 to FY22 $	Change in Budget FY 21 to FY22 %
-- FUNDING SOURCES AND USES --							
FUNDING SOURCES -							
Charges for Services	107,287,148	104,417,005	108,333,008	107,696,953	96,894,073	(11,438,935)	-10.6%
Interest & Rents	2,979,658	3,589,427	3,136,728	1,455,329	2,665,166	(471,562)	-15.0%
Other	549,095	-	-	-	-	-	0.0%
TOTAL FUNDING SOURCES	$110,815,901	$108,006,432	$111,469,736	$109,152,282	$ 99,559,239	(11,910,497)	-10.7%
FUNDING USES -							
Personnel Services	11,970,512	13,355,086	13,599,586	14,324,214	13,631,623	32,037	0.2%
Other Current Expenditures -							
- Supplies / Maintenance	4,979,926	4,905,840	5,697,065	6,272,864	8,151,492	2,454,427	43.1%
- Contractual	4,075,499	3,899,611	3,566,671	3,869,117	4,666,156	1,099,485	30.8%
- Electric Utility Production	34,583,908	31,994,196	37,027,080	34,013,008	38,636,988	1,609,908	4.3%
- Other	1,891,284	1,379,086	2,106,646	2,193,611	9,112,531	7,005,885	332.6%
Capital Outlay	7,540,076	4,705,578	8,485,415	9,303,900	13,282,871	4,797,456	56.5%
Debt Service Payments							
- Principal	15,199,982	885,303	905,762	5,890,762	97,204,940	96,299,178	10631.8%
- Interest & Fees	5,980,141	5,986,584	5,949,597	5,970,187	-	(5,949,597)	-100.0%
Transfers Out	6,606,000	7,656,276	7,968,900	7,968,900	8,595,384	626,484	7.9%
Depreciation	15,181,705	15,111,318	13,587,838	13,353,959	13,469,430	(118,408)	-0.9%
TOTAL FUNDING USES	$108,009,033	$ 89,878,878	$ 98,894,560	$103,160,522	$206,751,415	107,856,855	109.1%
-- FUND EQUITY --							
INCREASE (DECREASE)	$ 25,546,926	$ 23,718,435	$ 21,966,353	$ 21,186,422	$ 3,295,635		
ENDING BALANCE -							
Investment in Capital Assets	169,545,287	159,495,444	154,310,121	151,781,715	146,907,669		
Designated / Reserved	16,794,720	17,241,216	145,409,665	149,053,504	52,908,571		
Undesignated / Unreserved	113,581,300	146,903,082	45,886,309	43,990,945	148,305,559		
TOTAL FUND EQUITY	$299,921,307	$323,639,742	$345,606,095	$344,826,164	$348,121,799		
-- STAFFING --							
Total Positions	92.25	92.00	93.50	93.50	94.50		

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EXHIBIT – 7

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Holland MICHIGAN

FISCAL YEAR 2023 ADOPTED BUDGET

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Overview

Mandated by chapter 12 of the City Charter, the Electric Utility Fund provides accountability for a municipally owned electric generating facility and distribution system that supplies electrical power to residential, commercial, industrial and other users. Fiber Optics (broadband) is also supplied to a limited customer base. The City has entered into agreements with several of the surrounding governmental jurisdictions to supply electrical power to various residential, commercial and industrial areas outside the City.

Budget Summary

Description	FY 2020 Actual	FY 2021 Actual	FY 2022 Amended Budget	FY 2022 Revised Estimate	FY 2023 Adopted Budget	Change in Budget FY 22 to FY23 $	Change in Budget FY 22 to FY23 %
- - FUNDING SOURCES AND USES - -							
FUNDING SOURCES -							
Charges for Services	104,417,005	108,073,869	96,894,073	98,389,517	98,309,416	1,415,343	1.5%
Interest & Rents	3,589,427	443,990	469,626	38,775	468,733	(893)	-0.2%
Other	-	254,065	(6,559,248)	(298,155)	(3,345,713)	3,213,535	0.0%
TOTAL FUNDING SOURCES	$ 108,006,432	$ 108,771,924	$ 90,804,451	$ 98,130,137	$ 95,432,436	4,627,985	5.1%
FUNDING USES -							
Personnel Services	13,355,086	12,125,892	13,631,623	12,738,045	14,541,291	909,668	6.7%
Other Current Expenditures -							
- Supplies / Maintenance	4,905,840	6,413,165	8,151,492	6,854,375	6,372,554	(1,778,938)	-21.8%
- Contractual	3,899,611	4,044,245	4,666,156	4,640,540	5,616,792	950,636	20.4%
- Electric Utility Production	31,994,196	34,157,428	38,636,988	38,633,234	41,621,464	2,984,476	7.7%
- Other	1,379,086	767,143	2,553,283	862,242	1,135,472	(1,417,811)	-55.5%
Capital Outlay	4,705,578	5,007,916	13,282,871	8,592,421	20,588,568	7,305,697	55.0%
Debt Service Payments							
- Principal	885,303	108,129,958	97,204,940	20,935,745	13,721,946	(83,482,994)	-85.9%
- Interest & Fees	5,986,584	2,741,627	(2,195,540)	56,893	40,924	2,236,464	-101.9%
Transfers Out	7,656,276	7,968,900	8,595,384	8,595,384	8,456,856	(138,528)	-1.6%
Depreciation	15,111,318	13,191,159	13,469,430	13,199,224	13,278,744	(190,686)	-1.4%
TOTAL FUNDING USES	$ 89,878,878	$ 194,547,433	$ 197,996,627	$ 115,108,103	$ 125,374,611	(72,622,016)	-36.7%
- - FUND EQUITY - -							
INCREASE (DECREASE)	$ 23,718,435	$ 27,362,365	$ 3,295,635	$ 12,550,200	$ 4,368,339		
ENDING BALANCE -							
Investment in Capital Assets	159,495,444	261,932,759	247,684,176	252,374,626	247,552,738		
Designated / Reserved	17,241,216	6,099,040	23,631,000	27,911,360	20,708,395		
Undesignated / Unreserved	146,903,082	82,970,308	82,982,566	83,266,321	99,659,513		
TOTAL FUND EQUITY	$ 323,639,742	$ 351,002,107	$ 354,297,742	$ 363,552,307	$ 367,920,646		
- - STAFFING - -							
Total Positions	92.00	93.50	94.50	94.50	95.82		

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EXHIBIT – 8

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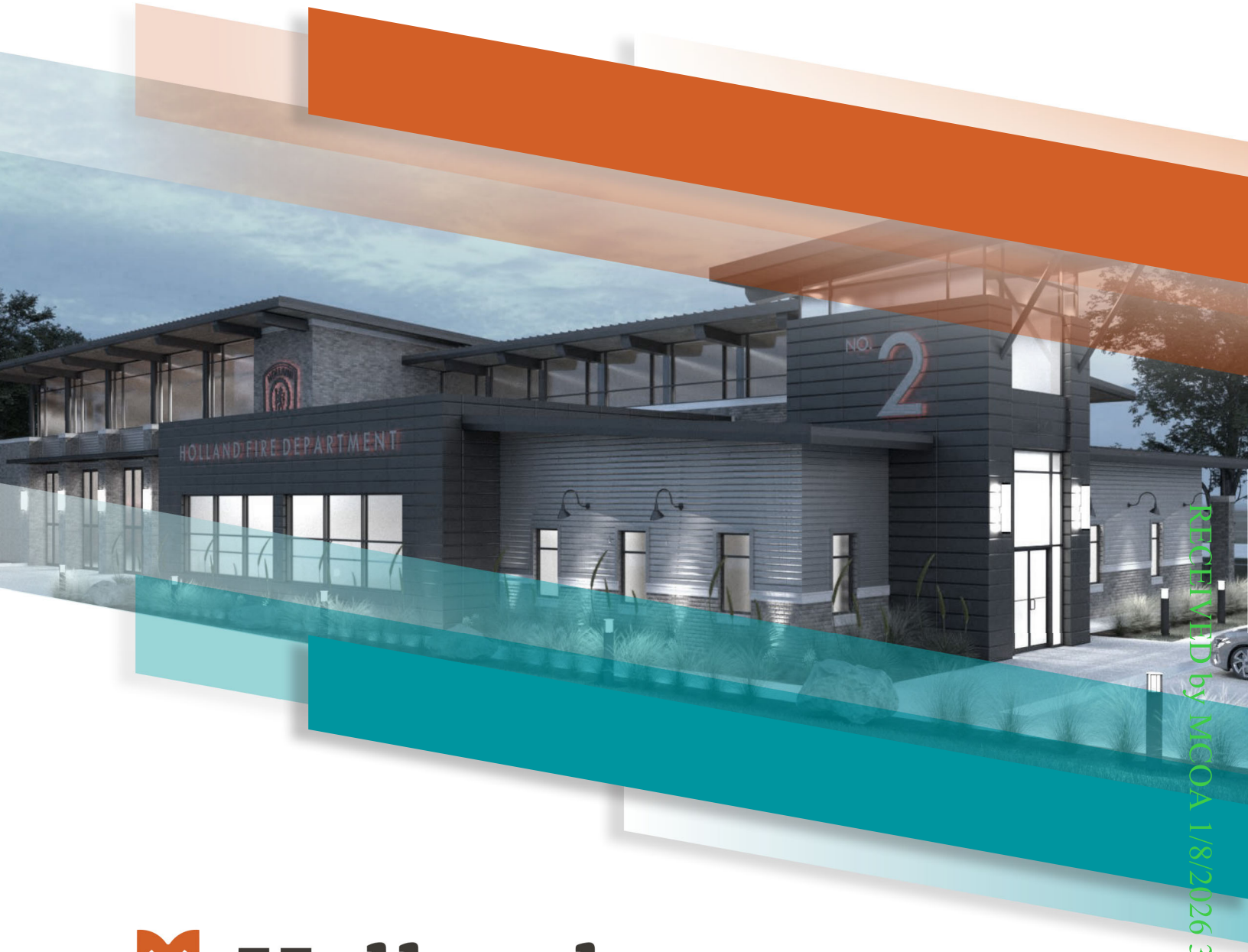
FISCAL YEAR 2024 ADOPTED BUDGET



Holland
MICHIGAN

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Overview

Mandated by chapter 12 of the City Charter, the Electric Utility Fund provides accountability for a municipally owned electric generating facility and distribution system that supplies electrical power to residential, commercial, industrial, and other users. Fiber optics (broadband) is also supplied to a limited customer base. The City has entered into agreements with several of the surrounding governmental jurisdictions to supply electrical power to various residential, commercial, and industrial areas outside the City.

Budget Summary

Description	FY 2021 Actual	FY 2022 Actual	FY 2023 Amended Budget	FY 2023 Revised Estimate	FY 2024 Adopted Budget	Change in Budget FY 23 to FY24 $	Change in Budget FY 23 to FY24 %
- - FUNDING SOURCES AND USES - -							
FUNDING SOURCES -							
Charges for Services	108,632,469	99,604,265	98,324,767	100,384,284	106,551,719	8,226,952	8.4%
Interest & Rents	610,365	(1,071,010)	614,981	434,676	393,548	(221,433)	-36.0%
TOTAL FUNDING SOURCES	$ 109,242,834	$ 98,533,255	$ 98,939,748	$ 100,818,960	$ 106,945,267	8,005,519	8.1%
FUNDING USES -							
Personnel Services	13,393,845	13,638,163	13,901,418	14,305,938	15,827,171	1,925,753	13.9%
Other Current Expenditures -							
- Supplies / Maintenance	6,892,805	7,175,639	6,389,222	6,448,605	7,567,233	1,178,011	18.4%
- Contractual	4,238,809	4,263,273	5,071,050	4,826,031	4,979,209	(91,841)	-1.8%
- Electric Utility Production	34,193,736	42,430,321	41,664,491	42,965,604	48,856,051	7,191,560	17.3%
- Other	1,751,077	2,417,609	7,111,228	6,359,160	6,801,446	(309,782)	-4.4%
Capital Outlay	5,007,916	7,308,594	20,588,568	25,294,385	27,570,021	6,981,453	33.9%
Debt Service Payments							
- Principal	108,129,958	20,929,940	13,721,389	13,715,979	983,876	(12,737,513)	-92.8%
- Interest & Fees	2,741,316	69,278	42,611	23,265	82,002	39,391	92.4%
Transfers Out	7,968,900	8,595,384	8,456,856	8,456,856	9,641,232	1,184,376	14.0%
Depreciation	13,446,398	13,461,034	13,559,124	13,530,825	14,299,052	739,928	5.5%
TOTAL FUNDING USES	$ 197,764,760	$ 120,289,235	$ 130,505,957	$ 135,926,648	$ 136,607,293	6,101,336	4.7%
- - FUND EQUITY - -							
INCREASE (DECREASE)	$ 24,615,948	$ 6,482,554	$ 2,743,748	$ 3,902,676	$ (1,108,129)		
ENDING BALANCE -							
Investment in Capital Assets	261,932,759	275,735,722	276,819,339	272,113,522	298,959,184		
Designated / Reserved	6,099,040	5,823,914	20,708,395	20,487,059	7,653,252		
Undesignated / Unreserved	80,223,891	73,178,608	59,954,258	68,784,089	53,664,105		
TOTAL FUND EQUITY	$ 348,255,690	$ 354,738,244	$ 357,481,992	$ 361,384,670	$ 360,276,541		
- - STAFFING - -							
Total Positions	93.50	94.50	95.82	104.80	113.49		

In August 2022, the citizens of Holland voted to make a community-investment in a high-speed fiber optic broadband network that will be available to every address in the City. The project is in the design stage and the FY 2024 budget includes additional personnel and costs. Service is anticipated to begin in Summer 2024. See https://hollandcityfiber.com/ for additional details.

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EXHIBIT – 9

FILED IN OTTAWA COUNTY 20TH CIRCUIT COURT; 7/2/2025 8:44 AM

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FISCAL YEAR 2025 ADOPTED BUDGET

Holland MICHIGAN

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Overview

Mandated by chapter 12 of the City Charter, the Electric Utility Fund provides accountability for a municipally-owned electric generating facility and distribution system that supplies electrical power to residential, commercial, industrial, and other users. Fiber optics (broadband) is also supplied to a limited customer base. The City has entered into agreements with several of the surrounding governmental jurisdictions to supply electrical power to various residential, commercial, and industrial areas outside the City.

Budget Summary

Description	FY 2022 Actual	FY 2023 Actual	FY 2024 Amended Budget	FY 2024 Revised Estimate	FY 2025 Adopted Budget	Change in Budget FY2024 to FY2025 $	Change in Budget FY2024 to FY2025 %
FUNDING SOURCES AND USES							
FUNDING SOURCES -							
Charges for Services	99,604,264	104,288,260	106,551,719	106,192,027	119,687,269	13,135,550	12.3%
Interest & Rents	(1,071,010)	1,613,753	393,548	2,641,433	1,254,872	861,324	218.9%
Other	-	52,087	-	-	-	-	-
TOTAL FUNDING SOURCES	$ 98,533,254	$ 105,954,100	$ 106,945,267	$ 108,833,460	$ 120,942,141	$ 13,996,874	13.1%
FUNDING USES -							
Personnel Services	13,604,974	13,424,221	15,827,171	15,128,058	16,738,359	911,188	5.8%
Other Expenditures							
- Supplies / Maintenance	7,208,874	7,338,177	7,567,233	7,817,813	7,871,684	304,451	4.0%
- Contractual	4,263,244	4,692,634	4,979,209	4,951,508	5,723,564	744,355	14.9%
- Electrical Utility Production	42,428,069	40,916,461	48,856,050	43,725,508	55,152,782	6,296,732	12.9%
- Other	2,419,848	6,283,690	6,801,445	6,277,148	4,954,795	(1,846,650)	-27.2%
Capital Outlay	7,308,593	18,377,873	27,570,022	32,232,191	34,015,653	6,445,631	23.4%
Debt Service Payments							
- Principal	20,929,940	13,715,978	983,876	983,876	1,017,354	33,478	3.4%
- Interest & Fees	69,278	(35,380)	82,002	77,726	49,800	(32,202)	-39.3%
Transfers Out	8,595,384	8,456,856	9,641,232	9,641,232	9,163,402	(477,830)	-5.0%
Depreciation	13,461,034	13,516,909	14,299,052	13,900,151	14,060,148	(238,904)	-1.7%
TOTAL FUNDING USES	$ 120,289,238	$ 126,687,419	$ 136,607,292	$ 134,735,211	$ 148,747,541	$ 12,140,249	8.9%
- - FUND EQUITY - -							
INCREASE (DECREASE)	$ 6,482,549	$ 11,360,532	$ (1,108,127)	$ 7,314,316	$ 7,227,607		
ENDING BALANCE -							
Investment in Capital Assets	275,735,722	280,633,710	297,874,872	283,319,748	268,973,046		
Designated / Reserved	5,823,914	18,581,811	7,653,252	7,626,267	9,336,520		
Undesignated / Unreserved	73,178,609	66,883,256	59,462,526	82,467,078	102,331,134		
TOTAL FUND EQUITY	$ 354,738,245	$ 366,098,777	$ 364,990,650	$ 373,413,093	$ 380,640,700		
- - STAFFING - -							
Total Positions	95.75	97.89	107.82	107.82	106.70		

In August 2022, the citizens of Holland voted to make a community investment in a high-speed fiber optic broadband network that will be available to every address in the City. Construction is underway, and the FY 2025 budget includes additional personnel and costs. Service is anticipated to begin in Summer 2025. See https://hollandcityfiber.com/ for additional details.

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STATE OF MICHIGAN
COURT OF APPEALS

STACY PHOTHISAN, individually,
and as representative of a class of
similarly-situated persons and entities,

Plaintiff,

v.

CITY OF HOLLAND, MICHIGAN,
a municipal corporation, by and through
THE HOLLAND BOARD OF PUBLIC WORKS,

Defendant.

Court of Appeals Case No. 377279

Ottawa County Circuit Court
Case No. 2025-008184-CZ
Hon. Karen J. Miedema

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
KICKHAM HANLEY PLLC
40950 Woodward Avenue, Suite 306
Bloomfield Hills, MI 48304
(248) 544-1500
Counsel for Plaintiff and the Class

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Sean P. Murphy (P79255)
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Co-Counsel for Plaintiff and the Class

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CUNNINGHAM DALMAN, P.C., City Attorney
321 Settlers Road, P.O. Box 1767
Holland, MI 49423
(616) 392-1821
Counsel for Defendant

Sonal Hope Mithani (P51984)
Elyse K. Lisznyai (P84825)
MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.
101 North Main Street, 7th Floor
Ann Arbor, MI 48104
(734) 668-7786
Counsel for Defendant

APPENDIX OF EXHIBITS IN SUPPORT OF PLAINTIFF/APPELLANT'S BRIEF ON APPEAL

VOLUME III

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APPENDIX EXHIBITS

Volume I

Appellant's App.Ex. 1	pp. 1-13	August 29, 2025 Opinion and Order on Defendant City of Holland's Motion for Summary Disposition of Plaintiff's Complaint pursuant to MCR 2.116(C)(8); Opinion and Order on Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) of Count I of Plaintiff's Complaint.
Appellant's App.Ex. 2	pp. 14-63	Plaintiff's Class Action Complaint with Exhibits

Volume II

Appellant's App.Ex. 3 (Part 1)	pp. 64-127	Plaintiff's Motion For Partial Summary Disposition as to Count I of the Complaint Under MCR.116(C)(10) and Brief in Support

Volume III

Appellant's App.Ex. 3 (Part 2)	pp. 128-173	Plaintiff's Motion For Partial Summary Disposition as to Count I of the Complaint Under MCR.116(C)(10) and Brief in Support
Appellant's App.Ex. 4	pp. 174-244	City of Holland's Response Brief in Opposition to Plaintiff's Rule 2.116(C)(10) Motion For Partial Summary Disposition as to Count I of the Complaint.
Appellant's App.Ex. 5	pp. 245-263	Plaintiff's Reply Brief in Support of Motion for Partial Summary Disposition with Exhibits
Appellant's App.Ex. 6	pp. 264-319	City's Motion to for Summary Disposition Pursuant to MCR 2.116(C)(8)
Appellant's App.Ex. 7	pp. 320-364	Plaintiff's Brief in Opposition to Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(8)

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APPENDIX EXHIBIT 3

Part 2

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EXHIBIT – 10

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Holland
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Annual Comprehensive Audit Report for Fiscal Year End June 30, 2022

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Long-range Financial Planning (continued)

The following table identifies the 2022 PA198 industrial tax abatements issued by the City. The value of the 2022 PA198 abatement roll is $106.9 million.

PA 198 Industrial Facilities Tax Abatements (IFT's) 2022

Company	Description of Services	Planned Investment	Projected Job Growth
By-Pas International	Manufacturing	$ 1,362,000	4
Forged by Design	Wood and Metal Products	1,350,000	8
Hudsonville Creamery and Ice Cream	Ice Cream and Dessert Products	35,537,000	0
Hyperion Automation	Automation Systems	1,505,000	12
JR Automation - 2 abatements	Automation Systems	4,425,000	99
Koops Inc.	Automation Systems	2,351,000	35
MG88 Holland Cold Storage	Warehousing and Processing	25,114,000	55
Power Manufacturing	Manufacturing	2,353,000	6
Strategic Label	Labeling Equipment and Labels	932,000	5
Sure-loc Edging	Landscape Products	1,138,000	4
Tommy's Car Wash Systems	Car Wash Systems	29,851,000	146
Trigon Steel Components	Manufacturing	197,000	7
Western Michigan Plastics	Manufacturing	824,000	6
	Total PA 198 Investment for 2022	**$ 106,939,000**	**387**

Building related fees continued to increase, driven by large industrial/commercial developments. In line with this, the City's building permit construction values increased by 40% from fiscal year 2021 ($126 million) to fiscal year 2022 ($176 million). Institutional and municipal permits totaled $13.7 million for fiscal year 2022 ($25.4 million for fiscal year 2021). The largest permit value in fiscal year 2022 was $27 million for a new LG Energy Solution production facility. Other large permits included Vision Quest's new industrial building totaling $18.7 million, Hudsonville Creamery and Ice Cream office and manufacturing buildings for $18.7 million, and a cold storage facility for Cold Link Logistics of $18.3 million.

The City's General Fund receives a transfer from the Electric Utility Fund consisting of 6.25% of the average of the previous three calendar year sales. Electric sales have increased as a result of strong manufacturing demand, resulting in increased payments to the General Fund over the past few years; however, electric rates are expected to decrease in the years ahead, which is expected to flatten the overall revenues.

Fund Balance Governmental Funds

The following comparison itemizes actual Fund Balances across all general governmental funds (excluding Component Units) and the change from the prior year:

	FUND BALANCES		
	@ June 30, 2021	@ June 30, 2022	Increase (Decrease)
General Fund	$ 5,444,359	$ 6,720,395	$1,276,036
Gen. Fund Budget Stabilization	1,601,787	1,680,510	78,723
Special Revenue Funds	6,543,225	6,803,683	260,458
Debt Service Funds	1,250,128	800,979	(449,149)
Capital Projects Funds	5,576,086	9,019,853	3,443,767
Permanent Trust Funds	2,444,278	2,309,237	(135,041)
Totals	$ 22,859,863	$27,334,657	$4,474,794

The Combined General Fund and Budget Stabilization ending fund balance totaled $8,400,905 at June 30, 2022. Of this amount, $8,393,071, or 32.2% of total expenditures plus transfers out, is unassigned.

The increase in *Fund Balance of the Special Revenue Funds* in fiscal year 2022 is due to increased revenue for Personal Property Tax (PPT) tax loss from Allegan County.

The *Fund Balance* of the *Capital Projects Funds* increased by $3,443,767 during Fiscal Year 2022 due a large donation received for future construction of a Recreation Center.

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Notes to Financial Statements

Electric Utility Fund Transfers

The City Charter authorizes an annual transfer from the Electric Utility Fund to the general purposes of the City. The current formula for determining this transfer is based upon 6.25% of Electric Utility Fund budgeted revenues of the same fiscal year. Based on this formula, a $6,000,000 transfer was made to the General Fund, and a $491,380 transfer was made to the Municipal Facilities/Land Improvements Projects Fund. Additionally, the City receives a portion of the electric wholesale sales designated for the capital improvement fund. The total for fiscal year 2022 was $2,104,004 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2022, total transfers of $8,595,384 were made.

Compensated Absences

Non-union City employees are granted paid time off (PTO) each pay period in varying amounts based on length of service. Public safety union employees are granted vacation and sick pay in varying amounts based on length of service. Utilities bargaining unit employees are granted paid time off on their anniversary date of hire. These benefits are compensable upon termination of employment except during resignation or discharge for disciplinary cause.

Vacation hours are credited to each public safety bargaining unit employee on the anniversary date of hire. The number of hours is dependent upon years of service. Sick leave hours are credited to each employee as earned during a calendar year up to a maximum of 104 hours for police bargaining union and 145.60 for fire bargaining union. Police bargaining employees are compensated for one half, or one quarter, based on the date of hire, of total accumulated sick leave hours in excess of 720 hours for the year ended June 30, 2022. Fire bargaining employees receive no pay out upon termination for accumulated sick leave hours.

The City's policy is to recognize the cost of vacation, sick, paid time off, deferred overtime and salary-related fringe benefits associated with these compensated absences at the time the compensated absences are earned. The liabilities associated with compensated absences have been recorded in the enterprise funds for those employees compensated by those funds and in the compensated absences internal service fund for employees compensated by governmental funds.

Deferred Inflows of Resources

In addition to liabilities, the statement of financial position will sometimes report a separate section for deferred inflows of resources. This separate financial statement element, deferred inflows of resources, represents an acquisition of net assets that applies to a future period(s) and so will not be recognized as an inflow of resources (revenue) until that time. The governmental funds report unavailable revenues, which arises only under a modified accrual basis of accounting, from special assessments receivable. These amounts are deferred and recognized as an inflow of resources in the period that the amounts become available. The City also reports a deferred inflow of resources for its deferred charge on refunding, which results from the difference in the carrying value of refunded debt and its reacquisition price and is amortized over the shorter of the life of the refunded or refunding debt. In addition, the City reports deferred inflows of resources related to its pension and other postemployment benefits plans.

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EXHIBIT – 11

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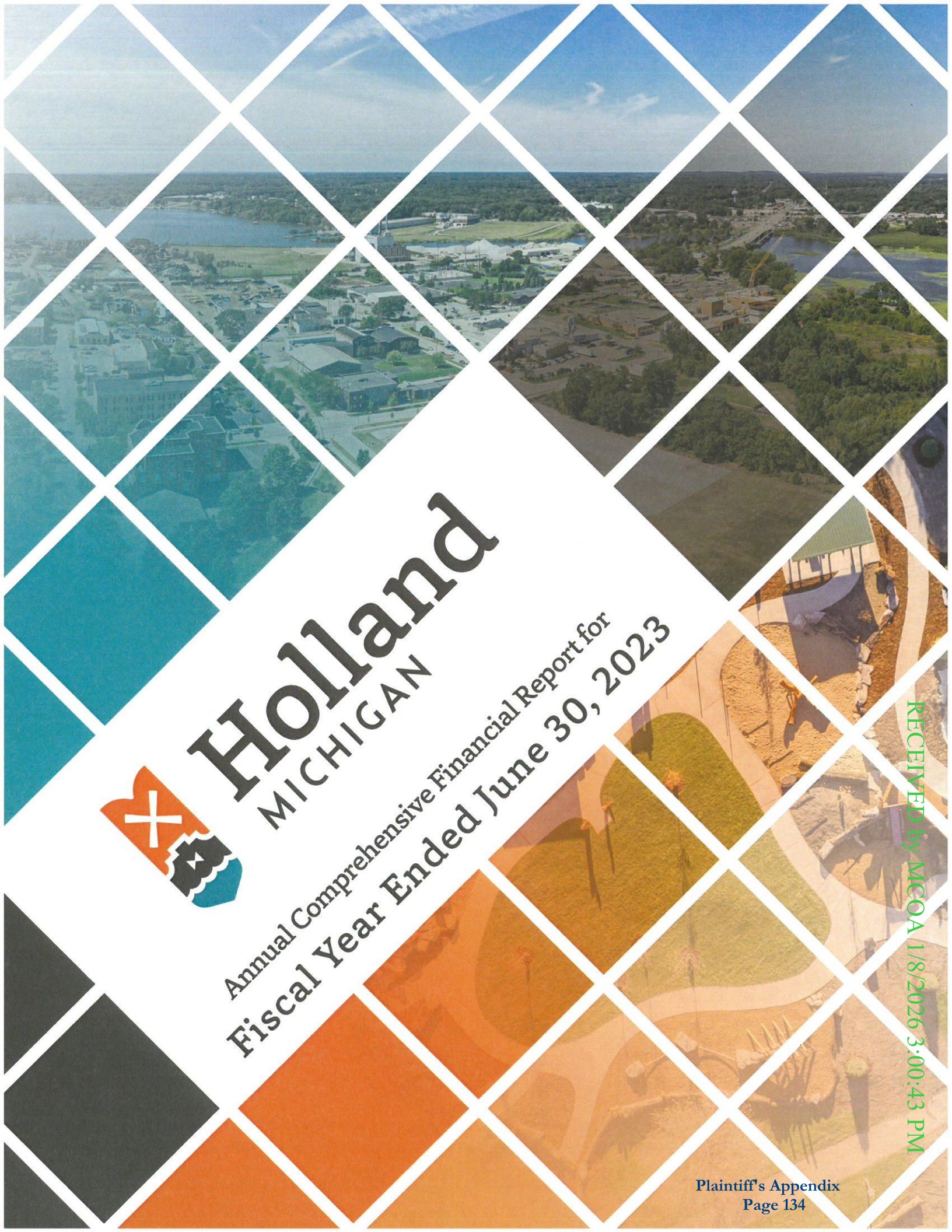

Holland
MICHIGAN

Annual Comprehensive Financial Report for Fiscal Year Ended June 30, 2023

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Long-range Financial Planning (continued)

Building related fees continued to increase, driven by large industrial/commercial developments. In line with this, the City's building permit construction values increased more than 100% from fiscal year 2022 ($176 million) to fiscal year 2023 ($535 million). The largest permit value for a project in fiscal year 2023 was $276.9 million for a new LG Energy Solution production facility. Other large permits included Resthaven Farmstead new residential project totaling $51.1 million, Homewood Suites Hotel for $20 million, Black River Flats apartments for $21 million, and Shoreline Flats apartments for $19.8 million.

The City's General Fund receives a transfer from the Electric Utility Fund consisting of 6.25% of the average of the previous three calendar year sales. Electric sales have increased as a result of strong manufacturing demand, resulting in increased payments to the General Fund over the past few years; however, electric rates are expected to decrease in the years ahead, which is expected to flatten the overall revenues.

Fund Balance Governmental Funds

The following comparison itemizes actual Fund Balances across all general governmental funds (excluding Component Units) and the change from the prior year:

	FUND BALANCES		
	@ June 30, 2022	@ June 30, 2023	Increase (Decrease)
General Fund	$ 6,720,395	$ 9,633,354	$2,912,959
Gen. Fund Budget Stabilization	1,680,510	1,775,447	94,937
Special Revenue Funds	6,803,683	9,208,697	2,405,014
Debt Service Funds	800,979	1,513,151	712,172
Capital Projects Funds	9,019,853	27,360,110	18,340,257
Permanent Trust Funds	2,309,237	2,542,739	233,502
Totals	$27,334,657	$52,033,498	$24,698,841

The Combined General Fund and Budget Stabilization ending fund balance totaled $11,408,801 at June 30, 2023. Of this amount, $11,364,184, or 39.8% of total expenditures plus transfers out, is unassigned. Property tax revenues contributed to the increase as assessed taxable value increased and an additional allocation of the City's property tax millage was directed to the General Fund for FY 2023. In addition, building permit revenues increased given additional volume and several large projects.

The increase in *Fund Balance of the Special Revenue Funds* in FY 2023 is primarily due to a large donation for the DeGraaf Nature Center.

The *Fund Balance* of the *Capital Projects Funds* increased by $18,340,257 during FY 2023 due to the receipt of $18 million in bond proceeds for the Fire Station project.

Capital Projects Governmental Funds

Capital Projects Funds expenditures, excluding interfund transfers, totaled $9,704,169 for FY 2023 compared to $8,047,420 for FY 2022. Projects exceeding $50,000 during the fiscal year included:

INFRASTRUCTURE PROJECTS (Excluding Utility Fund Share)	
6th Street Pine to Columbia	$ 1,245,859
40th Street Improvements	316,985
Street Resurfacing	1,153,675
Pine Avenue; 9th Street – Michigan Avenue	1,118,728
Country Club; 8th Street – Legion Park Drive	184,012
MUNICIPAL CAPITAL PROJECTS	
Waverly Fire Station	$ 2,876,898
Playground Equipment	301,417
City Hall – 1st Floor Renovation	411,187

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Notes to Financial Statements

Electric Utility Fund Transfers

The City Charter authorizes an annual transfer from the Electric Utility Fund to the general purposes of the City. The current formula for determining this transfer is based upon 6.25% of Electric Utility Fund budgeted revenues of the same fiscal year. Based on this formula, a $6,372,000 transfer was made to the General Fund. Additionally, the City receives a portion of the electric wholesale sales designated for the capital improvement fund. The total for fiscal year 2023 was $2,084,856 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2023, total transfers of $8,456,856 were made.

Compensated Absences

Non-union City employees are granted paid time off (PTO) each pay period in varying amounts based on length of service. Public safety union employees are granted vacation and sick pay in varying amounts based on length of service. Utilities bargaining unit employees are granted paid time off on their anniversary date of hire. These benefits are compensable upon termination of employment except during resignation or discharge for disciplinary cause.

Vacation hours are credited to each public safety bargaining unit employee on the anniversary date of hire. The number of hours is dependent upon years of service. Sick leave hours are credited to each employee as earned during a calendar year up to a maximum of 104 hours for police bargaining union and 145.60 for fire bargaining union. Police bargaining employees are compensated for 40 percent, based on the date of hire, of total accumulated sick leave hours in excess of 720 hours for the year ended June 30, 2023. Fire bargaining employees receive no pay out upon termination for accumulated sick leave hours.

The City's policy is to recognize the cost of vacation, sick, paid time off, deferred overtime and salary-related fringe benefits associated with these compensated absences at the time the compensated absences are earned. The liabilities associated with compensated absences have been recorded in the enterprise funds for those employees compensated by those funds and in the compensated absences internal service fund for employees compensated by governmental funds.

Deferred Inflows of Resources

In addition to liabilities, the statement of financial position will sometimes report a separate section for deferred inflows of resources. This separate financial statement element, deferred inflows of resources, represents an acquisition of net assets that applies to a future period(s) and so will not be recognized as an inflow of resources (revenue) until that time. The governmental funds report unavailable revenues, which arises only under a modified accrual basis of accounting, from special assessments and opioid settlement receivables. These amounts are deferred and recognized as an inflow of resources in the period that the amounts become available. In addition, the City reports deferred inflows of resources related to its other postemployment benefits plan.

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EXHIBIT – 12

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FISCAL YEAR 2024

ANNUAL COMPREHENSIVE FINANCIAL REPORT FOR FISCAL YEAR ENDED JUNE 30, 2024

Holland
MICHIGAN

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Long-range Financial Planning (Continued)

Major Revenues

Property tax is the largest source of revenue for the General Fund, representing more than 38% of total revenues. Property values have continued to rise even during the pandemic. Development interest continues to be strong with several large industrial and commercial projects in various stages of development. In addition, the City continues to prioritize affordable housing and has several residential projects in process. Property values continue to trend upward. While taxable values are limited by Michigan law, generally to the rate of inflation, numerous property sales (not limited by inflation factors) combined with new development have pushed the growth in taxable value beyond the inflation rate.

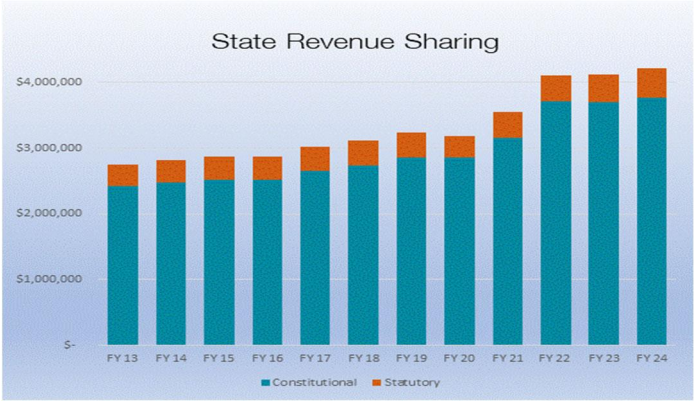
In 2012, several new public acts were passed eliminating the industrial *Personal Property Tax (PPT)* over a ten-year period. To replace the revenue source, the Local Community Stabilization Authority (LCSA) Act requires Personal Property Tax (PPT) reimbursement to municipalities. The complex calculation is designed to reimburse for the essential services (police and fire) and a portion of qualified loss. In FY 2024, the City received $3,237,941 in PPT reimbursement.

The State of Michigan provides several economic development incentive tools, including PA 198 industrial facilities certificates. The 2024 Taxable Value for properties with IFT abatements is $86,812,282 for new facility IFTs, all of which are taxed at half rate and $69,700 for rehab IFTs for which the value remains frozen. Based on 2024 PA 198 applications processed by the City, 278 new or retained jobs are anticipated to be created along with $131.1 million of new related construction and machinery.

State of Michigan PA 376 authorizes the creation of a Renaissance Zone for the purpose of fostering economic development and stimulating industrial, commercial, and residential improvements by providing certain tax credits or exemption within the zone. The City has two Renaissance Zones. The property is exempt from certain real and personal property taxes, including City operating taxes, but is not exempt from the millages voted for debt. Property within the zones have a 2024 Taxable Value of $85,910,453.

The City also supports Brownfield Redevelopments with fourteen active projects approved for tax captures at June 30, 2024. The reader is directed to the Notes to Financial Statements section (note #20) for detail information on the various tax abatements offered by the City.

Local government *Revenue Sharing* received from the State of Michigan varies from year to year. The constitutional portion is based on a specific percentage of sales tax revenues. The City, Village, and Township Revenue Sharing (CVTRS) is an incentive-based program for which the City has met the requirements annually. Revenues have leveled off in the past two years as consumers shift spending back to services (non-taxable) following sharp increases in the purchase of goods during the pandemic.



Building related fees remained strong, driven by large industrial/commercial developments. Permits issued for industrial and commercial projects totaled $211 million, residential projects $49 million and institutional and municipal $59 million.

The City's General Fund receives a transfer from the Electric Utility Fund consisting of 6.25% of the average of the previous three calendar year sales. Electric sales have increased as a result of strong manufacturing demand, resulting in increased payments to the General Fund over the past few years; however, electric rates are expected to decrease in the years ahead, which is expected to flatten the overall revenues.

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Electric Utility Fund Transfers

The City Charter authorizes an annual transfer from the Electric Utility Fund to the general purposes of the City. The current formula for determining this transfer is based upon 6.25% of Electric Utility Fund budgeted revenues of the same fiscal year. Based on this formula, a $6,228,000 transfer was made to the General Fund. Additionally, the City receives a portion of the electric wholesale sales designated for the capital improvement fund. The total for fiscal year 2024 was $3,413,232 allocated to the Municipal Facilities/Land Improvements Projects Fund. For fiscal year 2024, total transfers of $9,641,232 were made.

Compensated Absences

Non-union City employees are granted paid time off (PTO) each pay period in varying amounts based on length of service. Public safety union employees are granted vacation and sick pay in varying amounts based on length of service. Utilities bargaining unit employees are granted paid time off on their anniversary date of hire. These benefits are compensable upon termination of employment except during resignation or discharge for disciplinary cause.

Vacation hours are credited to each public safety bargaining unit employee on the anniversary date of hire. The number of hours is dependent upon years of service. Sick leave hours are credited to each employee as earned during a calendar year up to a maximum of 104 hours for police bargaining union and 145.60 for fire bargaining union. Police bargaining employees are compensated for 40 percent, based on the date of hire, of total accumulated sick leave hours in excess of 720 hours for the year ended June 30, 2024. Fire bargaining employees receive no pay out upon termination for accumulated sick leave hours.

The City's policy is to recognize the cost of vacation, sick, paid time off, deferred overtime and salary-related fringe benefits associated with these compensated absences at the time the compensated absences are earned. The liabilities associated with compensated absences have been recorded in the enterprise funds for those employees compensated by those funds and in the governmental activities for employees compensated by governmental funds.

Deferred Inflows of Resources

In addition to liabilities, the statement of financial position will sometimes report a separate section for deferred inflows of resources. This separate financial statement element, deferred inflows of resources, represents an acquisition of net assets that applies to a future period(s) and so will not be recognized as an inflow of resources (revenue) until that time. The governmental funds report unavailable revenues, which arises only under a modified accrual basis of accounting, from special assessments and opioid settlement receivables. These amounts are deferred and recognized as an inflow of resources in the period that the amounts become available. In addition, the City reports deferred inflows of resources related to its other postemployment benefits plan.

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EXHIBIT – 13

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Detroit News v. County of Wayne

Court of Appeals of Michigan

March 15, 2002, Decided

No. 235831

Reporter
2002 Mich. App. LEXIS 3409 *

DETROIT NEWS, Plaintiff-Appellee, v COUNTY OF WAYNE, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: **[*1]** Wayne Circuit Court. LC No. 01-118800-CZ.

Core Terms

disclosure, records, exempt, salaries, employees, service record, requested records, Civil Service Act, sentence, public record, legislative intent, public employee, confidential, request information, Dictionary, antecedent, matters, argues

Judges: Before: Talbot, P.J., and Smolenski and Wilder, JJ.

Opinion

PER CURIAM.

Plaintiff brought this action alleging defendant violated Michigan's Freedom of Information Act, MCL 15.231 *et seq.* ("FOIA") by refusing to disclose certain employee information about Wayne County employees. The trial court determined that the requested information was not exempt from disclosure and ordered defendant to produce the requested records. Defendant appeals by right. We affirm.

Pursuant to the FOIA, plaintiff requested the following information from defendant: (1) the name, job title, and salary or hourly pay rate for all Wayne County officials and employees for the calendar years 2000 and 2001, (2) the names of all employees who received longevity pay, and the amount of each payment for the calendar years 1999 and 2000, (3) the names of all employees who received pay for annual leave, accumulative leave, and the amount of leave pay each received for the calendar years 1999 and 2000, (4) the names of all employees who received pay for accumulated sick leave and the amount of sick pay each received during the calendar years 1999 and 2000, (5) the names of all employees who received flat rate **[*2]** mileage reimbursements and the monthly amount each received as of April 2, 2001, and (6) the names of all employees who had a county vehicle assigned to them as of April 2, 2001, and the year, make and model of each assigned vehicle.

Defendant denied plaintiff's request. Defendant relied on MCL 15.243(1)(d) of the FOIA, which provides that "[r]ecords or information specifically described and exempted from disclosure by statute" may be exempted from disclosure as a public record under the FOIA. Defendant maintained that the records plaintiff sought were part of the records of the Department of Personnel/Human Resources, a division created under the Wayne County Charter ("The Charter"). Defendant asserted that the Charter is controlled by the Civil Service Act, MCL 38.401 *et seq.*, which provides that "employees' records shall be confidential and not open for public inspection." MCL 38.412(g).

Plaintiff filed a complaint against defendant for an alleged FOIA violation along with a motion for an expedited order to show cause. The trial court proceeded on the assumption that the Civil Service Act governs the Charter, but the court concluded that the requested records did not fall within the exemptions of MCL 38.412(g), and ordered defendant to produce the **[*3]** records.

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Defendant's appeal raises two legal issues: (1) Does the County Employees Civil Service Act ("Civil Service Act"), MCL 38.412(g), exempt the requested information from FOIA disclosure, and (2) can a negative inference be made that the Legislature intended to protect from disclosure other public employee salaries when it amended the FOIA, Section 13a, MCL 15.243a, to expressly provide for the disclosure of the salaries of public education employees? We conclude that the Civil Service Act does not exempt the requested information from FOIA disclosure, and that the Legislature, by amending the FOIA, did not intend to bar the FOIA disclosure of public employee salaries.

I

Section 13 of the FOIA, MCL 15.243(1)(d), provides that "[r]ecords or information specifically described and exempted from disclosure by statute" may be exempted from disclosure as a public record. Defendant contends that MCL 38.412(g), of the Civil Service Act exempts the requested information from disclosure. We conclude that MCL 38.412(g) is inapplicable to the requested records.

A determination whether a public record is exempt from disclosure under the FOIA is a mixed question of law and fact. *Schroeder v City of Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997). We review the trial court's factual findings for clear error and review the questions of **[*4]** law de novo on appeal. *Id.* Statutory interpretation is a question of law that is also subject to review de novo on appeal. *Oakland Co Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

The trial court did not rule on the question whether the Civil Service Act governs the current civil service system in Wayne County, in light of the Wayne County Charter and Reorganization Plan ("Charter"), adopted by the electorate on November 3, 1981, effective January 1, 1983.[1] However, even assuming arguendo, as did the trial court in this case, that the Civil Service Act applies, a reading of the plain language of MCL 38.412(g) shows that it does not exclude the requested records from FOIA disclosure. Section 13 of the Civil Service Act, MCL 38.412, provides that the Civil Service Commission:

> (g) . . . Shall have such other powers and perform such other duties as may be necessary to carry out the provisions hereof.
> * * *
>
> **Service records**. It shall cause to be kept in each department and division thereof, records of the service of each employee, known as "service records". These records shall contain fact statements on all matters relating to the character and quality of the work done and the attitude of the individual to his work.
>
> **Service records; armed services records; confidential [*5] records**. It shall keep a roster of the employees of the county, together with a record of service, military or naval experience and such other matters as may have a bearing on promotion, transfer or discharge. *All such "service records" and employees' records shall be confidential and not open for public inspection.* [Emphasis added.]

Defendant argues that the requested information qualifies as a "service record," defined by MCL 38.412(g) as those records that "contain fact statements on all matters relating to the character and quality of the work done and the attitude of the individual to his work." In support of its argument, defendant merely offers a generalized statement that "[c]ompensation and benefit information include facts related to the employee's work and attitude."[2]

The exemptions in the FOIA are to be narrowly construed, and the burden of proving their applicability rests with the public body. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 232; 507 NW2d 422 (1993). To meet the burden of proving that

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[1] At the request of the trial court, the parties orally argued the issue of whether the Civil Service Act governed the Charter, but the trial court did not decide the issue, and it proceeded under the assumption that the Civil Service Act applied. Because the argument was not decided by the court, it is not preserved for appeal. *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 562; 475 NW2d 304 (1991); *Herald Co, Inc, v Ann Arbor Public Schools*, 224 Mich App 266, 278; 568 NW2d 411 (1997). Further, defendant failed to brief, and plaintiff did not fully brief, this issue in the trial court, and both parties have not fully briefed this question on appeal, giving their arguments only cursory attention. We decline to address the issue when the record relating to it is not fully developed and when the issue is unnecessary for this Court's review. *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 356 n7; 616 NW2d 677 (2000).

[2] We note that during oral argument, defense counsel conceded that the statute adequately defines the term "service records."

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public records are exempt from disclosure, the public body claiming the exemption should provide complete particularized justification, rather than simply repeat statutory language. *Hyson v Dep't of Corrections*, 205 Mich App 422, 424; 521 NW2d 841 (1994). Because defendant failed to support its claim with a complete particularized justification, **[*6]** it failed to carry its burden of showing that the requested records qualify as "service records."

Defendant also argues that MCL 38.412(g) does not define the term "employees' records" and that the plain meaning of the term encompasses the requested records. We disagree. A plain reading of the language of the statute shows that it does point to the definition of the term "employees' records" and excludes the requested records from its statutory exemption.

The primary goal of judicial interpretation of statutes is to give effect to the intent of the Legislature. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). The first criterion in determining intent is the specific language of the statute. *Indenbaum v Michigan Bd of Medicine (After Remand)*, 213 Mich App 263, 270; 539 NW2d 574 (1995). The Legislature is presumed to have intended the meaning it plainly expressed. *Id.* In determining legislative intent, we look first at the words of the statute. *Id.* The words of the statute must be given their ordinary and plain meaning; only if the language is ambiguous may the courts look beyond the statute to determine the intent of the Legislature. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). When statutory language is clear and unambiguous, this Court must honor the legislative intent as clearly indicated in that language. *Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 538; 565 NW2d 828 (1997). No further construction is required or permitted. *Id.*

The statutory **[*7]** language at issue is the following sentence: "All such 'service records' and employees' records shall be confidential and not open for public inspection." MCL 38.412(g). Plaintiff argues that the word "such" modifies the term "employees' records." Defendant argues that it does not. The only logical conclusion that can be drawn from a reading of the sentence is that the word "such" modifies the term "employees' records" because of the absence of a separating comma after the term "service records" and before the connective word "and." Punctuation is an important factor in determining legislative intent, and the rules of grammar are presumed to have been known to the Legislature. *Kizer v Livingston Co Board of Comm'rs*, 38 Mich App 239, 251; 195 NW2d 884 (1972). Therefore, the absence of a separating comma before the connective conjunction suggests that the word "such" was intended to modify the term "employees' records."

The word "such" is not defined in the statute. Therefore, we look to the dictionary definition for its ordinary and plain meaning. *DiBenedetto, supra* at 402. The relevant dictionary definitions of the adjective "such" include "of the kind, character, degree . . . indicated or implied" or "being the . . . things indicated." *Random House Webster's College Dictionary* (1997). The word "such" **[*8]** is properly used as an adjective when reference has previously been made to a category of persons or things, meaning "of that kind." *Garner, A Dictionary of Modern American Usage* (Oxford University Press, 1998). Furthermore, "such" is a pointing word that must refer to a clear antecedent. *Id.* A pointing word should always have an identifiable referent. *Id.* A "pointing word" is a word like *this, that*, *these, those*, and *it*, which points directly to an antecedent. *Id.* An "antecedent" is a word, phrase, or clause that is replaced later by a pronoun or other substitute. *Random House Webster's College Dictionary* (1997). A reading of the sentence in question points directly to two antecedents: the "service records" in the immediately preceding paragraph, and the "roster of the employees of the county, together with a record of service, military or naval experience and such other matters as may have a bearing on promotion, transfer or discharge" in the immediately preceding sentence. Because it is clear that the term "service records" in the sentence at issue refers to the "service records" defined in the preceding paragraph in the statute, the only conclusion to be made is that the term "employees' **[*9]** records" in the sentence at issue is the term that the Legislature chose to describe the second antecedent. Contrary to defendant's contention that the term "employees' records" was not defined in the statute, we conclude that a plain reading of the statute shows that it is defined, albeit indirectly.

We reject defendant's argument that had the Legislature intended to restrict "employees' records" to the items described in the preceding sentence, the Act would have read "these records shall be confidential" or "the foregoing records shall be confidential." Defendant does not explain the basis of its conclusion that the above sentence structures are the only syntax usages that the Legislature employs or should employ.

We find no ambiguity in the language of MCL 38.412(g), and therefore we may not look beyond the statute to determine the intent of the Legislature. *DiBenedetto, supra* at 402. Thus, an "employee record" as defined by MCL 38.412(g) is a record that contains "a record of service, military or naval experience and such other matters as may have a bearing on promotion, transfer or discharge." Defendant failed to show that the requested records of employee job title, salary, paid or used sick and annual leave, mileage

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reimbursement **[*10]** or the use of assigned county vehicles, have "a bearing on promotion, transfer or discharge." Therefore, the requested records do not fall within the definition of "employees' records" pursuant to MCL 38.412(g), and are not exempt from FOIA disclosure.[3]

II

Defendant next argues that when the Legislature amended the FOIA, section 13a, MCL 15.243a,[4] to expressly require only the disclosure of the salaries of public education employees, it did not expressly include the disclosure of other public employee salaries, and, consequently, a negative inference may be made that the Legislature did not intend that the salaries of other government employees be disclosed to the public. We disagree.

The FOIA is an act requiring full disclosure of public records unless a statutory exemption precludes the disclosure of information. *Messenger v Consumer & Industry Services*, 238 Mich App 524, 531; 606 NW2d 38 (1999); MCL 15.243(1)(d). Rather than specifying which records would be subject to disclosure, the Legislature chose to provide that, unless expressly exempt under Section 13 of the FOIA, all public records are subject to public disclosure. *Penokie v Michigan Technological Univ*, 93 Mich App 650, 657; 287 NW2d 304 (1979).

Here, it is undisputed that salary information of Wayne County employees are public records. However, defendant cites no statutory exemption that expressly exempts the release of the Wayne County employee salaries, other than MCL 38.412(g), which, as previously discussed, is inapplicable. In construing a statute, a court may consider a variety of factors and apply principles of statutory construction, but should not ignore common sense. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994). Common sense dictates that the manner in which Wayne County allocates taxpayer monies in the form of salaries is "information regarding the affairs of government and the official acts of those who represent [the people] as public officials and public employees." MCL 15.231(2).

The Legislature **[*12]** enacted 1979 PA 130, effective October 26, 1979, which amended the FOIA by adding Section 13a, MCL 15.243a. *Penokie, supra* at 664 n 7. The addition mandates the disclosure of the salary records of employees of institutions of higher education, school districts, intermediate school districts and community colleges. MCL 15.243a. In *Penokie*, this Court noted that MCL 15.432a represents a clarification of, rather than a substantive change in, prior law.[5] *Id.* at 664 n 7. The legislative history of the amendment indicates that the purpose of the amendment was to remove from the public educational institutions the discretion whether to disclose salary information, and make the disclosure mandatory pursuant to the FOIA. As noted in the House Legislative Analysis Section regarding the release of school salary information, the proponents of the bill argued that because other public employee salary information was available, there was no reason to provide an exemption for the disclosure of school teacher salaries. Thus, because the FOIA does not expressly exempt the disclosure of records of public employee salaries, defendant's argument is without merit.

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[3] We do not address here the issue whether the disclosure of the requested information would constitute an invasion of individual privacy, subsection 13(1)(a) of the FOIA, MCL 15.243(1)(a), because defendant does not raise it on appeal. We note, however, that defense counsel alluded to the question during oral argument.

[4] Section 13a of MCL 15.243a reads as follows:

> Notwithstanding section 13, an institution of higher education established under section 5, 6, or 7 of article 8 of the state constitution of 1963; a school district as defined in section 6 of Act No. 451 of the Public Acts of 1976, being section 380.6 of the Michigan Compiled Laws; an intermediate school district as defined in section 4 of Act No. 451 of the Public Acts of 1976, being section 380.4 of the Michigan Compiled Laws; or a community college established under Act No. 331 of the Public Acts of 1966, as amended, being sections 389.1 to 389.195 of the Michigan Compiled Laws shall upon request make available to the public the salary records of an employee or other **[*11]** official of the institution of higher education, school district, intermediate school district, or community college. [Footnote omitted.]

[5] It must be noted here that the Legislature enacted MCL 15.234a subsequently to the decision in *Penokie*, but prior to the release date **[*13]** of the opinion. *Penokie, supra* at 664 n 7. The issue in *Penokie* was the disclosure of salary records of university employees pursuant to the privacy provision of FOIA, MCL 15.243(1)(a).

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Affirmed.

/s/ Michael J. Talbot

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder

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EXHIBIT – 14

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Hebert v. Rapides Parish Police Jury

Supreme Court of Louisiana

April 11, 2007, Decided

NO. 06-C-2001, consolidated with NO. 06-C-2164

Reporter
974 So. 2d 635 *; 2007 La. LEXIS 893 **; 06-2001 (La. 04/11/07);

JOHN AND KLEA HEBERT VERSUS RAPIDES PARISH POLICE JURY, ET AL.

Subsequent History: **[**1]** Rehearing granted by *Hebert v. Rapides Parish Police Jury, 2007 La. LEXIS 1775 (La., Aug. 31, 2007)*

Supplemental opinion at, On rehearing at *Hebert v. Rapides Parish Police Jury, 974 So. 2d 635, 2008 La. LEXIS 154 (La., 2008)*

Prior History: ON WRIT OF CERTIORARI TO THE COURT OF APPEAL THIRD CIRCUIT, PARISH OF RAPIDES.

Hebert v. Rapides Parish Police Jury, 934 So. 2d 912, 2006 La. App. LEXIS 1569 (La.App. 3 Cir., July 12, 2006)

Disposition: REVERSED and RENDERED.

Core Terms

bridge, funds, inspections, off-system, Creek, allocated, Highway, fault, constructed, percent, inspection report, recommendations, reconstruction, replacement, inventory, withhold, remarks, construction of the bridge, political subdivision, safety standards, participated, plaintiffs', purposes, conform, preponderance of evidence, Transportation, guardrails, damages, records, mandated

Case Summary

Procedural Posture
Plaintiff parents sued defendant state transportation agency and bridge and road owner, asserting a wrongful death and survival action for their daughter's death as a result of a one-automobile accident that occurred on the road and bridge. The Court of Appeal, Third Circuit, Parish of Rapides (Louisiana), amended the district court's judgment, reassessing fault to the agency, owner, and daughter. The agency appealed the judgment.

Overview

The issues were whether the parents proved that the agency assumed the duty for the off-system bridge by a reasonable preponderance of the evidence and whether former *La. Rev. Stat. Ann. § 48:35* (amended 1984) required the agency to withhold all funding allocated to the owner until the bridge was brought into compliance with the agency's standards. The parents failed to sufficiently prove to a legal certainty by a preponderance of the evidence that the agency had assumed the duty of the owner to construct and maintain the bridge in conformity with the agency's safety standards as there was no evidence that the agency had funded or participated in the construction or maintenance of the bridge. Merely inspecting the bridge as mandated by federal law did not constitute an assumption of duty for maintenance and safety. Finally, former *La. Rev. Stat. Ann. § 48:35* (amended 1984) as written mandated the withholding of funds allocated for construction purposes during a particular nonconforming project for which agency funds were allocated. The statute was not applicable in this case given the absence of evidence establishing that the agency funded the 1980 bridge reconstruction project.

Outcome
The judgment was reversed. The appellate court rendered judgment finding that the agency had no liability. Thus, the parents' claim against the agency was dismissed with prejudice.

LexisNexis® Headnotes

Torts > ... > Duty > Affirmative Duty to Act > General Overview

HN1 **Duty, Affirmative Duty to Act**

Most cases alleging negligence on the part of a public body have been analyzed by the Supreme Court of Louisiana under the

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duty-risk analysis. In the classic duty-risk analysis, one of the inquiries the court must answer is: What, if any, duties were owed by the respective parties? The particular facts and circumstances of each individual case determine the extent of the duty and the resulting degree of care necessary to fulfill that duty. A plaintiff must prove that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to the plaintiff, the requisite duty was breached by the defendant, and the risk of harm was within the scope of protection afforded by the duty breached.

Torts > ... > Proof > Evidence > Burdens of Proof

HN2 **Evidence, Burdens of Proof**

The plaintiff bears the burden of proof and must establish his negligence claim by a preponderance of the evidence. Proof is sufficient to constitute a preponderance when the entirety of the evidence, both direct and circumstantial, shows the fact sought to be proved is more probable than not. It follows from this, that speculation, conjecture, mere possibility, and even unsupported probabilities are not sufficient to prove a plaintiff's claim.

Torts > ... > Duty > Affirmative Duty to Act > General Overview

HN3 **Duty, Affirmative Duty to Act**

Whether a particular duty should be imposed on a particular governmental agency is a policy question to be determined by the court. The inquiry is whether the plaintiff has any law, statutory, jurisprudential, or arising from general principles of fault, to support his claim. It is a court's role to determine whether there is any jurisprudential or statutory rule, or policy reason why, under the facts and circumstances of the case, the state would owe a duty to compensate the plaintiff for his personal injuries. Consequently, whether a duty is owed is a question of law for the court to decide based upon the facts and circumstances of the case as established in the evidence of record.

Governments > Public Improvements > Bridges & Roads

Torts > ... > Affirmative Duty to Act > Types of Special Relationships > Government Officials

HN4 **Public Improvements, Bridges & Roads**

While the State has a duty to maintain and render safe all bridges and roads included in the state highway system, i.e., on-system bridges, where the bridge is not on the state highway, i.e., an off-system bridge, and falls within a parish, but outside the corporate limits of any municipality, the duty to maintain the bridge and render it safe rests with the parish.

Torts > ... > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty

HN5 **Affirmative Duty to Act, Voluntary Assumption of Duty**

Under Louisiana law, one who does not owe a duty to act may assume such a duty by acting. The Supreme Court of Louisiana explains this concept of assumption of duty and states that an assumption of duty arises when the defendant (1) undertakes to render services, (2) to another, (3) which the defendant should recognize as necessary for the protection of a third person.

Torts > ... > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty

HN6 **Affirmative Duty to Act, Voluntary Assumption of Duty**

The Supreme Court of Louisiana finds the relationship between a parent corporation and its subsidiaries analogous to the relationship between the Louisiana State Department of Transportation and Development and the highway departments of political subdivisions of the State. Therefore, the assumption of duty doctrine applies.

Torts > ... > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty

HN7 **Affirmative Duty to Act, Voluntary Assumption of Duty**

The determination of whether an affirmative action was taken for purposes of the assumption of duty doctrine involves an examination of the scope of the defendant's involvement, the extent of the defendant's authority, and the underlying intent of the defendant. As in other civil cases, the burden is on the plaintiff to prove by a preponderance of the evidence facts sufficient to establish the action undertaken by the defendant.

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Torts > ... > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty

HN8 **Affirmative Duty to Act, Voluntary Assumption of Duty**

Neither a defendant's concern with safety conditions and its general communications regarding safety matters, nor its superior knowledge and expertise regarding safety issues, will create a duty to guarantee safety. Likewise, inspections and mere safety recommendations, which recommendations are not mandatory and are not within the authority of the defendant to remediate, cannot create such a duty.

Torts > ... > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty

HN9 **Affirmative Duty to Act, Voluntary Assumption of Duty**

Merely performing inspections required by federal law does not constitute maintenance so as to find an assumption of duty by the Louisiana State Department of Transportation and Development.

Torts > ... > Duty > Affirmative Duty to Act > Voluntary Assumption of Duty

HN10 **Affirmative Duty to Act, Voluntary Assumption of Duty**

Merely delivering a copy of federally-required reports with remarks regarding the deficiencies of a bridge does not constitute maintenance nor does it create a duty to guarantee safety.

Governments > Public Improvements > Bridges & Roads

HN11 **Public Improvements, Bridges & Roads**

See *La. Rev. Stat. Ann. § 48:757*.

Governments > Public Improvements > Bridges & Roads

HN12 **Public Improvements, Bridges & Roads**

See former *La. Rev. Stat. Ann. § 48:35* (amended 1984).

Governments > Legislation > Interpretation

HN13 **Legislation, Interpretation**

When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the Legislature. *La. Civ. Code Ann. art. 9*. Moreover, the words of a law must be given their generally prevailing meaning. *La. Civ. Code Ann. art. 11*.

Governments > Public Improvements > Bridges & Roads

HN14 **Public Improvements, Bridges & Roads**

As written, former *La. Rev. Stat. Ann. § 48:35* (amended 1984), does require the Louisiana State Department of Transportation and Development (DOTD) to withhold payment of any funds allocated to a political subdivision for such construction purposes if any such improvements constructed by the political subdivision fail to conform to DOTD standards. The key term in this statute is the adjective "such," which is defined as of this or that kind; having a quality just specified or to be specified. The use of the adjective "such" is a limitation on the objects described to those of a specific kind or quality previously specified or to be specified, giving the objects some particularity.

Governments > Public Improvements > Bridges & Roads

HN15 **Public Improvements, Bridges & Roads**

The language of former *La. Rev. Stat. Ann. § 48:35* (amended 1984) clearly provides for withholding funds allocated for construction purposes during a particular or specific nonconforming construction project for which the Louisiana State Department of Transportation and Development funds were allocated. The statute does not provide for the blanket withholding of funds allocated to a political subdivision for all construction projects or purposes.

Judges: KNOLL, Justice. KNOLL, Justice, additionally concurring.

Opinion by: KNOLL

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Opinion

[*639] [Pg 1] **KNOLL, Justice**

This fatal automobile accident case presents the legal questions of whether the Louisiana State Department of Transportation & Development ("DOTD") assumed a duty for an "off-system" bridge and whether *La. Rev. Stat. 48:35* required DOTD to withhold funds allocated to the Rapides Parish Police Jury ("RPPJ") until RPPJ brought the bridge into compliance with DOTD standards. Plaintiffs, John and Klea Hebert ("the Heberts"), brought a wrongful death and survival action against the State through DOTD and RPPJ for their young daughter's death as a result of a one-automobile accident that occurred on a RPPJ "off-system" road and bridge. Due to RPPJ's request for a bench trial, the trial was bifurcated and DOTD's alleged fault was tried to a jury. The jury found DOTD and RPPJ were both fifty percent at fault. In determining RPPJ's liability, the district judge assessed no fault **[**2]** to DOTD, attributed sixty percent fault to the deceased driver, and assessed the remaining forty percent fault to RPPJ. Both DOTD and the plaintiffs appealed. The court of appeal amended the judgment of the district court, assessing ten percent fault to the deceased driver, forty percent fault to RPPJ, and fifty percent fault to DOTD, and affirmed the [Pg 2] judgment as amended. We granted writs primarily to address the issue of DOTD's alleged duty for the "off-system" bridge. *Hebert v. Rapides Parish Police Jury, 06-2001, 06-2164 (La. 11/9/06), 941 So. 2d 29*. For the following reasons, we find plaintiffs failed to prove by a preponderance of the evidence that DOTD assumed a duty for the "off-system" bridge or that *La. Rev. Stat. 48:35* mandated DOTD should have withheld funds from RPPJ, and reverse the judgment of the court of appeal.

FACTS AND PROCEDURAL HISTORY

This case arises out of a tragic automobile accident that occurred on October 15, 1995, at approximately 9:00 p.m., on Haines Creek Bridge located on Philadelphia Road in Ward 11 of Rapides Parish, Louisiana. Katie Hebert ("Katie"), the Heberts' 17-year-old daughter, was driving **[**3]** her parents' 1992 four-door Pontiac Grand Am automobile eastbound on Philadelphia Road, an "off-system" road in rural Rapides Parish. As she entered an "on-grade" left-hand curve, the passenger side tires of her vehicle drifted onto the right side, unimproved, gravel shoulder and struck a deep drop-off of six to eight inches, which had formed at the roadway edge. Marks in the dirt and gravel on the shoulder indicated the right tires of the vehicle continued on the shoulder for approximately ninety-nine feet, then the vehicle traveled left and diagonally across the roadway. After traveling approximately fifty-six feet more, the vehicle "oversteered" to the right causing the vehicle to "yaw" out of control. After traveling another sixty feet, the driver's side door struck the end of the pipe bridge rail constructed of heavy gauge "drill-stem" three-inch pipe, which bordered the concrete bridge crossing Haines Creek. Guardrails were not attached to the ends of the pipe bridge rails. Both front and back rims on the left wheels had flattened, heavily scratched spots, which appeared to indicate that the vehicle was "up on two **[*640]** wheels" just prior to impact with the end of the bridge rail.

[4]** [Pg 3] After the impact, the vehicle rolled, coming to rest on the rail overturned with the front of the vehicle projecting from the bridge outward and suspended precariously above the creek. As a result of metal crush, Katie sustained severe mortal injuries and was tightly "pinned" within the vehicle. [1] Upon arrival of the volunteer fire department and ambulance personnel, the vehicle and damaged bridge were stabilized, life support initiated on Katie, and extrication procedures commenced. The total time from the collision to the air-med lift-off was approximately two hours. Although Katie was successfully resuscitated upon arrival at the hospital, she succumbed to her injuries and was pronounced dead at 2:42 a.m.

While investigating the accident, State Trooper Daniel B. Westmoreland noted that the eastbound approach to the curve and bridge **[**5]** where the accident occurred had no signs to indicate a speed limit or an impending curve, and lacked a roadway edge (fog-line). Additionally, the yellow-dashed line in the center of the roadway was badly faded in daytime and virtually invisible at night.

Philadelphia Road and the Haines Creek Bridge are part of an "off-system" roadway, owned and maintained by RPPJ. [2] The bridge was constructed by RPPJ in December of 1980 to replace the previous bridge crossing Haines Creek that was built in 1955 and closed to travel sometime earlier in 1980. In January of 1981, DOTD began to perform bridge inspections on the new construction every two years pursuant to federal regulations. In each of its inspection reports, DOTD made remarks regarding the substandard conditions of the bridge, particularly the lack of guardrails. This deficiency first appeared in the 1983 bridge

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[1] While the end of the bridge rail punctured the interior of the car between the front and rear seats, there is no indication in the record the rail pierced her body.

[2] According to trial testimony, all roads and bridges are classified as either "on-system," which are on state or federal maintained road systems, or "off-system," which are all other bridges opened to the public, but not on state or federal maintained road systems.

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inspection report issued [Pg 4] by DOTD, having not been previously noted in the 1981 bridge inspection report. Prior to Katie's accident, neither DOTD nor RPPJ took any action to remediate those conditions.

[6]** The Heberts sued RPPJ, DOTD, and the contractor who built the bridge, Slocum Construction and/or Slocum Manufacturing ("Slocum") and its liability insurers for damages. Because the suit was filed against the contractor more than five years after the applicable peremptive period had commenced, Slocum and its insurers were dismissed from the suit pursuant to *La. Rev. Stat. 9:2772*. The suit proceeded against the remaining defendants. The plaintiffs asserted that the absence of guardrails at the end of the bridge rails was the primary cause of Katie's death and that both defendants were responsible for this condition. [3] RPPJ and DOTD countered that Katie's excessive speed upon entering the curve was the cause of the accident and resulting injuries.

The district judge, completing the same verdict form completed by the jury, found RPPJ forty percent at fault and Katie sixty percent at fault. He did not assess any liability to DOTD. The jury, on the other hand, found **[**7]** RPPJ and DOTD to be equally at fault and assessed each with fifty percent liability for the accident. It assessed no fault to Katie. The jury's **[*641]** verdict form reflected an award for general damages to the Heberts in the amount of $ 750,000 each, a joint award of survival damages for Katie's pre-death pain and suffering in the amount of $ 25,000, and special damages to the plaintiffs in the amount of $ 43,871.24, for a total damage award of $ 1,568,871.24. The district judge's verdict form reflected an award of $ 500,000 to Mrs. Hebert in general damages, $ 700,000 in general damages to Mr. [Pg 5] Hebert, total survival damages in the amount of $ 100,000, and special damages totaling, $ 80,066.

The district court rendered a single judgment. [4] In accordance with the separate verdicts rendered by the court and the jury, DOTD was to pay the Heberts $ 375,000 each in general damages and $ 24,435.63 jointly, with legal interest on all amounts awarded from the date of judicial demand until paid. RPPJ was ordered to pay Mrs. Hebert $ 200,000, to pay Mr. Hebert $ 280,000, and to pay them jointly special damages in the amount of $ 53,591.50, with legal interest on all amounts awarded from **[**8]** the date of judicial demand until paid. All court costs were assessed equally to DOTD and RPPJ.

DOTD filed a motion for judgment notwithstanding the verdict and alternative motion for new trial, alleging there was insufficient evidence establishing DOTD paid for or participated in the construction of the bridge and no evidence that DOTD maintained the bridge, which the district court denied. DOTD suspensively appealed the judgment to which the Heberts answered, [5] and the matter was heard by a five-judge panel of the Third Circuit Court of Appeal that amended the district court's judgment and affirmed the judgment as amended, with one dissenting judge who would have found no liability against DOTD. *Hebert v. Rapides Parish Policy Jury, 05-471 (La. App. 3 Cir. 7/12/06), 934 So. 2d 912.* **[**9]**

Without first determining whether DOTD owed a duty, the appellate court analyzed the reconciling of the inconsistent verdicts. After analyzing the various approaches to reconciling conflicting verdicts, the court of appeal adopted the approach of the Fourth Circuit and undertook a *de novo* review of the record to make [Pg 6] its own independent findings. [6] Based on its *de novo* review, the appellate court determined that DOTD, as well as RPPJ, were both legally responsible for the maintenance of the bridge and concluded that the lack of the guardrails on the Haines Creek Bridge created a hazardous and dangerous condition. As to DOTD specifically, the court found:

> Without addressing whether *La. R.S. 48:35* imposes a legal duty on the DOTD in this case, we find that the DOTD assumed a duty to maintain this bridge because it carried out biennial inspections of this non-conforming bridge over **[**10]** a fifteen-year period, participated in the construction of the bridge in 1980, and had constructive and, eventually, actual knowledge that it was built in a non-conforming manner. *See Archon v. Union Pac. R.R., et al., 94-2728, 97-2743 (La. 7/2/96), 675 So. 2d 1055* (finding that the DOTD assumed a duty of upgrading **[*642]** a railroad crossing with active signals when it ordered a site survey and breached that duty when it failed to upgrade the crossing after the survey).

Hebert, 05-471 at pp. 12-13, 934 So. 2d at 922.

Although the panel concluded that Katie's negligence likely set the course for the accident to happen, it found the extent of the resulting harm to her was a direct result of her vehicle's impact

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[3] *See supra*, note 2.

[4] Even though this was a bifurcated trial, resulting in inconsistent verdicts, we did not grant this writ to address bifurcation and harmonization of verdicts, but to address whether DOTD owed a duty to the plaintiffs.

[5] RPPJ did not appeal and is not before this Court; the judgment against it is final.

[6] We are not commenting upon the correctness of the appellate court's harmonizing of the verdicts as we find the issue of DOTD's liability is dispositive.

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with the exposed and unguarded pipes of the bridge railing. Accordingly, the court found RPPJ's and DOTD's fault **[**11]** was more substantial and, therefore, allocated ten percent of the fault to Katie, fifty percent to DOTD, and forty percent to RPPJ. General damages in the amount of $ 750,000 each were awarded to Mr. and Mrs. Hebert for the wrongful death of Katie; $ 100,000 was awarded to the Heberts jointly for the pre-death pain and suffering of Katie; and various special damages were awarded as well.

LAW AND ANALYSIS

The seminal issue in this case is whether DOTD assumed a duty for the "off-system" bridge at issue and more specifically, whether plaintiffs proved the existence [Pg 7] of an assumption of duty by a reasonable preponderance of the evidence. Also of issue is whether La. Rev. Stat. 48:35 required DOTD to withhold all funding allocated to RPPJ until the bridge was brought into compliance with DOTD standards. [7]

[**12] *Negligence of DOTD*

HN1 Most cases alleging negligence on the part of a public body have been analyzed by this Court under the duty-risk analysis. *Cormier v. T.H.E. Ins. Co., 98-2208, p. 6 (La. 9/8/99), 745 So. 2d 1, 7*. In the classic duty-risk analysis, one of the inquiries the court must answer is: What, if any, duties were owed by the respective parties? *Cormier, 98-2208 at pp. 6-7, 745 So. 2d at 7*; *Mart v. Hill, 505 So. 2d 1120, 1122 (La. 1987)*. The particular facts and circumstances of each individual case determine the extent of the duty and the resulting degree of care necessary to fulfill that duty. *Cormier, 98-2208 at p. 7, 745 So. 2d at 7*. A plaintiff must prove that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to the plaintiff, the requisite duty was breached by the defendant, and the risk of harm was within the scope of protection afforded by the duty breached. *Id.*; *Berry v. State Through Dept. of Health and Human Resources, 93-2748, p. 4 (La. 5/23/94), 637 So. 2d 412, 414*.

HN2 The plaintiff bears the burden of proof and **[**13]** must establish his claim by a preponderance of the evidence. *Benjamin ex rel. Benjamin v. Housing Authority of New Orleans, 04-1058, p. 5 (La. 12/1/04), 893 So. 2d 1, 4-5*. Proof is sufficient to constitute a preponderance when the entirety of the evidence, both direct and circumstantial, shows the fact sought to be proved is more probable than not. *Cangelosi v. Our Lady of the Lake Regional Medical Center, 564 So. 2d 654, 664 (La. [Pg 8] 1989)*. It follows from this, that speculation, conjecture, mere possibility, and even unsupported probabilities are not sufficient to prove a plaintiff's claim. *See Coon v. Placid Oil Co., 493 So. 2d 1236, 1240 (La. App. 3d Cir.), writ denied, 497 So. 2d 1002 (La. 1986)*.

HN3 Whether a particular duty should be imposed on a particular governmental agency is a policy question to be determined by the court. *Cormier, 98-2208 at **[*643]** p. 7, 745 So. 2d at 8*. The inquiry is whether the plaintiff has any law-statutory, jurisprudential, or arising from general principles of fault-to support his claim. *Berry, 93-2748 at p. 4, 637 So. 2d at 414*. It is a court's role **[**14]** to determine whether there is any jurisprudential or statutory rule, or policy reason why, under the facts and circumstances of the case, the state would owe a duty to compensate the plaintiff for his personal injuries. *Cormier, 98-2208 at pp. 7-8, 745 So. 2d at 8*; *Berry, 93-2748 at p. 5, 637 So. 2d at 414*. Consequently, whether a duty is owed is a question of law for the court to decide based upon the facts and circumstances of the case as established in the evidence of record. *Lemann v. Essen Lane Daiquiries, Inc., 05-1095, p. 7 (La. 3/10/06), 923 So. 2d 627, 633*.

In the present case, the Heberts presented two theories for recovery against DOTD: (1) the bridge was constructed using state or DOTD funds, and DOTD participated in the construction and maintenance of the bridge, thereby it assumed a duty that the bridge should have met DOTD's minimum safety standards; and (2) DOTD knew that the bridge was constructed without guardrails, in violation of its own minimum safety standards, and therefore, as provided by La. Rev. Stat. 48:35, DOTD was required to withhold from RPPJ any funds allocated to RPPJ for construction **[**15]** purposes until guardrails were added to the ends of the bridge. The [Pg 9] plaintiffs had the burden of proving these theories by preponderance of the evidence. We will now discuss each theory in turn.

Assumption of Duty

At issue in this case is the substandard condition of an "off-system" bridge. ***HN4*** While the State has a duty to maintain and render safe all bridges and roads included in the state highway system, *i.e.*, "on-system" bridges, where the bridge is not on the state highway, *i.e.*, an "off-system" bridge, and falls within a parish, but outside the corporate limits of any municipality, the duty to maintain the bridge and render it safe rests with the parish. *Breshers v. Dept. of Transp. and Development, 536 So. 2d 733, 736 (La. App. 3d Cir. 1988), writ denied, 541 So. 2d 854 (La. 1989)*. In this case, the duty to maintain and render safe the bridge in question in accordance with the state safety standards rests with

[7] Because we find these issues dispositive, we pretermit discussion of all other issues, to include the issue of harmonization of the inconsistent verdicts, raised in the applications.

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RPPJ as the bridge is located in Rapides Parish on a RPPJ road. Because the duty by law fell upon RPPJ, DOTD could be found liable for the breach of this duty only if the evidence demonstrates DOTD assumed the **[**16]** duty of RPPJ for the bridge.

HN5 Under Louisiana law, one who does not owe a duty to act may assume such a duty by acting. Frank L. Maraist & Thomas C. Galligan, *Louisiana Tort Law* 5.07[6], 5-27 (Supp. 2006). In *Bujol v. Entergy Services, Inc., 03-0492, p. 16 (La. 5/25/04), 922 So. 2d 1113, 1129*, this Court explained this concept of assumption of duty and stated an assumption of duty arises when the defendant (1) undertakes to render services, (2) to another, (3) which the defendant should recognize as necessary for the protection of a third person. *Bujol* involved the alleged assumption of the duty of a subsidiary to provide a safe working environment by a parent corporation under the "Good Samaritan Doctrine" as codified in *Section 324A of the Restatement (Second) of Torts. 03-0492 at pp. 14-15, 922 So. 2d at 1128*. ***HN6*** We find the relationship [Pg 10] between a parent corporation and its subsidiaries analogous to the relationship between DOTD and the highway departments of political subdivisions of the State, such as RPPJ. Therefore, we find the assumption of duty doctrine announced in *Bujol* applicable in this **[**17]** case.

[*644] The *Bujol* court described the action required by the defendant in such instances as an affirmative undertaking and further explained that ***HN7*** the determination of whether such an action was taken involves an examination of the scope of the defendant's involvement, the extent of the defendant's authority, and the underlying intent of the defendant. *03-0492 at p. 18, 922 So. 2d at 1131*. As in other civil cases, the burden is on the plaintiff to prove by a preponderance of the evidence facts sufficient to establish the action undertaken by the defendant. *See e.g., Bujol, 03-0492 at p. 16, 922 So. 2d at 1130*.

However, ***HN8*** neither a defendant's concern with safety conditions and its general communications regarding safety matters, nor its superior knowledge and expertise regarding safety issues, will create a duty to guarantee safety. *Bujol, 03-0492 at p. 21, 922 So. 2d at 1133*. Likewise, inspections and mere safety recommendations, which recommendations are not mandatory and are not within the authority of the defendant to remediate, cannot create such a duty. *Id.* at 20-22, 1133-34.

The Heberts seek to establish DOTD assumed RPPJ's **[**18]** duty for the Haines Creek Bridge by proving DOTD funded the bridge replacement project, DOTD participated in the construction of the bridge, or DOTD maintained the bridge. Under the facts and circumstances as established in the evidence of record, we find the plaintiffs did not prove facts, *i.e.*, actions of DOTD, sufficient to establish DOTD affirmatively undertook or assumed the duty of RPPJ for the bridge. The reasons we so find are threefold.

[Pg 11] First, there is no evidence of record that DOTD funded the reconstruction of the Haines Creek Bridge. What the evidence does clearly establish is that the funds used came from the State. Cecil Raggio, a retired RPPJ Parish Engineer and the only fact witness with first-hand knowledge of the reconstruction process, so testified, but clarified that, by saying the funds came from the State, he did not intend to mean DOTD, explaining:

> I don't know if it came through an agency of the State. I don't know if it was, per se, DOTD. I know that our bridges that we maintain, we communicate with DOTD at all times when work is being done on them. I believe that the funds were obtained possibly obtained through [the] Governor's Office, **[**19]** I'm not sure.

According to trial testimony, such funds would have likely come through a special fund of the Governor's Office for special projects over which DOTD had no control.

Mr. Raggio also testified regarding his December 11, 1980 letter addressed to Mr. Billy C. Daniels, District Maintenance Engineer for DOTD, in which he notified DOTD of the new construction:

> Please be advised that the Rapides Parish Police Jury has replaced the above referenced bridge which is located on the Philadelphia Road in Ward 11. This bridge crosses Haines Creek, and was completed on December 9, 1980.
>
> The new bridge is four-twenty foot spans constructed of treated timber piles and headwalls, precast concrete caps and decking. The width of the new bridge is 24' - 9" from out to out with 3" pipe hand railing.

The letter contained a project number, "737-05-39." Much testimony was elicited regarding this number in the plaintiffs' attempt to prove this number was a DOTD number. Plaintiffs sought to prove this because of the testimony of Rhett Desselle, DOTD's representative at trial, who testified that if DOTD monies had been used to finance the bridge construction, the project **[**20]** would have received a DOTD number. Mr. Raggio testified that the **[*645]** number was a "State project number," but he did not know "whether it's a DOTD number." The only origin that the number had [Pg 12] was that RPPJ had to refer to that number when writing to the State for reimbursement and that could have well been to the Governor's Office. On cross-examination by plaintiffs' counsel, Mr. Raggio agreed that it would be fair for one to be led to believe that the number was probably a DOTD number, because the number appeared in a communication between RPPJ and DOTD. Yet, as noted above, that communication contained no request for

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payment, but was merely a notification of completion and a description of the construction.

Mr. Desselle, on the other hand, explained the reason why RPPJ sent the letter to DOTD:

> They're required to. We maintain the inventory of all the bridges in the state whether they are our bridges or off-system bridges, owned by other people. Each time they have a change to that bridge whether they close it, they change the load posting on it, they put in a new bridge, they close it, take it out of service, they are required to inform us of what changes they are **[**21]** making to that bridge so we can update the inventory. And that information is passed on, not only to our headquarters in Baton Rouge, but also to the Federal Highway Administration.

As to the funding of the project, Mr. Desselle testified that after researching DOTD's records he could find no record that the federal government, DOTD, or the State funded this reconstruction, although he conceded that the State could have funded this project:

> To my knowledge and my research of the records of DOTD, no funds to repair this bridge came through DOTD. I am aware of another avenue. The Governor, the Governor's office has some discretionary funds for emergency replacement of bridges or repair of bridges that I am familiar with. Those funds do not come through DOTD and we really don't have anything to do with it. Usually the bridge owner makes application to the Governor's office. Part of that application is, there is a little checklist that I have to fill out as the Maintenance Engineer to say that there is a bridge there. This entity is the owner. And answer a few little questions and they make, they make this application to the Governor's office. What happens from there, it's **[**22]** outside of DOTD's realm and outside of what goes on that I am aware of what goes on.

[Pg 13] Regarding the project number "737-05-39," Mr. Desselle testified he researched the project number in DOTD's project history data base that dated back to the 1930s and could not find any information on that project number. The number simply did not exist in DOTD's records. He further explained DOTD's project numbering system with regards to off-system bridges:

> A. Okay. On the project number we have a numbering scheme. The first, it starts out there's three digits, a dash, two digits and a dash, and another two digits. The first three digits for our off-system bridge replacement program is always going to be 713. That signifies that the money is coming out of off-system, federal off-system bridge replacement funds.
> Q. You said "713?"
> A. 713
> Q. Okay. Can you read the first three numbers of the project number for me?
> A. 737.
> Q. Not 713.
>
> **[*646]** A. That's correct.
> Q. Okay. And, -
>
> A. The second two digits normally signify the parish that the bridge is in. What we do is we take all the parishes and put them in alphabetical order and we number them. Rapides Parish is parish number forty **[**23]** (40) in that numerical order.
> Q. And what number is Rapides Parish, is designated for Rapides Parish?
> A. Forty (40).
> Q. And, can you read for the jury what number is there?
> A. 05.
> Q. And the last section of the number. Can you tell me -?
> A. It's 39.
> Q. And what does that refer to?
> A. In our numbering scheme, it's just a unique number for that individual bridge replacement project. That's the only thing unique to that bridge or to that project.

On cross-examination, Mr. Desselle did concede the project number at issue had the same format as older DOTD project numbers.

Although the State may have funded this project, most probably through the Governor's Office, the evidence does not preponderate that DOTD monies were used in the funding of the bridge reconstruction. Mr. Raggio's concession regarding the [Pg 14] *probability* that the number contained in his letter to DOTD was a DOTD project number is not supported by any evidence of record. Therefore, we find the plaintiffs failed to prove by a preponderance of the evidence DOTD funded the project and likewise that by funding the project, DOTD assumed the duty of the owner, RPPJ, to construct the bridge in accordance **[**24]** with its safety standards.

Second, while plaintiffs make allegations that DOTD supervised the construction of the bridge, the record does not support their allegations. The evidence at best is too speculative on this issue. Plaintiffs called Mr. Raggio, a former RPPJ engineer, under cross-examination, who was the only fact witness employed by either RPPJ or DOTD at the time of the bridge construction. He testified RPPJ took "opened and sealed" bids for the construction of a bridge to replace the bridge crossing Haines

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Creek, built in 1955 and closed in 1980. Because Slocum was the low bidder, RPPJ awarded the bid to Slocum's construction company. Slocum did not provide RPPJ with any plans for building the bridge, just the cost of the proposed construction. RPPJ paid Slocum after the bridge was built in December of 1980, once Mr. Raggio wrote a letter to the treasurer of RPPJ recommending payment, which he did either during the construction or at the completion of the bridge. Mr. Raggio could not recall if DOTD participated in the construction of the bridge in 1980. Moreover, although progress reports were kept by Mr. Raggio throughout the construction process for payment from RPPJ, **[**25]** no such reports were submitted to the court, nor were any documents requesting payment from either RPPJ or the State.

Significantly, we note Slocum did not testify at trial, and if DOTD supervised the construction of the bridge as plaintiffs claim, Mr. Slocum could have verified this [Pg 15] fact. Arguably, DOTD did not call Slocum, but the burden rests with plaintiffs to prove their allegations by a preponderance of the evidence, not DOTD.

Jerry Burnaman, a DOTD bridge inspector, also testified. He stated he had worked for DOTD for about twenty-two years at the time of trial, which would indicate his employment began in 1982 and **[*647]** that he was not employed with DOTD at the time of the reconstruction of the Haines Creek Bridge. Based upon his knowledge and experience, he testified that if a parish bridge is constructed using State funds, DOTD has one of its inspectors present at the job location during the construction phase of the project to see that the bridge is built under the standards of the plans. He did not know, however, if there was a state inspector present when the bridge in question was built:

> A. At this particular bridge, I couldn't say this it was a bridge, you **[**26]** know, bridge inspector at it to inspect it as it was built. This is, this was before we started our bridge program when this bridge was constructed.
> Q. So, if State funds were being used or DOTD funds were being used would there have been a state inspector there?
> A. That's correct.

We find this ambiguous testimony does not establish DOTD inspected the Haines Creek bridge during construction. Consequently, we find plaintiffs' scant evidence on this issue fails to preponderate that DOTD participated in the construction or even inspected the construction of this bridge.

Third, as to plaintiffs' allegation that DOTD participated in the maintenance of the bridge because of its inspections after completion of construction, we find inadequate proof in the record. ***HN9*** Merely performing inspections required by federal law does not constitute maintenance so as to find an assumption of duty by DOTD, especially when DOTD has no authority under law to actually maintain the "off-system" bridge at issue. *See e.g., Bujol, 03-492 at pp. 20-21, 922 So. 2d at 1133-34.* No party in this case disputes DOTD inspected the Haines Creek Bridge after its [Pg 16] reconstruction **[**27]** or that DOTD hand-delivered its inspection reports to the RPPJ almost immediately after each inspection. What the evidence does not demonstrate is that the inspection constituted maintenance of the bridge.

Although all the inspection reports maintained in the files of RPPJ regarding the Haines Creek Bridge were introduced through the testimony of Mr. Raggio, Mr. Desselle explained the purpose of the inspections:

> The main purpose of the bridge inspection reports is to comply with the National Bridge Inspection Standards. And in order for us to do that, we have to do the inspections every two years, prepare a report, and turn it over to the bridge owner.
> ***
> In 19-, I think, '79, and the legislation, the federal legislation, I think, started in '78, National Bridge Inspection Standards came into being and the federal government required each state transportation agency to develop a program to inventory all of the bridges that are in public use, to inspect them every two (2) years, to determine how much load that they can carry safely.

Admittedly, even though the bridge inspection reports would make the bridge owner aware of the bridge's deficiencies as to DOTD **[**28]** safety standards under the section of the reports entitled "Remarks," Mr. Desselle stated the reports were made in accordance with federal regulations under the National Bridge Inspection Standards and the remarks were merely recommendations, but were not mandatory.

Although adopted in 1971 by the Federal Highway Administration to implement section 26 of the Federal-Aid Highway Act of 1968, *23 U.S.C. 116(d)*, the National **[*648]** Bridge Inspection Standards [8] were not made applicable to "all structures defined as bridges [9] located on all public roads" until

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[8] *23 U.S.C. 151* authorizes the establishment of the standards for the proper safety inspection and evaluation of all highway bridges and sets forth the minimum requirements of the standards.

[9] A bridge is defined "as a structure including supports erected over a depression or an obstruction, such as water, highway, or railway, and having a track or passageway for carrying traffic or other moving loads, and having an opening measured along the center of the roadway of more than 20 feet between undercopings of abutments or spring lines of arches, or extreme ends of openings for multiple boxes; it may also

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1979. *See* 44 Fed. Reg. 25435; [Pg 17] *23 CFR 650.301*, 260 (1980). [10] Through the 1979 amendment, "off-system" bridges were included in those bridges subject to the standards, and each state highway department was required to "include a bridge inspection organization" capable of performing inspections, preparing reports, and determinating ratings in accordance with the provisions of the American Association of State Highway and Transportation Officials's ("AASHTO") Manual for Maintenance Inspection of Bridges 1978 ("the Manual") [11] and the standards contained therein. **[**29]** *See 23 CFR 650.303*, 260 (1980); 44 Fed. Reg. 25435.

[30]** Each bridge was to be inspected at regular intervals not to exceed 2 years in accordance with Section 2.3 of the Manual, but the depth and frequency to which the bridges were to be inspected depended on such factors as age, traffic characteristics, state of maintenance, and known deficiencies. *See 23 CFR 650.305*, 261 (1980). A bridge inspection was described as the use of techniques required to determine the physical condition of the structure. Manual, Sec. 2.1 at 3. These inspections were required to include several observations, [12] the findings and results of which had to be recorded on standard forms. *See 23 CFR 650.309*, 261 (1980). The data required to complete the forms and the functions which had to be performed to compile the data [Pg 18] were contained in section 3 of the Manual, [13] which, as pertinent to this case, **[*649]** stated that the records "should provide a full history of the structure including all recommendations for strengthening and repair along with the actions which have been taken on these recommendations." *See id*; Manual, Sec. 3.1 at 18. Additionally, "all recommendations and direction for corresponding **[**31]** repair and maintenance" of the bridge and its site, all signs of distress, failure, or defects worthy of mention, and descriptions of condition and appraisal had to be noted with sufficient accuracy so that another inspector at a future date could easily make a comparison of the condition or rate of disintegration. Manual, Sec. 2.4.3 at 16.

[32]** Moreover, through the 1979 amendment, each state was required to prepare and maintain an inventory of all bridge structures subject to the Standards, *i.e.*, all bridges located on public roads. *See 23 CFR 650.311(a)*, 261(1980); 44 Fed. Reg. 25435. Under these Standards, certain structure inventory and appraisal data had to be collected and retained within the various departments of the state organization for collection by the Federal Highway Administration as needed. *See id.* All bridges had to be inventoried by December 31, 1980, *see 23 CFR 650.311(b)*, 261 (1980), and the inventory reports, in accordance with the Standards, had to contain the general description, history, and plans of the bridge, and incorporate the inspection reports and stress analysis, which reflected conditions and recommendations regarding the bridge and its site. Manual, Sec. 3.2.1 at 18.

[Pg 19] As demonstrated in the reports on file with the RPPJ regarding the Haines Creek Bridge, DOTD first inspected the structure on February 26, 1980. This inspection report included a structure inventory and appraisal sheet identical to that **[**33]** contained in the Manual. *See* Manual, Plate 10 at 55. The inspection report contained the information required by the Manual. [14] The bridge was next inspected on June 25, 1980, and

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include multiple pipes, where the clear distance between openings is less than half of the smaller contiguous opening." *23 CFR 650.301*, 260 (1980).

[10] Previously, the standards applied only to "all structures defined as bridges located on any of the Federal-aid highway systems." *See 23 CFR 650.301*, 270 (1979).

[11] In its preface, the Manual explained its purpose

to serve as a standard and to provide uniformity in the procedures and policies of determining the physical condition and maintenance needs of highway bridges. The procedure for correcting known deficiencies are outside the scope of this manual and no attempt has been made to cover this field.

Manual, Preface, at 1.

[12] These observations included but were not limited to (1) approaches, (2) waterways, (3) piers and abutments, (4) bents, (5) stringers, (6) steel girders, (7) concrete girders, (8) bearings, (9) expansion joints, (10) deck, (11) curbs, (12) sidewalks, (13) bridge railings, (14) barrier railing, (15) trusses (steel), (16) trusses (timber), (17) movable bridges, (18) suspension span, (19) signs, (20) encroachments, (21) aesthetics, (22) general observations. Manual, Sec. 2.4.2 at 5-15.

[13] The information at a minimum necessary to compile these reports included (1) the bridge number, (2) date of investigation, (3) the full name of the bridge, (4) the location, (5) description, (6) skew angle, (7) the number of spans and the span lengths, (8) the over-all length, (9) roadway width, (10) surfacing, (11) sidewalks, (12) railing, (13) alignment, (14) traffic lanes, (15) design live loading, (16) waterway, (17) other features crossed, (18) clearances, (19) date built, (20) plans, (21) plans and dimensions if plans not on file, (22) bridge inspection report, (23) restrictions, (24) miscellaneous, (25) stress analysis, (26) paint record, (27) signature, (28) channel profile, (29) encroachments, (30) environmental conditions, (31) federal aid system, and (32) average daily traffic. Manual, Sec. 3.2.2 at 18-21.

[14] This information included the location, bridge type, bridge name, year built, bridge length, roadway width and surface, average daily traffic, structure number, date of inspection and date of the next inspection, specifics of the deck, specifics of the superstructure, which included the bearings, girders, stringers, and trusses, the condition of the substructure, which included the abutments, bents, and piers, the condition of the traffic services, the waterway, the approach, movable spans, and general notes and remarks.

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in the report, it was noted that the bridge had been removed from service and that the site would "be checked one year from date for new bridge or pipes." The next inspection occurred five months earlier than scheduled on January 23, 1981, which report noted "[t]his is a new bridge that replaces previous bridge." From that date until the July before the accident at issue, the bridge was inspected every two years.

[34]** The reports were issued on standard forms, which contained a "Remarks" section, and a copy of each report was given to the owner of the bridge, in this case RPPJ. Notably, the information collected in each report on file with the RPPJ coincided with the information required by the Manual, including the recommendations regarding deficiencies contained in the "Remarks."

This evidence in conjunction with the testimony in this case clearly establishes the inspections were conducted in accordance with federal law, and DOTD only inspected the bridges and made remarks regarding noted deficiencies because it was required by the federal standards to do so. The federal standards did not require **[*650]** DOTD or any state agency to correct the deficiencies, but rather merely mandated that the various transportation departments maintain records of the deficiencies in their [Pg 20] inspection and inventory reports for the benefit of future inspections, while providing no procedure to remedy the noted deficiencies.

Moreover, ***HN10*** merely delivering a copy of these reports with remarks regarding the deficiencies of the bridge does not constitute maintenance nor does it create a duty to guarantee safety. **[**35]** *See Bujol, 03-0492 at pp. 20-21, 922 So. 2d at 1133-34*. The remarks, while directed to the bridge owner, were mandated by the standards for record-keeping purposes and future inspections. Further, given the fact that the deficiencies noted in the remarks sections, *i.e.*, the need for guardrails, were not remediated prior to the accident, the record cannot establish these reports were used in the actual maintenance of the bridge, even though plaintiffs categorize these reports as free inspections to aid RPPJ in its maintenance of the bridge. As emphasized by plaintiffs' counsel, DOTD obviously did have knowledge of RPPJ's failure to remediate the deficiencies, yet such information was required to be recorded by the federal standards, but not to be remedied.

Additionally, DOTD had no authority under Louisiana law to maintain the "off-system" Haines Creek Bridge. The Legislature by enacting *La. Rev. Stat. 48:757* prohibits such action by DOTD under the facts of this case. [15] In light of this [Pg 21] prohibition and the evidence of record that demonstrates DOTD inspections were done in accordance with the federal mandate of the National Bridge **[**36]** Inspection Standards, we find DOTD did not assume the duty of RPPJ to maintain the bridge in question or that plaintiffs sufficiently established such an undertaking by DOTD. Furthermore it seems illogical economically and administratively to assume such a duty is imposed to maintain "off-system" bridges based on the mandated inspections when the federal law that obligates DOTD **[*651]** to inspect does not require maintenance, but merely a record-keeping function, and state law prohibits such maintenance.

[37]** Finding plaintiffs' assumption of duty theory meritless, we turn now to a discussion of plaintiffs' theory of liability

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[15] *La. Rev. Stat. 48:757* provides, in pertinent part:

> ***HN11*** A.(1) The Department of Transportation and Development shall perform no work on the parish road system or on any other roads or streets which are not in the state highway system, whether such work is construction or maintenance and whether the work is done at the expense of the state or at the expense of the governing authority of the parishes, except in the following circumstances:
>
> (a) The department shall construct, maintain, and improve roads, whether hard surfaced or otherwise, within state parks and state historic sites as defined in *R.S. 56:1684*, and connect such sites with existing highways.
>
> (b) The department is authorized to perform work on any off-system bridge which is included as a TIMED project within the provisions of *R.S. 47:820.2(B)(1)(b)*.
>
> (c) The department is authorized to perform work on intersectional improvements on parish roads or municipal streets and to perform work on parish roads or municipal streets for purposes of operational or safety reasons when the parish road or municipal street intersects with a state highway which is programmed for improvement or construction; however, the distance of such off-system work shall conform to AASHTO design standards as adopted
>
> ***
>
> C. In addition, in instances in which the federal government has established programs pertaining to off-system construction, maintenance, or improvement, the department may participate in said projects and provide necessary matching funds including but not limited to monies in the Transportation Trust Fund. Funding for programs under the provisions of this Subsection shall be subject to the availability and appropriation of funds in excess of the total funds appropriated for the Parish Transportation Fund in Fiscal Year 1994-1995.
>
> Circumstances giving rise to the exceptions to the prohibition do not exist in this case.

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arising from La. Rev. Stat. 48:35.

Statutory Liability-La. Rev. Stat. 48:35

When the Haines Creek Bridge was built in 1980, La. Rev. Stat. 48:35 provided:

> HN12 The office of highways of the Department of Transportation and Development shall adopt minimum safety standards with respect to highway design, construction and maintenance. These standards shall correlate with and, so far as possible, conform to the system then current as approved by the American Association of State Highway and Transportation Officials. Hereafter, the state highway system and all public roads, highways and streets under the jurisdiction of any political subdivision of this state shall conform to such safety standards.
> ***
> [Pg 22] *If any such improvements constructed by a political subdivision of this state fail to conform to such standards, payment of any funds allocated to said political subdivision for such construction purposes shall be withheld by the Department of Transportation and Development* **[**38]** *until such time as the standards established by the department are complied with.* (Emphasis added). [16]

[39]** Plaintiffs assert under this statute DOTD was required to withhold all funding to RPPJ until RPPJ brought the bridge in question up to DOTD standards. A plain reading of the statute, however, does not support such an interpretation.

HN13 When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the Legislature. La. Civ. Code art. 9; Pumphrey v. City of New Orleans, 05-979, p. 10 (La. 4/4/06), 925 So. 2d 1202, 1209. Moreover, the words of a law must be given their generally prevailing meaning. La. Civ. Code art. 11; Pumphrey, 05-979 at p. 11, 925 So. 2d at 1209-10.

HN14 As written, La. Rev. Stat. 48:35 does require DOTD to withhold payment of any funds allocated to a political subdivision for "such construction purposes" if any "such improvements" constructed by the political subdivision fail to conform to DOTD standards. The key term in this statute is the adjective "such," which is defined as "of this or that kind; having a quality just specified or to **[**40]** be specified." *Merriam Webster Desk Dictionary*, "such *adj*," 542 (1995). The use of the adjective "such" is a limitation on the objects described to those of a specific kind or quality previously **[*652]** specified or to be specified, giving the objects some particularity.

[Pg 23] With this understanding, "such improvements" clearly refer to particular roads, highways, and streets as specified in the previous paragraph constructed by the political subdivision with funds allocated by DOTD. "Such standards" logically refer to the standards specified in the preceding paragraph to be adopted by DOTD in conformity with AASHTO standards, and "such construction purposes" unambiguously refer to the specific improvements constructed by the political subdivisions mentioned previously in the statutory sentence. Thus, HN15 the language of the statute clearly provides for withholding funds allocated for construction purposes during a particular or specific non-conforming construction project for which DOTD funds were allocated. The statute does not provide for the blanket withholding of funds allocated to RPPJ for all construction projects or purposes. Moreover, testimony at trial demonstrated DOTD **[**41]** has always interpreted the statute as requiring the withholding of funds allocated to "that individual [DOTD funded] construction project," not on all construction projects in general.

Clearly, the statute applies to funding of a particular construction project not in conformity with the standards and requires the funds allocated from DOTD be withheld until the particular project conforms with DOTD standards. The only funding at issue in this case subject to La. Rev. Stat. 48:35, therefore, is the funding for the 1980 bridge reconstruction project. Because the plaintiffs failed to establish DOTD funded the bridge reconstruction project at issue and cannot, therefore, prove DOTD could have withheld funds without proof such funds were allocated by DOTD, the statute is not applicable under the facts of this case. [17] Thus, we find this theory of

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[16] This is the version of the statute the district court allowed submitted to the jury. Notably, in 1984, the second paragraph of this statute was amended to state that "payment of any funds allocated to the political subdivision for the construction purposes shall be withheld…." 1984 La. Acts No. 625, § 1. This language does not affect our interpretation of the provisions, but rather, further bolsters our finding that the required withholding of funds applies to *the* particular construction project, as "the" is even more definitive than "such." *See infra.* Prior to the accident at issue, the withholding provisions had not otherwise been amended. Nevertheless, our interpretation requires the application of the statutory provisions in effect at the time of construction. Additionally, the 1986 amendment substituted "highway and bridge design" for "highway design" in the first sentence. La. Acts 1986, No. 119, § 1.

[17] Because the statute is not applicable, we do not address whether DOTD can be held liable for personal injuries based on DOTD's failure to withhold funds for specific construction projects under the statute.

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liability meritless.

[42]** [Pg 24] ***Conclusion***

In summation, we find the plaintiffs failed to sufficiently prove to a legal certainty by a preponderance of the record evidence DOTD assumed the duty of RPPJ to construct and maintain the Haines Creek Bridge in conformity with DOTD safety standards as there is no evidence DOTD funded or participated in the construction or maintenance of the bridge. We further find that merely inspecting a bridge as mandated by federal law does not constitute an assumption of duty for maintenance and safety. Finally, we find *La. Rev. Stat. 48:35* as written mandates the withholding of funds allocated for construction purposes during a particular non-conforming project for which DOTD funds are allocated and that the statute is not applicable in this case given the absence of evidence establishing DOTD funded the 1980 bridge reconstruction project.

DECREE

For the foregoing reasons, we reverse the judgment of the court of appeal and render judgment finding DOTD had no liability, thereby dismissing plaintiffs' claim against DOTD, with prejudice.

REVERSED and RENDERED.

Concur by: KNOLL

Concur

[*653] KNOLL, Justice, additionally concurring

[43]** I additionally concur to explain my dissent in *Bujol v. Entergy Services, Inc.*, 03-0492 (La. 5/25/04), 922 So. 2d 1113, does not affect the issue before this court on the law of assumption of duty. I dissented on grounds that I found no manifest error in the findings of the lower courts.

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EXHIBIT – 15

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Lozano v. Alvarez

Court of Appeals of Kansas

October 2, 2015, Opinion Filed

No. 113,060

Reporter
2015 Kan. App. Unpub. LEXIS 833 *; 356 P.3d 1077; 2015 WL 5750439

DARIO LOZANO, Appellant, v. OSCAR ALVAREZ, ARACELY ALVAREZ, Appellees.

Notice: NOT DESIGNATED FOR PUBLICATION.

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PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Subsequent History: Review granted by Lozano v. Alvarez, 2016 Kan. LEXIS 524 (Kan., Oct. 21, 2016)

Affirmed by Lozano v. Alvarez, 306 Kan. 421, 394 P.3d 862, 2017 Kan. LEXIS 287 (May 26, 2017)

Prior History: **[*1]** Appeal from Ford District Court; VAN Z. HAMPTON, judge.

Disposition: Affirmed.

Core Terms

refile, savings, trial court, plain language, merits, statute of limitations, due time, original action, expired, new action, lack of prosecution, antecedent, commence, phrases, trial court's dismissal, original case, limits, noun

Counsel: Peter J. Antosh, of Garcia & Antosh, LLP, of Dodge City, for appellant.

Andrew M. Stein, of Doll Law Firm, LLC, of Dodge City, for appellees.

Judges: Before GREEN, P.J., HILL, J., and TIMOTHY G. LAHEY, District Judge, assigned.

Opinion

MEMORANDUM OPINION

Per Curiam: After two dismissals for lack of prosecution, Dario Lozano, the plaintiff-appellant, filed his third case against Oscar Alvarez and Aracely Alvarez, the defendants-appellees. This was Lozano's third case filed against the Alvarezes, but the second case was refiled under the Kansas savings statute, K.S.A. 60-518. Citing *Clanton v. Estivo*, 26 Kan. App. 2d 340, Syl. ¶ 1, 988 P.2d 254 (1999), which held that a plaintiff may use the savings provision of K.S.A. 60-518 only once, the Alvarezes moved to dismiss Lozano's third case with prejudice. The trial court found that *Clanton* controlled and dismissed Lozano's case with prejudice. On appeal, Lozano asks this court to reverse the trial court's dismissal. Lozano argues that the trial court must be reversed because the *Clanton* decision it relied on incorrectly interpreted K.S.A. 60-518. Nevertheless, Lozano's arguments about why the *Clanton* court incorrectly interpreted K.S.A. 60-518 are unpersuasive. Accordingly, we affirm the trial court's dismissal of **[*2]** Lozano's case with prejudice.

The facts in this case are undisputed. It is worth noting, however, that Lozano does not include any documents associated with his first or second cases against the Alvarezes, or the trial court orders dismissing those cases, in the record on appeal. All the important dates listed below come from the Alvarezes' motion to dismiss Lozano's third case and the transcript of the hearing on this motion.

On December 4, 2010, Lozano and the Alvarezes got into a physical fight. Lozano suffered a head injury during the fight. On December 5, 2011, Lozano filed a civil case against the Alvarezes alleging that he suffered both economic and noneconomic losses exceeding $75,000 because of the fight. This case will be referred to as *Lozano I*. On August 28, 2012, after the statutory period of limitations had run, the trial court dismissed *Lozano I* for lack of prosecution.

On February 27, 2013, Lozano refiled his civil case against the Alvarezes under the Kansas saving statute, K.S.A. 60-518. This case will be referred to as *Lozano II*. The trial court dismissed *Lozano II* on December 31, 2013, for lack of prosecution.

Then, on June 18, 2014, Lozano refiled his case against the

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Alvarezes **[*3]** under K.S.A. 60-518. This case will be referred to as *Lozano III*. The Alvarezes moved to dismiss *Lozano III* with prejudice. In this motion, the Alvarezes argued that the trial court must dismiss *Lozano III* with prejudice because *Clanton v. Estivo*, 26 Kan. App. 2d 340, Syl. ¶ 1, 988 P.2d 254 (1999), held that a plaintiff may use the savings provision of K.S.A. 60-518 only once after the statute of limitations had run.

The trial court held a hearing on the motion to dismiss. At the hearing, Lozano's attorney agreed that *Clanton* required the dismissal of *Lozano III* with prejudice. Nevertheless, Lozano's attorney asserted that the *Clanton* court incorrectly interpreted the plain language of K.S.A. 60-518. Lozano's attorney further asserted that the plain language of K.S.A. 60-518 allowed multiple refilings.

Because the trial court ruled that *Clanton* controlled, the trial court disagreed with those arguments. Thus, the trial court dismissed *Lozano III* with prejudice.

Did the Trial Court Err When It Found That Lozano Was Not Entitled to the Benefit of the Savings Statute After Two Prior Dismissals for Lack of Prosecution?

Lozano asserts that the trial court erred when it dismissed *Lozano III* with prejudice. Lozano contends that under the plain language of K.S.A. 60-518, a plaintiff's case may be refiled and saved multiple times. **[*4]** Essentially, Lozano contends that a plaintiff may continue to refile his or her case under K.S.A. 60-518 indefinitely as long as the following requirements are met: (1) the trial court dismissed the plaintiff's last case for a reason other than on the merits after the statute of limitations had run; and (2) the plaintiff refiled his or her new case within 6 months of the trial court's last dismissal. Although Lozano recognizes this court's holding in *Clanton*, Lozano makes several arguments in an attempt to undermine *Clanton* on appeal. Based on those arguments, Lozano asks this court to reverse the trial court's dismissal and remand for further proceedings.

Standard of Review

An appellate court reviews the trial court's decision to grant a motion to dismiss de novo. *Hale v. Brown*, 287 Kan. 320, 322, 197 P.3d 438 (2008). When the trial court has granted a motion to dismiss, "this court must assume the truth of the facts alleged by the plaintiff, along with any inferences that can reasonably be drawn from those facts." *Hale*, 287 Kan. at 322.

Moreover, interpretation of a statute is a question of law over which an appellate court has unlimited review. *Cady v. Schroll*, 298 Kan. 731, 734, 317 P.3d 90 (2014). The most fundamental rule of statutory construction is the intent of the legislature. *Nationwide Mutual Ins. Co. v. Briggs*, 298 Kan. 873, 875, 317 P.3d 770 (2014). An appellate court will first attempt **[*5]** to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *Cady*, 298 Kan. at 738. Additionally, when the legislature does not "'modify a statute to avoid a standing judicial construction of the statute, we presume the legislature intended the statute to be interpreted as we have done.'" *Cady*, 298 Kan. at 737.

Applicable Law

The savings provision of K.S.A. 60-518 states:

> "If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if the plaintiff die, and the cause of action survive, his or her representatives may commence a new action within six (6) months after such failure."

In *Denton v. City of Atchison*, 76 Kan. 89, 90-92, 90 P. 764 (1907), our Supreme Court held that a plaintiff may refile a case under the savings statute if the following occurs: (1) the plaintiff commenced the original case within due time; (2) the trial court dismissed the original case for a reason other than on the merits after the statutory period of limitations had run; and (3) the plaintiff refiled the new case within 1 year following this dismissal (the time limit in effect under the savings statute when *Denton* was decided). The *Denton* court **[*6]** further held a "new action begun more than one year after such failure, whether it was the second or third action, would be an enlargement of the time fixed by statute, and would result in permitting the plaintiff to dismiss and reinstate at will and indefinitely." *Denton*, 76 Kan. at 92.

In *Clanton*, this court considered "whether [a plaintiff] can obtain the benefit of the savings statute, K.S.A. 60-518, in connection with filing [his or] her third action." 26 Kan. App. 2d at 342. Based on the plain language of K.S.A. 60-518 and our Supreme Court's holding in *Denton*, the *Clanton* court held that a plaintiff could obtain the benefit of the savings provision only once. 26 Kan. App. 2d at 345.

Application of Clanton *in This Case*

Given the facts in this case and the Clanton holding, the trial court did not err when it dismissed *Lozano III* with prejudice. Again, Lozano filed his original case, *Lozano I*, on December 5, 2011, the exact day the statute of limitations to file his original

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case expired under K.S.A. 60-514. Thus, the trial court dismissed *Lozano I* for lack of prosecution after the statute of limitations had expired on August 28, 2012. Lozano filed *Lozano II* under K.S.A. 60-518 nearly 6 months later on February 27, 2013. Like *Lozano I*, the trial court dismissed *Lozano II* for lack of prosecution. **[*7]** Then, on June 18, 2014, Lozano filed *Lozano III* under K.S.A. 60-518. Because the *Clanton* court interpreted K.S.A. 60-518 to mean that a plaintiff may obtain the benefit of the savings provision only once, the trial court correctly dismissed *Lozano III* with prejudice because this was the second time Lozano had refiled his case under K.S.A. 60-518.

Lozano's Arguments

On appeal, Lozano argues that this court should reject the *Clanton* court's interpretation of K.S.A. 60-518 for the following reasons: (1) the plain language of K.S.A. 60-518 does not prevent a plaintiff from refiling his or her case multiple times; (2) the *Clanton* holding was erroneous because it relied on the *Denton* decision, which examined an older version of the savings statute; and (3) the *Clanton* court only reached its holding because the legislature had not amended the savings statute since *Denton*. Although this court is not bound by the *Clanton* court's interpretation of K.S.A. 60-518, as discussed below, Lozano's arguments why this court should reject the *Clanton* court's interpretation of K.S.A. 60-518 are unpersuasive.

Plain Language of K.S.A. 60-518 *Argument*

First, Lozano asserts that it is "[c]lear as day" that the plain language of the savings statue allows multiple refilings. Lozano states that the conditions of K.S.A. 60-518 that "[if] **[*8]** any action be commenced in due time" and that "the plaintiff fail in such action otherwise than upon the merits" contain broad enough descriptors to allow a plaintiff to refile his or her case under the savings statute a second time. Lozano contends that he could refile *Lozano III* under the plain language of K.S.A. 60-518 because (1) *Lozano II* was commenced in due time; (2) *Lozano II* was dismissed for a reason other than upon the merits; (3) the statutory period of limitations to bring his original case had expired; and (4) *Lozano III* was refiled within 6 months of the dismissal of *Lozano II*. Nevertheless, the plain language of K.S.A. 60-518 does not support Lozano's interpretation.

In his brief, Lozano correctly recognizes that conditions consisting of three external events must occur before the savings provision of K.S.A. 60-518 is triggered, *i.e.*, a plaintiff is entitled to the benefits of the savings provision only (1) if the plaintiff commences his or her action within due time; (2) if the plaintiff fails in such action otherwise than upon the merits; and (3) if the time limited for the plaintiff to file the same shall have expired. Yet, Lozano fails to recognize that under the plain language of K.S.A. 60-518, the phrases "any action" **[*9]** and "such action" are not so broad as to include a plaintiff's action that had already been refiled under the savings statute but dismissed for a reason other than upon the merits. Instead, those phrases refer to a plaintiff's original action.

Again, K.S.A. 60-518 states: "If *any action* be commenced within due time, and the plaintiff fail in *such action* otherwise than upon the merits, and the time limited for *the same* shall have expired, the plaintiff . . . may commence a new action within six (6) months after such failure." (Emphasis added.) Under K.S.A. 60-518, the phrases "any action," "such action," and "the same" reference one another; the action the plaintiff commences in due time must be the same action that was dismissed otherwise than upon the merits, and the time limit to bring that same action must have expired. Such an interpretation conforms with the last antecedent rule, which states that "qualifying words are 'ordinarily confined to the last antecedent, or to the words and phrases immediately preceding.'" *Link, Inc. v. City of Hays*, 266 Kan. 648, 654, 972 P.2d 753 (1999) (quoting *Barten v. Turkey Creek Watershed Joint District No. 32*, 200 Kan. 489, 504, 438 P.2d 732 [1968]).

Here, an application of the rule of the last antecedent leads to the conclusion that the word "such" is an adjective, and that it modifies the antecedent noun "action" contained in **[*10]** the initial conditional clause ([*i*]*f any action*) of the sentence. The adjective phrase "such action" tells us which action. Indeed, the adjective "such" is called a limiting adjective. It limits a noun or pronoun. As a result, the word "such" designates or limits the antecedent noun "action" contained in the aforementioned initial conditional clause of the sentence. Moreover, the pronoun "same" refers to the antecedent noun "action." Thus, the antecedent noun "action" is limited to a plaintiff's original action.

Thus, under the plain language of K.S.A. 60-518, a plaintiff may commence a new action within 6 months of the dismissal of his or her original action only (1) if the plaintiff commenced the original action within due time; (2) if the trial court dismissed the plaintiff's original action for reasons other than upon the merits; and (3) if the trial court dismissed the plaintiff's original action following the expiration of the statute of limitations.

Accordingly, Lozano misinterprets the plain meaning of K.S.A. 60-518 by asserting that the phrases "any action" and "such action" are broad enough descriptors to include a plaintiff's action that had already been refiled under the savings statute but dismissed **[*11]** for a reason other than upon the merits, or in

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his case, *Lozano II*. Those phrases clearly refer to a plaintiff's original action. Because those phrases clearly refer to a plaintiff's original action, Lozano cannot circumvent the 6-month time limit to invoke the savings provision of K.S.A. 60-518 by arguing that a plaintiff can continue to refile his or her case under the savings statute indefinitely as long as that plaintiff refiled his or her last action under the statute within due time and the last refiled action was dismissed for a reason other than on the merits.

Moreover, the plain language of K.S.A. 60-518 clearly limits a plaintiff to refiling under the statute a single time. K.S.A. 60-518 states that if the plaintiff's original action was commenced in due time, dismissed other than on the merits, and dismissed after the statute of limitations had run, then the plaintiff "may commence *a* new action within six (6) months after such failure." (Emphasis added.) The word "a" limits how many times a plaintiff may bring an action under K.S.A. 60-518. Thus, the plain language of K.S.A. 60-518 states that if the plaintiff's original action was commenced in due time, dismissed other than on the merits, and dismissed after the statute of limitations **[*12]** had run, then the plaintiff may file a single new action. Accordingly, Lozano has misinterpreted the plain language of K.S.A. 60-518 because the plain language does not allow a plaintiff to refile his or her case under the statute multiple times.

In an attempt to bolster his interpretation of K.S.A. 60-518, Lozano also points out that the Utah Court of Appeals held that its savings statute allows multiple refilings in *Hebertson v. Bank One, Utah, N.A.*, 1999 UT App. 342, 995 P.2d 7 (1999). Utah caselaw, however, is merely persuasive authority. Additionally, if this court were to consider other state's savings statutes, most other states permit their saving statutes to be invoked only once. See 51 Am. Jur. 2d, Limitation of Actions § 278.

Finally, even if the plain language of K.S.A. 60-518 allowed a plaintiff to refile his or her case multiple times, the trial court's dismissal of Lozano's case with prejudice was still appropriate because Lozano filed *Lozano III* more than 6 months after the dismissal of *Lozano I*. The trial court never addressed the timeliness of *Lozano III* below. Even so, under K.S.A. 60-518, a plaintiff "may commence a new action within *six (6) months*" of the trial court's dismissal of the plaintiff's original case for a reason other than on the merits following the expiration of the statute of limitations. (Emphasis added.)

As noted **[*13]** earlier, the *Denton* court interpreted this provision and held that a plaintiff must refile his or her case under the savings statute within 1 year (now 6 months). 76 Kan. at 91-92. The *Denton* court further held that "[a] new action begun more than one year after such failure, whether it was the second or third action, would be an enlargement of the time fixed by statute." 76 Kan. at 92. Essentially, K.S.A. 60-518 tolls the operation of the statute of limitations during the pendency of a plaintiff's case and for 6 months after the action has ceased to pend for any reason other than a determination on the merits. Therefore, Lozano needed to refile *Lozano III* within 6 months of the dismissal of *Lozano I* to successfully refile his case under K.S.A. 60-518.

Yet, Lozano did not refile *Lozano III* within 6 months of the dismissal of *Lozano I*. As previously detailed, Lozano filed *Lozano I* on December 5, 2011, the day the statute of limitations to file his case under K.S.A. 60-518 expired. The trial court dismissed *Lozano I* for lack of prosecution on August 28, 2012. To timely refile under K.S.A. 60-518, Lozano needed to refile his case within 6 months of August 28, 2012; thus, at the very latest, Lozano needed to refile his case by February 28, 2013. Lozano timely refiled **[*14]** *Lozano II* when he refiled the case on February 27, 2013. Nevertheless, Lozano did not timely refile *Lozano III* when he refiled the case on June 18, 2014. *Lozano III* was refiled more than 6 months after the *Lozano I* action was dismissed on August 28, 2012. Because of his failure to timely refile *Lozano III* within 6 months after *Lozano I* ceased to pend, the trial court's dismissal of *Lozano III* with prejudice was proper regardless of whether the plain language of K.S.A. 60-518 allows multiple refilings under the statute. As a result, we need not address Lozano's remaining arguments.

Affirmed.

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EXHIBIT – 16

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Leahy v. Polarstar Dev., LLC

Court of Appeals of Oregon

February 13, 2008, Argued and Submitted; October 29, 2008, Filed

A133144

Reporter
223 Ore. App. 373 *; 195 P.3d 919 **; 2008 Ore. App. LEXIS 1634 ***

MIKE LEAHY and JULIE LEAHY, husband and wife, Plaintiffs-Respondents, v. POLARSTAR DEVELOPMENT, LLC, Defendant-Appellant.

Prior History: [*1]** Deschutes County Circuit Court. 05CV0592ST. Stephen N. Tiktin, Judge.

Disposition: Reversed and remanded for entry of declaratory judgment in favor of defendant.

Core Terms

Parcels, partition, subdivision, ambiguous, plat, provisions, subdivide, extrinsic evidence, declaratory judgment, recorded, trial court

Case Summary

Procedural Posture
Defendant landowner challenged a decision of the Deschutes County Circuit Court (Oregon), which, on a petition filed by plaintiff landowners, (1) entered a declaratory judgment stating that the conditions, covenants, and restrictions (CCRs) attached to a plat of land precluded further subdivision or partition, and (2) entered an injunction enjoining defendant and future owners from seeking subdivision or partition of the land.

Overview
Defendant owned one parcel of land and plaintiffs owned another. After receiving notice of defendant's intent to subdivide its parcel, plaintiffs brought this action. The trial court determined that the CCRs precluded subdivision or partition of defendant's parcel and entered an injunction. On appeal, the court reversed and remanded for an entry of judgment in favor of defendants. After reviewing the CCRs, the court found that further subdivision of all the parcels was not only permitted, but anticipated. The court thus agreed with defendant's interpretation of certain paragraphs of the CCRs, to the extent that it clearly indicated that subdivision or partition was permissible. Plaintiffs' construction was not tenable. Because the CCRs were unambiguous to the extent that they permitted further subdivision and partition, and thus the court did not need to examine extrinsic evidence or maxims of construction.

Outcome
The court reversed the declaratory judgment and injunction and remanded for the entry of a declaratory judgment in favor of defendant.

LexisNexis® Headnotes

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

HN1 Encumbrances, Restrictive Covenants

When interpreting conditions, covenants, and restrictions, the court follows the three-step method laid out in Yogman v. Parrott. First, the court looks to the text of the disputed provisions in the context of the whole document. If the meaning is clear, the court's analysis ends. If the court determines that the restrictive covenants are ambiguous, the court then examines extrinsic evidence of the contracting parties' intent to resolve that ambiguity. If the ambiguity cannot be resolved after considering that evidence, the court turns to maxims of construction. The court may also examine extrinsic evidence for the purpose of determining whether there is ambiguity.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

HN2 Contract Interpretation, Ambiguities & Contra

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Proferentem

Conditions, covenants, and restrictions are interpreted as contractual provisions. Whether the terms of a contract are ambiguous is a question of law. In this step of the analysis, the court considers the document as a whole, with emphasis on the disputed provisions. A contractual provision is ambiguous if it has no definite meaning or is capable of more than one reasonable interpretation.

Contracts Law > Contract Interpretation > General Overview

HN3 Contracts Law, Contract Interpretation

The adjective "such" can mean having a quality already or just specified--used to avoid repetition of a descriptive term.

Counsel: George W. Kelly argued the cause and filed the briefs for appellant.

John A. Berge argued the cause for respondent. With him on the brief was Bryant, Lovlien & Jarvis, P.C.

Judges: Before Haselton, Presiding Judge, and Armstrong, Judge, and Schuman, Judge.

Opinion by: ARMSTRONG

Opinion

[920]** **[*375]** ARMSTRONG, J.

Defendant appeals a declaratory judgment stating that the conditions, covenants, and restrictions (CCRs) attached to a plat of land in Deschutes County preclude further subdivision or partition of the platted land, and an injunction enjoining defendant and future owners from seeking subdivision or partition of the land. Defendant seeks a reversal of that judgment, arguing that (1) the trial court erred by concluding that the CCRs are ambiguous as to the ability to subdivide or partition the affected property, and (2) even if the CCRs are ambiguous, the trial court erred in resolving that ambiguity in plaintiff's favor based on relevant extrinsic evidence. We agree with defendant that the CCRs unambiguously permit further subdivision or partition of the property, and, thus, we **[***2]** need not reach its second assignment of error. Consequently, we reverse the trial court's declaratory judgment and injunction and remand to enter judgment for defendant.

The following facts are undisputed. Walsh, who is not a party to this action, originally owned the 5.41-acre parcel of land at issue, which he partitioned in 1998 into one 3.41-acre parcel (Parcel 1) and two single-acre parcels (Parcels 2 and 3). Walsh recorded with Deschutes County the original plat of the subdivision of land and CCRs pertaining to those parcels.

Defendant now owns Parcel 1. [1] In 2005, it sought to partition Parcel 1 into three parcels; following approval of that partition, defendant planned to subdivide one of those parcels into an 11-lot subdivision. Plaintiffs, who own Parcel 2, received notice of defendant's intention to subdivide Parcel 1 and negotiated with defendant without success. They then sought a declaratory judgment that the CCRs precluded subdivision or partition of Parcel 1 and an injunction enjoining defendants and subsequent owners from seeking to partition the parcel.

[921]** **[*376]** The trial court followed the method for interpreting restrictive covenants laid out in *Yogman v. Parrott*, 325 Ore. 358, 937 P2d 1019 (1997). It first concluded that the CCRs were ambiguous regarding whether they permitted further subdivision of Parcels 1, 2, and 3. It then resolved that ambiguity by considering extrinsic evidence and ultimately concluded that the CCRs precluded defendant from subdividing Parcel 1. Consequently, the court entered a declaratory judgment in plaintiffs' favor and enjoined defendant and future owners from seeking to subdivide or partition the property subject to the CCRs.

On appeal, defendant argues that the trial court erred by entering the declaratory judgment and the injunction. It asserts that it should prevail because the CCRs unambiguously permit further subdivision of its property. Alternatively, defendant argues that, even if the CCRs are ambiguous, the relevant extrinsic evidence resolves the ambiguity in its favor. Plaintiffs respond that, at the first level of analysis, the CCRs are ambiguous as to **[***4]** the ability to subdivide or partition the property, and that the relevant extrinsic evidence offered at trial resolves the ambiguity in their favor.

HN1 When interpreting CCRs, we follow the three-step method laid out in Yogman. First, we look to the text of the disputed provisions in the context of the whole document. *Eagle Industries, Inc. v. Thompson*, 321 Or 398, 405, 900 P2d 475 (1995). If the meaning is clear, our analysis ends. *Yogman*, 325 Ore. at 361. If we determine that the restrictive covenants are ambiguous, we then examine extrinsic evidence of the

[1] The defendants in the original action, the Adkinses, sold Parcel 1 and their appeal rights to defendant after they **[***3]** filed their appeal. For simplicity, we attribute to defendant the Adkinses' actions regarding Parcel 1 that predated the sale of property to defendant.

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contracting parties' intent to resolve that ambiguity. If the ambiguity cannot be resolved after considering that evidence, we turn to maxims of construction. *Yogman*, 325 Ore. at 363-64. We may also examine extrinsic evidence for the purpose of determining whether there is ambiguity. *Batzer Construction, Inc. v. Boyer*, 204 Or App 309, 317-18, 129 P3d 773 (2006), *rev den*, 341 Ore. 366, 143 P.3d 239 (2006).

Thus, our first task is to determine whether the CCRs unambiguously permit further division of Parcels 1, 2, and 3. **HN2** CCRs are interpreted as contractual provisions. *Yogman*, 325 Ore. at 361. Whether the terms of a contract are **[*377]** ambiguous is a question of **[***5]** law. *Eagle Industries, Inc.*, 321 Ore. at 405. In this step of the analysis, we consider the document as a whole, with emphasis on the disputed provisions. *Id.* A contractual provision is ambiguous if it has no definite meaning or is capable of more than one reasonable interpretation. *See Yogman*, 325 Ore. at 362-63; *Andrews v. Sandpiper Villagers, Inc.*, 215 Ore. App. 656, 664, 170 P3d 1098 (2007).

Accordingly, we set forth the provisions at issue. The CCRs begin with general statements that the restrictions apply to "certain real property" in Deschutes County, "hereinafter referred to as 'Said Property.'" The text then refers to Exhibit I, appended to the CCRs, which briefly identifies "Parcels 1, 2, and 3" by referring to the specific partition plat that Walsh filed and describing the property's general location. Further, Article I of the CCRs defines terms used throughout the CCRs and provides, in part:

> "1.1 'Said Property' shall mean and refer to that certain real property hereinbefore described and such additions thereto as may be hereafter brought within the jurisdiction of the Association by recorded Declarations in the manner hereinafter set forth.
>
> "1.2 'Lot' shall mean any numbered plot **[***6]** of **[*378]** land shown upon any recorded subdivision or partition plat of said property or subdivided or partition parcels of any such plat."

Article II then sets forth the restrictions on the use of the property subject to the CCRs. The relevant provisions of that Article include:

> "2.1 Each lot shall be used for single family residential purposes only.
>
> "* * * * *
>
> "2.29 No owner shall occupy, use or permit his lot or any part thereof to be used for any purpose other than a private residence for the owner, his family, or his guests, except that each owner shall be **[**922]** permitted to rent the unit when he is not in occupancy."

The parties focus on paragraph 1.2 and its definition of "lot." Defendant argues that "lot," by its definition, includes two different things: *both* "any numbered plot of land shown upon any recorded subdivision or partition plat of said property,"--*i.e.,* Parcels 1, 2, and 3 in Walsh's original plat--*and* any "subdivided or partition parcels" of Parcels 1, 2, or 3. In other words, in defendant's view, the second "or" in the definition clearly means "alternatively," with the preceding text indicating Parcels 1, 2, and 3, and subsequent text indicating any subdivision or partition of **[***7]** Parcels 1, 2, and 3.

Plaintiffs acknowledge that defendant's reading is plausible. They argue, however, that the second "or" introduces ambiguity, because it could mean "in other words," with the text following "or" simply redefining Parcels 1, 2, and 3. Accordingly, plaintiffs argue, "lot" would be synonymous with "parcel," and, given that paragraphs 2.1 and 2.29 limit lots (or parcels, by plaintiffs' definition) to be used for the owner's single family residence, the CCRs prohibit further subdivision of Parcels 1, 2, and 3.

The problem with plaintiffs' argument is that it ignores the grammatical structure of paragraph 1.2. The first part of paragraph 1.2 defines "lot" as "any numbered plot of land shown upon *any recorded subdivision or partition plat of said property.*" (Emphasis added.) "Said property" was defined earlier in the CCRs as the property comprising Parcels 1, 2, and 3; thus, "any numbered plot of land shown upon any recorded subdivision or partition plat of" the property comprising Parcels 1, 2, and 3 are those three parcels. [2] We look to the remainder of the sentence, "or subdivision or partition of *any such plat.*" (Emphasis added.) **HN3** The adjective "such," as used here, **[***8]** means "having a quality already or just specified--used to avoid repetition of a descriptive term." *Webster's Third New Int'l Dictionary* 2283 (unabridged ed 2002). Thus, the phrase "any *such* plat" refers the reader back to parallel phrasing in the first part of the definition, "any *recorded subdivision or partition* plat" of Parcels 1, 2, and 3. Given that the definition in the second part of the sentence refers back to--and modifies--the definition in the first part of the sentence, it must mean a different thing than the **[*379]** first definition. Here, it can *only* mean that further subdivision or partition of Parcels 1, 2, and 3 is not only permitted but anticipated.

Accordingly, we agree with defendant's interpretation of paragraph 1.2, to the extent that it clearly indicates that

---

[2] Even if "said property" referred instead to Parcels 1, 2, and 3 individually, rather than the aggregate whole, we would reach the same result. The first definition then would refer to any "plot of land shown upon any recorded subdivision or partition plat" of either Parcel 1, 2, or 3; the second definition would refer to any further subdivision or partition of those partitions of Parcels 1, 2, or 3.

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subdivision **[***9]** or partition of Parcels 1, 2, and 3 is permissible. Plaintiff's construction is not tenable, and we see no other sensible interpretation of the disputed provision in light of the other provisions of the CCRs. In that regard, the "one residence per lot" restrictions in paragraphs 2.1 and 2.29 do not contradict our conclusion. Those paragraphs simply limit the use of each lot to residential use--as opposed to commercial or industrial use--as a single-family home that owners may occupy or rent. Nothing in those provisions precludes owners from partitioning their existing parcels or lots and selling those lots to a new owner who then builds or occupies a single-family residence on that lot. Further, nothing in the other provisions in the CCRs indicates that subdivision or partition of the lots is forbidden. Thus, the CCRs are unambiguous to the extent that they permit further subdivision and partition of the property to which they apply, and we need not examine extrinsic evidence or maxims of construction.

We therefore conclude that the trial court erred in concluding that the CCRs were ambiguous as to the permissibility of further subdivision or partition of Parcels 1, 2, and 3. Accordingly, **[***10]** we reverse.

Reversed and remanded for entry of declaratory judgment in favor of defendant.

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EXHIBIT – 17

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News Release

Release Date:
For immediate release

Media Contact:
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HOLLAND APPROVES SALE OF BONDS TO FINANCE NEW POWER PLANT

March 19, 2014, Holland, Michigan – The City of Holland City Council and the Holland Board of Public Works Board of Directors voted, in a special joint meeting today, to approve the pricing and sale of $158.84 million in municipal revenue bonds to help fund building a combined cycle natural gas power generating facility for the community.

"A key part of the community's 40-year energy plan, this is the largest bond issue and civil project in the history of Holland," said Kurt Dykstra, mayor. "It continues the legacy and mission of Holland to be self-supporting, with a low-cost, reliable source of power."

Jefferies Group LLC, a global investment banking firm headquartered in New York City, is the senior underwriter for the bond issue. Marketing of the bonds began March 3. Retail orders were taken March 18 with the remaining bonds offered to institutional buyers today.

HBPW earned high credit ratings, Aa3 from Moody's and AA from Standard & Poor's, which were key factors in the attractiveness of the bonds to investors. The bonds are sold in denominations of $5,000. The overall interest rate is 4.08 percent. Principal and interest payments will be made semi-annually for maturities in 2017 through 2039. The bonds are exempt from Federal and Michigan State income taxes.

The project will be 72 percent funded by the amount raised from the bond sale and 28 percent from BPW cash reserves. No debt in the electric utility and its cash reserves were additional factors contributing to the high credit rating.

- more -

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The new power plant represents a move to state-of-the-art equipment, according to Dave Koster, HBPW general manager. “It will be nearly twice as efficient with dramatically less emissions than our current power plant,” says Koster. “Along with other power resources in our diversified fuel portfolio, this plant positions Holland very well for the future.”

HBPW and Holland City Council voted in December 2012 to build a 114-megawatt natural gas power plant. The 26-acre location approved July 2013 is the area surrounding Fifth Street and Fairbanks near downtown. Most properties needed for the project have been purchased. Demolition will begin in May after the Tulip Time Festival. Construction is scheduled to start early 2015 with operations commencing late 2016.

###

The Holland Board of Public Works (HBPW) is a community-owned enterprise providing electric generation and distribution, water, wastewater treatment and broadband utility services to nearly 28,000 business and residential customers in the Holland area. HBPW is committed to enhancing the economic and environmental vitality of the community, providing reliable services at the lowest rates achievable through innovation, efficiency and professional operations.

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APPENDIX EXHIBIT 4

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STATE OF MICHIGAN
OTTAWA COUNTY CIRCUIT COURT

STACY PHOTHISAN, individually, and as a representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF HOLLAND, MICHIGAN, a municipal corporation, by and through THE HOLLAND BOARD OF PUBLIC WORKS,

Defendant.

Case No. 25-0000008184-CZ

Hon. Karen J. Miedema

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THE CITY OF HOLLAND'S RESPONSE BRIEF IN OPPOSITION TO PLAINTIFF'S RULE 2.116(C)(10) MOTION FOR PARTIAL SUMMARY DISPOSITION AS TO COUNT I OF THE COMPLAINT

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INTRODUCTION

The City of Holland, through its Board of Public Works ("HBPW") (together, the "City"), filed a Rule 2.116(C)(8) motion seeking summary disposition as a matter of law as to the meaning of §12.16 in the City's Charter (excerpt attached as **Ex 1**). In response and prior to discovery, Plaintiff (who upon information and belief is not even a City of Holland resident) now moves for summary disposition under Rule 2.116(C)(10) – claiming, on the one hand, that there is a dispositive legal question for the Court, and on the other, that the Court should consider extrinsic evidence to deny the City's (C)(8) motion and grant her own. The fact that Plaintiff brings a (C)(10) motion in response to a (C)(8) motion tells this Court everything it needs to know about how weak Plaintiff's interpretation of §12.16 is. The only thing the Court should entertain at this early stage of the proceedings is the City's (C)(8) motion and the legal questions presented therein. Thus, all the exhibits and factual assumptions in Plaintiff's (C)(10) motion are irrelevant.

As for the legal arguments in Plaintiff's (C)(10) motion, they are unavailing. Plaintiff's interpretation of §12.16 does not give meaning to every word in §12.16, adds terms to §12.16, ignores and/or misconstrues various provisions in §12.16, and is grounded in meaningless distinctions between the terms "such" and "the" (the latter of which Plaintiff conveniently fails to define for the Court because doing so undercuts her argument). When construed together, the operative provisions of §12.16 – i.e., paragraph 2 and 4 of the section – do not limit HBPW and Holland City Council's ("Council") ability to approve an appropriation for general purposes if the transfer is only less than or equal to electric utility's net income. Nor do the plain terms of §12.16 suggest that having "net income" is a condition precedent to HBPW and Council making an appropriation from the electric utility's fund for general purposes. Nothing in Paragraph 4 of §12.16 (which covers voter-approved appropriations for general purposes) even implies that only

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the voters can approve an appropriation for general purposes that is more than the electric utility's net income. Instead, the plain language of Paragraphs 2 and 4 reveal that the independent authority of both (1) HBPW and Council, and (2) the voters, to appropriate more than 50% of net income is coextensive. Section 12.16 simply allows the voters to make the appropriation if and/or when HBPW and Council will not.

Knowing that her legal interpretation of §12.16 is unconvincing, Plaintiff cherry-picks excerpts of budgets and memos (which do not mean what Plaintiff's counsel say they mean) to convince the Court that it should just ignore the City's clear authority under a voter-approved charter to appropriate more than the net income from the City's electric utility fund for general purposes, and conclude that there are issues of fact precluding summary disposition under Rule 2.116(C)(8). Plaintiff then goes a step further, asking this Court to conclude that her one-sided presentation of "evidence" entitles her to summary disposition. But, at this stage, when the City has not answered the Complaint and Plaintiff clearly needs extrinsic evidence to advance her motion, the Court cannot rely solely on her interpretation of what the content in City-authored documents means. Those documents are not legal instruments like statutes, ordinances, charters, resolutions, or contracts. They are factual pieces of evidence that the City is entitled to explain and/or rebut. As the attached affidavits reveal, the City ascribes different meaning to the Plaintiff's "evidence" and disputes Plaintiff's interpretations. Even Plaintiff knows that she needs discovery to prevail on Count I because she served 29 Requests to Admit various issues regarding the appropriations. Regardless, Plaintiff's attempt to obtain summary disposition by relying on budget summaries, when the Charter requires a net income determination based on actual expenses is specious, at best. Proper calculations reveal that the City had net income for each

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challenged fiscal year and irrespective of the City's Charter authority, all the transfers for general purposes have been under 100% of net income.

The Court should not let Plaintiff's motion confuse the very straightforward question before the Court at this early stage of the proceedings – i.e., whether the plain language of §12.16 unambiguously provides HBPW and Council with the authority to increase the amount of the appropriation made from the electric utility's fund for general purposes. The answer to this question is "yes." For this reason and those stated below, the City respectfully requests that this Court deny Plaintiff's (C)(10) motion as to Count I, and instead, grant its pending (C)(8) motion dismissing the Complaint in its entirety.

LEGAL STANDARD

While a motion under Rule 2.116(C)(8) tests the legal sufficiency of a complaint, a motion under Rule 2.116(C)(10) tests its factual sufficiency. *Jackson v Southfield Neighborhood Revitalization Initiative*, 348 Mich App 317, 366-67; 18 NW3d 27 (2023), rev'd in part on other grounds, slip op (Mich July 16, 2025). In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The moving party has the initial burden of supporting its position through documentary evidence. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden

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then shifts to the opposing party to establish the existence of a genuine issue of material fact. *Id.* The non-moving party "may not rest on the mere allegations or denials of his or her pleadings, but must, by affidavit or otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Only if the opposing party fails to set forth specific facts showing that there is a genuine issue for trial may a court grant the (C)(10) motion for summary disposition. *Id.*; *Quinto*, *supra* at 363. Generally, a motion for summary disposition under MCR 2.116(C)(10) is premature if discovery has not closed. *Colista v Thomas*, 241 Mich App 529, 537-38; 616 NW2d 249 (2000) (holding that a (C)(10) motion is premature when discovery on a disputed issue is not complete).[1]

I. THE PLAIN LANGUAGE OF §12.16 OF THE CHARTER AUTHORIZES THE CITY'S APPROPRIATIONS FOR GENERAL PURPOSES.

Plaintiff claims that the "clear and unambiguous provisions of § 12.16" prohibit the City from "transferring any amount more than the budgeted 'net income' of the Electric Fund without voter approval." Pl's Mot at 11. Yet, Plaintiff never explains exactly what she thinks that HBPW and Council have the authority to do under Paragraph 2 of §12.16. By implication, Plaintiff appears to believe that HBPW and Council can only increase the percentage of net income appropriated for general purposes *if* there is net income and even then, only up to 100% of net income. Any allocation of "more" than net income (i.e., 100% or more) may only be approved

[1] See also *Babi v Estate of Herman*, ___ NW3d ___ , 2023 WL 8108080, at *2 (Nov 21, 2023) (agreeing that trial court erred when it granted summary disposition to defendants because discovery "had not begun in earnest and it would be premature to grant summary disposition when discovery had a reasonable chance of uncovering relevant information to plaintiff's claim.") (attached as **Ex 2**); *Oliver v Smith*, 269 Mich App 560, 567; 715 NW2d 314 (2006) ("The trial court's denial of defendant's motion for summary disposition was also proper because discovery was not complete and summary disposition at that time was therefore premature.").

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by 3/5 of the City's voters. However, none of these additional caveats and limitations are in the plain language of §12.16 and thus, this Court should reject Plaintiff's interpretation of §12.16.

A. Unambiguous Charter Provisions Must Be Interpreted in Context and Liberally Construed in Favor of Municipalities.

The judiciary cannot "'read restrictions or limitations into a [charter provision] that plainly contains none.'" *Hackel v Macomb Cnty Comm'n*, 298 Mich App 311, 319; 826 NW2d 753 (2012) (quoting *Rusnak v Walker*, 273 Mich App 299, 305; 729 NW2d 542 (2006)). Rather, as set forth in the City's (C)(8) motion and as Plaintiff acknowledges, "[t]he prevailing rules regarding statutory construction are well established and extend to the construction of home rule charters." *City of Detroit v Walker*, 445 Mich 682, 691; 520 NW2d 135 (1994); Pl's Mot at 11-12. "The provisions [of charters] are to be read in context, with the plain and ordinary meaning given to every word." *Barrow v Detroit Election Comm'n*, 305 Mich App 649, 663; 854 NW2d 489 (2014). "When considering the correct interpretation, the [charter provision] must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme." *Potter v McLeary*, 484 Mich 397, 410-11; 774 NW2d 1 (2009) (citations omitted). It is appropriate to consider dictionary definitions when construing undefined terms. *Bate v City of St Clair Shores*, 347 Mich App 771, 782; 16 NW3d 338 (2023). However, "judicial construction is not permitted when the language is clear and unambiguous." *Barrow*, 305 Mich App at 663; 854 NW2d 489. Indeed, "the framers of the charter, and the people of the City . . . in its adoption, must be presumed to have intended that the provision be construed as it reads." *Woods v Bd of Trustees of Policemen & Firemen Ret Sys of City of Detroit*, 108 Mich App 38, 43; 310 NW2d 39 (1981). And, in the context of a city charter, all these canons of construction must be applied "against the backdrop of Article 7, §§22 and 34 of the 1963 Constitution and subsequent developments in [] caselaw since their adoption," which collectively

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acknowledge that "the electors of cities are vested with control over their cities' charters, and . . . provisions concerning cities should be liberally construed in their favor." *Sheffield v Detroit City Clerk*, 508 Mich 851, 853; 962 NW2d 157 (2021).

B. Plaintiff's Narrow Focus on a Single Word within §12.16 Fatally Ignores the Greater Context of the Provision.

Instead of construing §12.16 in its entirety, Plaintiff hyper-focuses on one word within Paragraph 2. She asserts that "the use of the adjective 'such' prior to 'net income' necessarily precludes [the City's] the transfer of any amount in excess of the total 'net income' . . . because the term 'such' used in conjunction with 'net income' necessarily limits the maximum transfer amount without voter approval to the amount of 'such net income.'" Pl Mot at 13. Put differently, Plaintiff advances an interpretation that the only thing the Council and HBPW can increase is the percentage of net income to be appropriated (from 50% to 100%), further suggesting that the presence of "net income" is a condition precedent to Council and HBPW's authority to increase any allocation. This makes no sense. And, by too narrowly framing her focus, Plaintiff neglects to read §12.16 cohesively.

The City does not disagree that "such" means "of the same kind" or refers to a previously referenced term in the Charter (i.e., "net income"). However, that does not mean (as Plaintiff contends) that the phrase "such net income" in §12.16 limits the appropriations available under §12.16 to appropriations of "only net income" and only permits appropriations if the City has "net income" according to Plaintiff's preferred calculation. It simply means that the Charter is referring back to the previously-referenced phrase "net income" and then stating that the City may increase appropriations above that previously-referenced amount.

To that end, in Paragraph 1 of §12.16, the Charter notes that "[u]p to 50% of the annual net income of the board may be appropriated by the council to the general purposes of the city."

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The Charter then plainly states immediately after in Paragraph 2 that **"[t]he foregoing limitation** of 50% of such net income which may be appropriated by the council for general purposes **may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council**." Charter, §12.16 (emphasis added). The intent of this provision is to give discretion to the City – by and through its officials – to increase the earlier-referenced limitation on the general purpose transfer through the joint consent of HBPW and seven members of City Council. What is being "increased" in Paragraph 2 is the entire limitation on the amount of the appropriation – not the percentage of the net income, as Plaintiff suggests. If Plaintiff were correct (and she is not), the sentence would not need to contain the phrase "which may be appropriated by the council." Instead, the sentence would just need to say, "The foregoing limitation of 50% may be increased." Or, it would say, "The foregoing limitation of 50% of such net income, which may be appropriated by the council for general purposes, may be increased in any year . . ." But there are no commas qualifying the "net income." The phrase "of 50% of such net income which may be appropriated by council for general purposes" simply refers back to the description of the limitation set forth in Paragraph 1. As such, the plain and ordinary meaning of the Charter is that HBPW and Council can increase the limitation itself, not just the percentage of net income. *Barrow*, 305 Mich App at 663; 854 NW2d 489. This is true even if there is no net income. The authority to increase the limit on appropriations is irrespective of "net income." Instead, §12.16's authority to increase the entire limit on appropriations necessarily means that HBPW and Council have the ability to increase appropriations from the fund where the electrical utility revenues are held. See Pl's Mot, Ex 2 (Charter, §§12.11, 12.12) (referring to City's "account or fund" holding revenue from each public work).

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Nor does the use of "the" as opposed to "such" before the term "net income" in Paragraph 4 change anything. Plaintiff labors to manufacture a distinction between two of the four paragraphs of §12.16 with the aim of explaining the intent of the 1950 electorate. But this distinction is meaningless. And it ignores the greater context of §12.16 by placing too much emphasis on individual words. *Barrow*, 305 Mich App at 663; 854 NW2d 489; *Potter*, 484 Mich at 410-11; 774 NW2d 1. First, the use of the term "the" before "net income" isn't limited to Paragraph 4 of §12.16 (which covers voter-approved appropriations for general purposes). It is also used repeatedly in Paragraph 1. Thus, when understanding it in the context of §12.16 as a whole, the term "such" in Paragraph 2 simply refers back to "the net income" previously referenced in Paragraph 1, which is in turn no different than "the net income" referenced in Paragraph 4. Second, while Plaintiff spends much of her time fixated on the definition of "such" and how "such" is a different term than "the," she conveniently omits the definition of the term "the." Per the *Cambridge Essential American English Dictionary*, the word "the" is a determiner. See https://dictionary.cambridge.org/us/dictionary/essential-american-english/the. Accessed 16 Jul 2025. It is used "before nouns to mean things or people that have already been talked about or are already known." *Id.* And Merriam Webster notes that "the" is "used as a function word to indicate that the following noun or noun equivalent is definite or has been previously specified by context or by circumstance." "The." Def 1(a). *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/the. Accessed 16 Jul 2025. This renders Plaintiff's attempt at construing a deeper intent from the usage of "such" and "the" meaningless.

C. Section 12.16 Plainly Contemplates Two Concurrent Avenues for Increasing the Appropriation Limitation.

Contrary to Plaintiff's assertions, when construed together, the plain language of Paragraphs 2 and 4 reveal that the independent authority of both (1) HBPW and Council, and (2)

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the voters, to appropriate more than 50% of net income is coextensive. Critically, Paragraph 4 of §12.16 does not contain a mandate. Nor does it preclude the plain authority conferred upon City Council and HBPW in Paragraph 2 of §12.16. Rather, it simply allows 3/5 of the qualified voters to make the appropriation if and/or when HBPW and Council will not. Plaintiff argues this cannot be so because, "if the City had unlimited power to transfer an unlimited amount of Electric Utility funds to the General Fund without voter approval," Paragraph 4 would be rendered "superfluous." Pl Mot at 17. Per Plaintiff then, "read as a whole, §12.6 can only be construed to require voter approval for any transfer that exceeds 'net income' of the Electric Fund." *Id.* Not so.

The plain language of Paragraph 4 states that the electors may approve from the electric utility fund "an appropriation of more than 50% of the net income for any year for general purposes . . ." This provision does not say the voters may "exclusively" vote to appropriate "more than 100% of net income," "greater than net income," or "in excess of net income." Per Paragraph 4, an appropriation from the electric utility fund of more than 50% of net income could be approved by the voters. But an appropriation of more than 50% of net income could also be approved by City Council and HBPW. Nothing about Paragraph 2 constrains the voters' authority under Paragraph 4 and nothing about Paragraph 4 constrains the authority of HBPW and seven Council members in Paragraph 2. Paragraphs 2 and 4 accomplish the same thing – i.e., they authorize the increase of the limitation on appropriations.

Plaintiff will likely attempt to argue that it is improper to construe these provisions as accomplishing the same thing. But even though they allow for the same result (i.e., an increase in appropriations), they exist for different purposes. For example, Paragraph 4 ensures that the voters can act if/when Council and/or HBPW choose not to increase the appropriation in a given year. Per the Charter, the approval of seven of nine members of Council (or 77.8%) is needed to

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increase the appropriation. Conversely, that means that the approval of six Council members (or 66.7%) is not enough to increase the appropriation, even though those same elected officials represent more than 50% of the City population. Paragraph 4 prevents a small minority of elected City Council officials from obstructing an appropriation supported by those elected officials representing a majority of the voters. With its inclusion, Paragraph 4 permits 3/5 of the qualified electorate (or 60% of the voters) to authorize the appropriation instead.

D. The City's Voter-Approved Authority to Appropriate Is Not Limitless.

Nor does the City's interpretation result in the City's power to appropriate being "unlimited," as Plaintiff suggests. Pl Mot at 17. True, seven Council members and HBPW can act to override the limitation in a given year. But they must act together. HBPW alone can veto an appropriation of its electric utility funds beyond the limitation. By the same token, Council could refuse to increase the appropriation. And the City's voters also have control over the City's power to appropriate. Regular elections provide City voters with the ability to support or oppose the decisions of each elected official (including any decisions regarding these appropriations). Moreover, the very authority provided to Council and HBPW in §12.16 was voter-approved when the Charter was ratified in 1950. The voters also have the power to amend the Charter, should they deem §12.16 improper in any way. See Charter, §16.12 (Amendments) (excerpt attached as **Ex 1**). As such, there are limits on what HBPW and City Council can appropriate.

II. IF THE COURT DENIES THE CITY'S (C)(8) MOTION, PLAINTIFF'S (C)(10) MOTION IS PREMATURE.

In her Rule 2.116(C)(10) motion, Plaintiff presents several facts as "undisputed." But Plaintiff offers these facts with her own spin. She relies on an out-of-context footnote in a memorandum that was never circulated to HBPW or City Council to say that §12.16 of the Charter means what she thinks it means. She then takes snippets from various City-approved budgets and

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mischaracterizes them to supposedly prove that the City has violated §12.16 of its Charter. None of this is appropriate at this stage of the proceedings, even if this Court concludes that the City's Charter is ambiguous or adopts the Plaintiff's interpretation of the Charter.

A. Plaintiff's Extrinsic Evidence Does Not Capture §12.16's Purpose or Intent.

As noted in the City's (C)(8) motion, the canons of statutory construction apply similarly to municipal charters. City's Mot at 8-9, 11-12. *If* §12.16 were ambiguous, then Michigan courts would interpret the section "in a manner consistent with reason, and with the goal of determining ***the purpose and intent*** of the framers and the public." *Detroit Fire Fighters Association v City of Detroit*, 127 Mich App 673, 677; 339 NW2d 230 (1983) (emphasis added). They would not rely on a solitary footnote in a memorandum drafted by two nonlawyers decades *after* §12.16 was adopted. The memorandum, which references draft policies and procedures and shows no evidence of having been formally adopted by the City, does not offer any insight into the intent of the City or its voters when the Charter was approved in 1950. Plaintiff cites no Michigan case law to support her absurd position.

B. Plaintiff's Net Income Calculations Are Incorrect.

If this Court (incorrectly) concludes that the City was not authorized to appropriate more than "net income" from the City's electric utility fund for general purposes, then there are still issues of fact for this Court to resolve, not the least of which is whether the City had "net income." Under §12.16, net income is determined by subtracting from receipts from operations and income from investments, "all expenses *incurred* and charges *made* or allowed for and on behalf of such utility in accordance with budget appropriations, or by appropriation action under Section 9 of this chapter, and after the setting aside of money for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness."

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(emphasis added). By acknowledging that expenses and charges must be "incurred" or "made," §12.16 reveals that the term "net income" refers not to budgeted, but rather, *actual* net income, which would not be known with certainty until the fiscal year is ended and audited. The City's budgets only reflect projected expenses, not actual ones.

Plaintiff simply assumes that the City had no net income based on her reading of the City's budget documents. See Pl's Mot, Exs. 6-9. But, as noted above, the budget summaries do not reflect net income per the Charter. See **Ex 3** (Van Beek Aff ¶7). Budget summaries also do not reflect actual expenses. *Id.* ¶¶5,7 (comparing Pl's Mot, Ex 6 w/ Ex 9 for FY 2022). As averred by the City Manager, myriad issues abound with relying on the budget summary "expenses" to calculate net income. *Id.* ¶¶7-9. It is improper to include certain capital outlay expenses that are funded from cash reserves or bonds, voluntary debt service payments,[2] and depreciation expense. *Id.* When properly calculated, the City has net income for each fiscal year in dispute. See **Ex 4** (Koster Aff ¶¶9-10, Ex C). Moreover, the City has routinely transferred less than 50% of net income in each fiscal year since 2020 except in fiscal year 2022. *Id.* But the fiscal year 2022 transfer, which was approximately 98% of net income, was properly approved by HBPW and seven members of City Council. See City's Mot, Ex B.

C. The Use of a Proxy to Estimate Net Income in the Budget is Proper.

The Court will also need to grapple with whether the City's reliance on a proxy for net income in its budgets is truly inappropriate given the fact that net income cannot be determined until after a fiscal year has ended. See **Ex 3** (Van Beek Aff ¶¶5-6). HBPW and the City must have some basis upon which to estimate what net income might be as part of the budgeting

[2] The City's budget summaries also do not necessarily reflect what the bond resolutions require to be "set aside" for the payment of principal and interest in a given year. See Charter §12.16.

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process. *Id.*; see also Charter, §9.3(c) (requiring "detailed estimates of all anticipated income of the city from sources other than taxes and borrowing . . . ") (excerpt attached as **Ex 1**). If Plaintiff is permitted to (improperly) rely on budgeted dollars to calculate net income, then the City should be provided an opportunity to explain how relying on a percentage of gross revenues is an appropriate proxy for net income during the budgeting process.

D. Plaintiff Fails to Offer Evidence of Inequity to Support Summary Disposition.

Plaintiff has also failed to produce any evidence regarding a critical element of an unjust enrichment claim – i.e., inequity. To sustain a claim of unjust enrichment in Michigan, there must be "the receipt of a benefit by a defendant from a plaintiff, which benefit it is inequitable that the defendant retain." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006) (quotation marks omitted). However, "[e]ven where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it." *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991), quoting Restatement Restitution, §1, cmt c, p13. It is not enough for the Plaintiff to establish a Charter violation to obtain summary disposition on Count I; she must also show that there is something inequitable and unjust about the transfer (as to her and to every single member of this purported class).

Plaintiff alleges that these "transfers" are part of the City's electric rates (Compl ¶52) and seeks recovery on behalf of those who have paid these rates. (*Id.* ¶37.) But Plaintiff provides no evidence that paying the rates has resulted in any inequity as to her. In challenging the appropriations for general purposes, Plaintiff is also effectively challenging the City's electric rates and the underlying rate setting process. However, the City's electric utility rates were established through a cost-of-service study and are the second lowest in the state. See **Ex 4**

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(Koster Aff ¶¶4,6, Ex B). Plaintiff never explains how the rates are unreasonable – an overarching consideration for any rate challenge. See City's Mot at 16. Plaintiff had the opportunity to object to these budgets and rates before HBPW and Council approved them (see, e.g., *Id.* ¶5, Ex A), but has offered no evidence that she ever did. Upon information and belief, the Plaintiff is also not a resident of the City but instead resides in Holland Township. Discovery would establish that Plaintiff does not have standing to pursue a Charter violation claim against the City, let alone suffer any inequity in this regard, because the Charter provisions serve to benefit and govern *City of Holland* residents. See, e.g., Charter, §2.1 (The city and its officers shall have the power . . . to do any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants . . . ") (excerpt attached as **Ex 1**); *Save Our Downtown v City of Traverse City*, 343 Mich App 523, 545; 997 NW2d 498 (2022) ("Plaintiffs have a substantial interest in enforcing the voting provisions of the city charter under which they live.") (emphasis added). In the absence of evidence addressing other critical elements of proof to prevail on Count I (and given the City's evidence regarding the fairness of the electric rates), this Court should decline to grant summary disposition under Rule 2.116(C)(10).

CONCLUSION

Plaintiff's claims challenging the transfers from the City's electric utility fund for general purposes might make sense in another community where the City's voters have not already approved a Charter that authorizes HBPW and City Council to increase the Charter-defined appropriations from the electric utility fund for general purposes In this City, however, the voters have entrusted their elected officials to determine when it is appropriate to increase these appropriations. Per the plain language of the Charter, whether the City has net income is irrelevant. It is not a condition precedent to increasing the appropriation. Moreover, under a proper net

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income calculation that relies not on budgets, but on actual expenses and the required amount to be set aside for the payment of principal and interest on debt, the City had net income for the disputed fiscal years. For these reasons and those stated above and in the City's Rule 2.116(C)(8) motion, the City respectfully requests that the Court deny Plaintiff's Rule 2.116(C)(10) motion for partial summary disposition and grant the City's Rule 2.116(C)(8) motion instead.

Respectfully Submitted,

By:*/s/ Sonal Hope Mithani*

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Dated: July 18, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2025, I electronically filed the foregoing document using the electronic court filing system, which will send notification of such filing to all counsel of record.

By: */s/ Sonal Hope Mithani*

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EXHIBIT 1

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Chapter C

CHARTER

CHAPTER 1
Boundaries and Subdivision of City

Sec. 1.1. Boundaries.
Sec. 1.2. Wards established and described.
Sec. 1.3. Alteration of ward boundaries.
Sec. 1.4. Election precincts.

CHAPTER 2
General Municipal Powers

Sec. 2.1. General powers of city.
Sec. 2.2. Exercise of powers.
Sec. 2.3. Intergovernmental contracts.

CHAPTER 3
General Provisions Affecting Officers of the City

Sec. 3.1. Officers to be elected.
Sec. 3.2. Officers to be appointed.
Sec. 3.3. City employees generally.
Sec. 3.4. Eligibility for office in city.
Sec. 3.5. Vacancies in office generally.
Sec. 3.6. Removals by council.
Sec. 3.7. Resignations.
Sec. 3.8. Filling vacancies.
Sec. 3.9. Shortening or extending terms of office.
Sec. 3.10. Additional compensation; increase or decrease of compensation.
Sec. 3.11. Oath of office.
Sec. 3.12. Surety bonds generally.
Sec. 3.13. Business dealings with city.
Sec. 3.14. Giving of surety bonds, etc., forbidden.
Sec. 3.15. Delivery of office and its effects to successor.

CHAPTER 4
City Council

Sec. 4.1. City governing body; composition.
Sec. 4.2. Nomination, election and terms of office of mayor and city councilmen.
Sec. 4.3. Judge of qualifications of members.
Sec. 4.4. Remuneration of members of council and mayor.
Sec. 4.5. Functional duties and powers of mayor.
Sec. 4.6. Mayor pro tem.
Sec. 4.7. Meetings; quorum; rules; journal; voting; public access to records.
Sec. 4.8. Powers and duties generally—Providing for public health, safety, etc.
Sec. 4.9. Same—Council as board of health.
Sec. 4.10. Same—Licenses.
Sec. 4.11. Same—Public works generally.
Sec. 4.12. Same—Cemeteries.
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[HISTORY: Adopted by the electors of the City of Holland at a special election held on 11-7-1950, under the provisions of the Home Rule City Act. Amendments noted where applicable.]

PREAMBLE

We, the people of the City of Holland, mindful of the ideals and labors of our fathers in founding and developing this community, grateful to Almighty God for the blessings of freedom, peace, health, safety, and justice, and desirous of further securing these blessings to ourselves and our posterity, do hereby ordain and establish this Charter for the City of Holland.

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CHAPTER 2
General Municipal Powers

Sec. 2.1. General powers of city. [Amend. No. 18, 8-2-1983]

The City of Holland and its officers shall possess and be vested with any and all powers, privileges, and immunities, expressed or implied, which cities and their officers are, or hereafter may be, permitted to exercise under the constitution and laws of the State of Michigan, it being the intent of the Charter commission, in framing this Charter, and of the people of the city, in adopting it, to include all such powers, privileges, and immunities within the scope of the powers granted to the City of Holland by the provisions of this Charter. The city and its officers shall have power to exercise all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; to do any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants, and, through its regularly constituted authority, to pass and enforce all laws, ordinances, and resolutions relating to its municipal concerns, subject to the constitution and general laws of the state and the provisions of this Charter.

In addition to the powers possessed by the City of Holland under the constitution and general laws of the State of Michigan, and those set forth throughout and, under proper headings, within this Charter, the City of Holland shall have power with respect to and may, by ordinance and other lawful acts of its officers, provide:

(1) Streets, alleys, etc. — use, regulation, etc., generally. For the use, regulation, improvement, and control of the surface of its streets, alleys, and public ways, and of the space above and below them;

(2) Same—Use by others than owner. For the use, by others than the owner, of property located in streets, alleys, and public places of the city in the operation of a public utility, subject to any limitations imposed by state law;

(3) Same—Plan. For a plan of streets and alleys within the city and for a distance of not more than three miles beyond its limits;

(4) Streams, waters and watercourses. For the use, control, and regulation of streams, waters, and watercourses within its boundaries, subject to any limitations imposed by law;

(5) Sabbath observance. For preventing and punishing violations of the Sabbath day, commonly known as Sunday, and for regulating or forbidding the conduct of business on that day; provided, that any ordinance passed by the council to enforce the provisions hereof shall specifically exempt from its provisions any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and who actually refrains from secular business and labor on that day, provided he disturbs no other person;

(6) Maintaining the peace, etc. For maintaining the peace within the city, and preventing and punishing the disturbance of any religious meeting, congregation, or society, or other meeting which is assembled for any lawful purpose;

(7) Storage and parking of vehicles. For the acquiring, establishment, operation, extension, and maintenance of facilities for the storage and parking of vehicles within its corporate limits, including the fixing and collection of charges for services and use thereof on a public utility basis, and for such purpose to acquire by gift, purchase, condemnation, or otherwise, the land necessary therefor;

(8) Docks for pleasure boats, etc. For the acquiring, construction, establishment, operation, extension,

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and maintenance of facilities for the docking of pleasure water crafts or hydroplanes, or both, within its corporate limits, including the fixing and collection of charges for use thereof, and, for such purpose or purposes, to acquire by gift, purchase, condemnation, or otherwise, the land necessary therefor;

(9) Service stations. For regulating, restricting, and limiting the number and locations of oil and gasoline stations;

(10) Buildings and zoning regulations; setback lines. For establishing standards to govern the construction, alteration, equipment, or removal of buildings and structures within the city; the zoning of the city in the manner and for the purpose permitted by law; and, in any zoning ordinance passed or effective in the city, or independently thereof, to regulate and establish the line upon which buildings may be erected on any street, lane or alley in said city, and to prevent such buildings being erected nearer the street than such line;

(11) Trades, occupations and amusements. For the regulation of trades, occupations, and amusements within the city, not inconsistent with state and federal laws, and to prohibit such trades, occupations, and amusements as are detrimental to the health, morals, or welfare of its inhabitants;

(12) Dangerous, offensive, etc., acts, conditions, etc.; nuisances. For preventing injury or annoyance to the inhabitants of the city from anything which is dangerous, offensive, or unhealthful, and to prevent and abate nuisances and punish those occasioning them or neglecting or refusing to abate, discontinue, or remove the same;

(13) Signs and billboards. For licensing, regulating, restricting, and limiting the number and locations of advertising signs or displays and billboards within the city;

(14) Airports and aircraft. For establishing, acquiring, and operating airports, either within or without its corporate limits, and for regulating all airports located within its boundaries, and, for the purpose of promoting and preserving the public peace, safety, and welfare, for the control and regulation of the use of the air above the city by aircraft of all types, subject to the limitations imposed by law and the limitations expressly hereinafter set forth:

A. No city revenues or funds shall be expended for the acquisition, improvement; maintenance, or operation of an airport, owned by the city, without voter approval except revenues or funds received from any of the following sources or any combination thereof;

(i) Revenues derived by the city from airport operations;

(ii) State and/or federal funds, grants, or reimbursements designated specifically for airport use;

(iii) Monies donated or contributed by business, industry, or the public in general (other than contributions or donations from the city itself or affiliated city agencies);

B. No airport shall be operated or maintained by the city except pursuant to a lease or other contractual agreement with a fixed base operator approved by the city;

C. No acquisition, improvement, or construction of an airport shall commence, or federal or state grants or monies applied for until legally enforceable pledges from business, industry, or the public in general (other than contributions or donations from the city itself or affiliated city agencies) are received by the city representing the aggregate city contribution for such acquisition, improvement, or construction;

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(15) House trailers. For the prohibition or regulation of the use, occupancy, sanitation, and parking of house trailers within the city, and the right of the city to so regulate any house trailer shall not be abrogated because of any detachment thereof from its wheels or because of placing it on, or attaching it to the ground by means of any temporary or permanent foundation, or in any manner whatsoever.

Sec. 2.2. Exercise of powers.

All powers granted to and possessed by the city shall be exercised as provided in this Charter, by ordinance of the council, or by state law. Where no procedure is set forth in this Charter for the exercise of any power granted to or possessed by the city and its officers, the council may provide a procedure for the exercise thereof by ordinance or resort may be had to any procedure set forth in any statute of the State of Michigan which has been enacted for the government of any political subdivision of the state or for the exercise of such powers by the state itself.

Sec. 2.3. Intergovernmental contracts.

The city shall have power to join with any governmental unit or agency, or with any number of combination thereof, by contract or otherwise as may be permitted by law, to perform jointly, or by one or more, for or on behalf of the other or others, any power or duty which is permitted to be so performed by law or which is possessed or imposed upon the city and each such governmental unit or agency.

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CHAPTER 9
Budget and Finance Generally

Sec. 9.1. Fiscal year.

The fiscal and budget year of the city shall begin on the first day of July.

Sec. 9.2. Budget procedure generally.

On or before the 15th day of February in each year, each city officer and department head shall submit to the city manager an itemized estimate of the expenditures for the next fiscal year, for the department or activities under his control. The city manager shall prepare a complete itemized budget proposal for the next fiscal year of the city and shall submit it to the council on or before the first day of April, preceding the fiscal year of the city.

Sec. 9.3. Contents of budget document.

The budget proposal shall present a complete financial plan for the ensuing fiscal year. It shall include at least the following information:

(a) Detailed estimates of all proposed expenditures for each department and office of the city, showing the expenditures for corresponding items for the current and last preceding fiscal years, with reasons for increases and decreases recommended, as compared with appropriations for the current year;

(b) Statements of the bonded and other indebtedness of the city showing the debt redemption and interest requirements, the debt authorized and unissued, and the condition of sinking funds, if any;

(c) Detailed estimates of all anticipated income of the city from sources other than taxes and borrowing, with a comparative statement of the amounts received by the city from each of the same or similar sources for the last preceding and current fiscal years;

(d) A statement of the estimated balance or deficit, as the case may be, for the end of the current fiscal year;

(e) An estimate of the amount of money to be raised from current and delinquent taxes, and the amount to be raised from bond issues which, together with income from other sources, will be necessary to meet the proposed expenditures;

(f) Such other supporting schedules as the council may deem necessary.

Sec. 9.4. Budget hearing; notice; public inspection of budget.

A public hearing on the budget shall be held before its final adoption, at such time and place as the council shall direct, and notice of such public hearing shall be published at least one week in advance thereof by the clerk. A copy of the proposed budget shall be on file and available to the public for inspection during office hours at the office of the clerk for a period of not less than one week prior to such public hearing.

Sec. 9.5. Adoption of budget; appropriation; tax levy and limit.

Not later than the first meeting of the council in the month of May, the council shall, by resolution, adopt the budget for the next fiscal year and shall in such resolution make an appropriation of the money needed for municipal purposes during the ensuing fiscal year of the city and provide for a levy of the amount

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CHAPTER 12
Utility Franchises and Municipal Ownership of Utilities

Sec. 12.1. Conditions applicable to public utility franchises.

All public utility franchises granted after the adoption of this Charter, whether it be so provided in the granting ordinance or not, shall be subject to the right of the city:

(a) To repeal the same for misuse, or nonuse, or for failure to comply with the provisions thereof;

(b) To require proper and adequate extension of plant and service maintenance thereof at the highest practicable standard of efficiency;

(c) To establish reasonable standards of service and quality of products, and prevent unjust discrimination in service or rates;

(d) To require continuous and uninterrupted service to the public in accordance with the terms of the franchise throughout the entire period thereof;

(e) To impose such other regulations as may be determined by the council to be conducive to the safety, welfare, and accommodation of the public;

(f) To require the public utility to which any franchise is granted to permit joint use of its property and appurtenances located in the streets, alleys, and public places of the city, by the city, and other utilities insofar as such joint use may be reasonably practicable and upon payment of reasonable rental therefor; provided, that in the absence of agreement, upon application by the public utility, the council shall provide for arbitration of the terms and conditions of such joint use and the compensation to be paid therefor;

(g) To pay such part of the cost of improvement or maintenance of the streets, alleys, bridges, and public places of the city, as shall arise from its use thereof and to protect and save the city harmless from all damages arising from said use.

Sec. 12.2. Procedures and requirements controlling franchise ordinances, etc.

Every ordinance or resolution granting any franchise or right to occupy or use the streets, highways, bridges, or public places in the city for any purpose shall be complete in the form in which it is finally passed, and remain on file with the clerk for public inspection for at least 30 days before the final passage or adoption thereof, or approval for referral to the electorate. No exclusive or irrevocable franchise shall be granted by the city, unless such proposition shall have first received the affirmative vote of at least 3/5 of the electors of the city voting thereon at a regular or special election. No such franchise ordinance, or resolution shall be approved by the council for referral to the electorate until a public hearing has been held thereon, nor until the grantee named therein has filed with the clerk his unconditional acceptance of all terms of such franchise. No special election for such purpose shall be ordered by the council unless the expense of holding such election, as determined by the council, shall have first been paid to the treasurer by the grantee.

A franchise ordinance, or ordinance granting or authorizing the granting of a license to use or occupy the streets of the city for public utility purposes which is subject to revocation at the will of the city, may be enacted by the council without referral to the voters, but shall not be enacted nor become operative unless it shall have been complete in the form in which it is finally enacted and remain on file with the clerk for public inspection for at least four weeks before the final enactment thereof.

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Sec. 12.3. General powers relative to municipal utilities and services. [Amend. No. 16, 11-8-1977]

The city shall possess and hereby reserves to itself all powers granted to cities by the constitution and general laws of the State of Michigan to acquire, by purchase or condemnation, the franchises, if any exist, and the property used in the operation of companies or individuals engaged in the electric, light, gas, heat, water and power business and for the purchase and condemnation of private property for any public use or purpose within the scope of the powers specified herein, to construct, own, operate, improve, enlarge, extend, repair and maintain, either within or without its corporate limits, airports, landing fields and aeronautical facilities, hospitals and public utilities, including, but not by the way of limitation, public utilities for treating and supplying water, and for supplying light, heat, power, gas, sewage treatment and garbage disposal facilities, or any of them, to the city and its inhabitants; and also to sell and deliver water, light, heat, power, gas and other public utility services, without its corporate limits to an amount not exceeding the limitations set by the state constitution. The power to supply, as herein possessed and reserved, shall include the power to extract and process water, electricity or gas from natural resources, to manufacture the same or to purchase the same from others.

Sec. 12.4. Board of public works generally—Management of electric and water utilities of the city.

The board of public works of the City of Holland, having been created, is hereby continued, and shall be known and designated as the board of public service.[2] Such board, subject only to the approval of the council, is hereby charged with the duty, power and responsibility of constructing, maintaining, improving, and extending the electric and water plants and distribution systems of the city, together with any public heating which may be a by-product thereof, and with the management, supervision, and control thereof. The title of all grounds and rights in real or personal property held, purchased, or otherwise secured by or on behalf of said board, shall be taken in the name of the City of Holland; and said water, electric and heating plants and works, and everything pertaining thereto, shall be the property of the city, and all contracts and purchases made by said board, shall be in the name of the city.

Sec. 12.5. Same—Status of board.

The board of public service [works][3] and the works, and utilities, under its management, supervision, and control, shall constitute a department of the city government.

Sec. 12.6. Same—Composition; appointment, qualifications and terms of members; filling vacancies. [Amend. No. 12, 4-7-1969]

The board of public works shall be composed of the five members of that board, who held office on the date that this Charter became law, and the city manager. Said members shall hold office for the balance of the terms for which they were elected or appointed prior to the date that this Charter became law. Thereafter, their successors shall be appointed by the mayor, with the advice and consent of the council, during the month of June of each year. Each person appointed as a member of the board of public works shall possess the qualifications required by this Charter for elective officers of the city and shall be appointed to serve for a term of five years commencing on and dating from the first day of July, next following his appointment; provided, that persons appointed to fill a vacancy shall assume office immediately upon appointment and shall hold office only for the balance of the term of the person creating such vacancy. The city manager, as a member of the board of public works, shall have the duty of attending all meetings of the board, shall be

2. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

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privileged to participate in all discussions and proceedings of the board, but shall not be entitled to vote on questions before the board.

Sec. 12.7. Same—Organization; officers; quorum.

Said board shall, annually during the month of July, organize and elect one of its appointed members president. A majority of the board, other than the city manager, shall constitute a quorum for the transaction of business. The clerk of the city shall be ex officio clerk of the said board, but shall have no vote therein. He shall have access to all of its records and papers.

Sec. 12.8. Same—Public service planning; annual report.

The board of public service [works][4] shall be charged and entrusted with the responsibility for the planning of improvements of, additions to, extensions of, and the operation and maintenance of the public service works of the city relating to the supplying of electricity and water to the inhabitants of the city, and within any limits provided by law, the territory surrounding the city. The board shall, annually in the month of March, make a report to the council, by filing the same with the clerk, which report shall present an analysis of the status and needs of the public service works under the board's jurisdiction and the recommendations of the board with respect thereto. Such report shall contain estimates of the costs of all improvements of, additions to, and extensions of the public services of the city which are recommended to be made during the ensuing fiscal year of the city, together with explanations thereof. The council shall have power to modify or disapprove any improvement of, addition to, or extension of the public service works of the city which may be recommended to be made in such report; provided, however, that unless the council shall modify or disapprove of any such recommended improvement, addition, or extension, or any number or combination of the same within 30 days after the date of the first meeting of the council, following the filing of such report with the clerk, such report shall be deemed to be approved by the council. Such report, as approved or modified by the council shall constitute the public service works program of the board of public service [works] for the fiscal year following that in which it is filed and it shall not again be necessary for the board to secure the approval of the council for the making of any improvement of, addition to, or extension of the public service works of the city which is made in accordance with such report as approved or modified by the council. Except as provided in section 12.9, the board of public service [works] shall make no improvement of, addition to, or extension of any public service work of the city in any year, except in accordance with such report as approved or modified by the council with respect to both the nature and the estimated cost thereof, unless the same shall be first approved by the council.

Sec. 12.9. Same—Budget; additional expenditures.

On or before February 15, of each year, the board of public service [works][5] shall file with the city manager for the consideration of the council, a budget proposal and a payroll schedule for the next fiscal year of the city. Such budget shall set forth estimates, in substantially the form required by this Charter for budget proposals of the city, of the amount of money, other than moneys estimated to be required for improvements of, additions to, or extensions of the public service works of the city under its control which, according to the judgment of the board, will be required for the public service works of the city during the ensuing fiscal year of the city. The budget proposal of the board of public service [works] shall be appended to and made a part of the budget proposal of the city which is submitted to the council by the city manager. The estimates of the board of public service [works], contained in its budget proposal, may

4. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

5. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

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be modified or adopted by the council. In the event that the council does not act upon or complete its action upon such proposed budget by the first day of June, following the filing thereof with the clerk, such proposed budget shall be presumed to have been approved by the council and shall be the budget of the board for the ensuing fiscal year of the city just as though formally approved by the council. The board of public service [works] shall administer its own budget. With the consent of the council, the board may exceed any budget appropriation or allotment where it can transfer a sufficient amount therefor from unencumbered balances within its budget. All proposed expenditures of the board of public service [works] which are not included in the board's planning report provided in section 12.8, or its budget, as approved by the council, shall be approved by the council before any obligation for such expenditures shall be incurred by the board; provided, however, that when by unanimous action of the board, it is deemed necessary for the proper functioning of any utility under the board's jurisdiction to install or construct works, or purchase material for the extension of, or addition to, any such utility beyond its yearly planning or budget report, and when the cost of such extension, addition, or purchase does not exceed the total sum of $1,000, and the money to pay the same is or will be available in the unencumbered funds of the board, then such extension, addition, or purchase may proceed without further authorization; provided, further, that the total cost of all extensions, additions, or purchases made or done under authority by this proviso shall not exceed the sum of $5,000 in any fiscal year of the city.

Sec. 12.10. Same—Employment of superintendent of utilities and other operating personnel.

Subject to budget allowances therefor, and without the necessity of the approval of the council, the board of public service [works][6] shall have power to employ a superintendent of utilities and all personnel deemed by the board to be necessary for carrying on the supervision, operation, maintenance, and general conduct of the public service works of the city entrusted to it by the provisions of this Charter and budget allowances therefor.

Sec. 12.11. Same—Expenses and funds generally.

The expenses of conducting the affairs of the board of public service [works][7] shall be defrayed from the revenues of the public service works of the city under its control, or may be paid or supplemented from the general funds of the city, if the council shall so determine with the concurrence of the board of public service [works]. All funds earned, raised, or realized by the board shall be deposited with the treasurer who shall give a receipt therefor and file a copy thereof with the city auditor. The treasurer shall deposit all such receipts to the credit of the proper fund or account of the city.

Sec. 12.12. Same—City auditor to provide system of accounts; board accounts generally.

Separate accounts shall be provided for and kept by the city auditor, in the form required by state law, for each public service work which is owned by the city and operated by the board. Such accounts shall show the value of any service rendered to or by such public service work or works of the city with reference to the city itself. Such accounts shall take into consideration and preserve, for the use for which the same were set aside and accumulated, all funds of the city which stand to the credit of the board of public works of the city at the time that this Charter became law. Except as otherwise provided in this Charter, all funds raised for, or realized from the operation of such public service works and utilities of the city shall remain in the accounts to which they have been allocated and no part thereof shall be transferred from or revert to any other account or fund at the close of any fiscal year.

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6. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**
7. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

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Sec. 12.13. Same—Annual audit; other reports to council.

The cost of making the annual audit of the accounts of the board of public service [works][8] shall be defrayed from the funds of the board. The annual audit of the affairs of the board of public service [works] shall show the financial status of the affairs of the board and, as nearly as possible, the financial results of the city ownership and operation of the public service works of the city for which the board is responsible. The board shall also make such other reports and furnish such other information to the council as that body shall require by ordinance or resolution.

Sec. 12.14. Same—Purchase of water or electricity by city.

With the consent of the council, the board of public service [works][9] may purchase water or electricity from any person, firm, or corporation, municipal or private, if such purchase may be deemed by the board to be in the best interest of the city and the inhabitants thereof.

Sec. 12.15. Other city utility services.

The council shall be charged with the responsibility for constructing, maintaining, improving and extending the sewage disposal facilities, the fire alarm system, and such other utilities of the city as existed on the date this Charter became law or which may thereafter have been acquired by the city. Such facilities shall constitute one or more separate departments of the city government or may be assigned by resolution of the council to an appropriate department or division of the city government, or shall be under the administrative charge and responsibility of the city manager as the council shall determine.

Sec. 12.16. Limitation on use of utility funds.

The receipts from the operation of the electric and water utilities and income from investments shall be applied to the purposes thereof, in accordance with the budget appropriations, including the payment of bonds outstanding or which may be issued for the purposes of such utilities and the interest thereon. The net income shall be determined by deducting from the receipts from operations and income from investments all expenses incurred and charges made or allowed for and on behalf of such utility in accordance with budget appropriations, or by appropriate action under authority of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness. Up to 50% of the annual net income of the board may be appropriated by the council to the general purposes of the city. All such net income which is not so appropriated shall be placed in proper accounts or funds of the city which shall be established as reserves for future operations, replacement, extension, or improvement of such utilities. Nothing herein contained shall be interpreted to limit the power of the council to place, for any year, in such accounts or funds a larger percentage than 50% of such net income to the purposes of such utilities, in the event that such appropriation shall be requested by the board of public service [works][10] and be approved by seven members of the council.

The foregoing limitation of 50% of such net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council.

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Such funds so established as reserves for the purposes of the utilities may be invested and reinvested by the city auditor as the board of public service [works] shall direct, by and with the approval of the council, in such investments as are authorized by law for investment by fiduciaries. Said funds may be used for the purposes of such utilities upon the recommendation of the board of public service [works], by and with the consent of the council.

The electors of the city may, by a 3/5 vote of the qualified electors voting on such proposal at a regular or special election, approve an appropriation of more than 50% of the net income for any year for general purposes, or may approve the placing of more than 50% of the net income for any year in the reserve accounts or funds as above provided for the purposes of such utilities, or may approve for other municipal purposes the use of such accumulated and unallocated accounts or funds as have been established.

Sec. 12.17. Utility rates and charges generally.

With the approval of the council, the board of public service [works][11] shall fix the rates to be charged for all public utility services under its control. The council shall fix the rates to be charged for all public utility services of the city which are not under the control of the board of public service [works]. When any person, firm, or corporation, shall fail or refuse to pay to the city any sums due on utility bills, such service upon which such delinquency exists may be shut off or discontinued by the proper board or department of the city and suit may be instituted by the city for the collection of the same in any court of competent jurisdiction.

Sec. 12.18. Lien for utility charges; collection of delinquent charges.

Except as otherwise provided, or limited by state law, the city shall have as security for the collection of all charges, a lien upon the premises to which such utility services were supplied. Such lien shall become effective immediately upon the distribution or supplying of such utility service or services to such premises.

All unpaid charges for utility services furnished to any such premises, which, on the 30th day of June of each year, have remained unpaid for a period of three months, or more, shall be reported by the city auditor to the council at the first meeting thereof in the month of July. The council thereupon shall order the publication in a newspaper published in the city, of notice to all owners of property within the city that all unpaid utility charges which have remained unpaid for a period of three months or more prior to the 30th day of June, and which have not been paid by the thirty-first day of July, shall be assessed upon the city's tax roll against the premises to which the utility services, for which the unpaid charges accrued, were supplied or furnished; and that such charges shall be collected in the same manner as the city taxes on said tax roll.

All such utility charges, which remain unpaid on the 31st day of July, shall be transferred to the city's tax roll and assessed against the premises to which the utility service, for which the unpaid charges accrued, was supplied or furnished, and shall be collected with, and in the same manner as, city taxes. If the same have remained delinquent and unpaid after the expiration of the time limited in the treasurer's warrant for the collection of taxes levied in said tax roll, such charges shall be returned to the county treasurer to be collected in the same manner as the lien created by city taxes on the delinquent tax roll of the city.

In the event that any provision of this section shall prove to be incomplete or inadequate for the carrying out of the purposes thereof, the council shall provide by ordinance such additional procedures as may be

11. **Editor's Note: See section 12.20 of the Charter which changes the name of the "board of public service" to the "board of public works."**

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required for the collection of public utility charges, and, for such purpose, shall have all the powers granted to cities by Act No. 178 of the Public Acts of 1939, as amended.

Sec. 12.19. Disposal of plants, etc.

Except for purposes permitted by law, the city shall not sell, exchange, lease, or in any other way alien or dispose of the property, easements, income, equipment, privileges, or assets belonging to and appertaining to any utility which it may own or acquire, unless and except such proposition shall first have been submitted to the qualified electors of the city at a special city election called for that purpose in the manner provided in this Charter, and approved by them by a 3/5 majority vote of the electors of the city voting thereon. All contracts, negotiations, licenses, grants, leases, or other forms of transfer in violation of this provision shall be void and of no effect. The provisions of this section shall not, however, apply to the sale or exchange of any article of equipment of any city-owned utility which is worn out or useless, or which is being or has been replaced by new and improved machinery or equipment.

Sec. 12.20. Board name change, etc. [Amend. No. 1, 4-2-1951]

The name of the "board of public service" is hereby changed to the name of "board of public works," and in each place in the city Charter where the name of "board of public service" appears, the same shall be deemed to mean the "board of public works."

The board of public works shall succeed to all the property, money, contracts, rights, credits, effects, records, files, books and papers belonging to the board of public service, and shall perform all the duties, obligations and functions specified in the Charter to be performed by the board of public service.

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deemed to constitute a part of, any franchise, contract, document, or agreement, contrary to any public record of the city. Any such representation shall be void and of no effect as against the city.

Sec. 16.6. Continuation of rights and liabilities.

The adoption and taking effect of this Charter shall not discharge, impair, or limit any right vested in or liability incurred by the City of Holland at the time this Charter became law.

Sec. 16.7. Tense.

Except as otherwise specifically provided or indicated by the context, all words used in this Charter indicating the present tense shall not be limited to the time of adoption of this Charter, but shall extend to and include the time of the happening of any event or requirement for which provision is made therein, either as a power, immunity, requirement, or prohibition.

Sec. 16.8. Number and gender.

As used in this Charter, every word importing the singular number only, may extend to and embrace the plural number and every word importing the plural number may be applied and limited to the singular number. Every word importing the masculine gender only shall be extended and applied to the feminine as well as the masculine gender.

Sec. 16.9. Public schools of the city.

The adoption of this Charter by the people of Holland and the taking effect thereof as law shall not affect, nor extend to or include the government of the school district comprising the City of Holland known as the "Public Schools of the City of Holland" and all provisions of law relating to and affecting such school district shall continue to apply to and govern such school district without any change whatsoever.

Sec. 16.10. Chapter headings and catchlines not part of Charter.

The chapter and section headings used in this Charter are for convenience only and shall not be considered to be a part of this Charter.

Sec. 16.11. Effect of illegality of any part of Charter.

Should any provision or section, or portion thereof, of this Charter be held by a court of competent jurisdiction to be invalid, illegal, or unconstitutional, such holding shall not be construed as affecting the validity of this Charter as a whole or of any remaining portion of such provision or section; it being hereby declared to be the intent of the Charter commission and of the electors who voted thereon that such unconstitutionality or illegality shall not affect the validity of any part of the Charter, except that specifically affected by such holding.

Sec. 16.12. Amendments.

This Charter may be amended at any time in the manner provided in Act No. 279 of the Public Acts of 1909, as amended.[13] Should any two or more amendments, adopted at the same election, have conflicting provisions, the one receiving the largest affirmative vote shall prevail as to those provisions.

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13. Editor's Note: See M. S. A., § 5.2071 et seq.

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EXHIBIT 2

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2023 WL 8108080
Only the Westlaw citation is currently available.
Court of Appeals of Michigan.

Melvin J. BABI, Plaintiff-Appellant,
v.
ESTATE OF Gregg E. HERMAN, Cathy A. Herman, Personal Representative of the Estate of Gregg E. Herman, and Gregg E. Herman, P.C., Defendants-Appellees.

No. 364375
|
November 21, 2023
|
Approved for Publication January 11, 2024, 9:00 a.m.

Synopsis

Background: Attorney that had referred medical malpractice client brought action against receiving attorney for breach of referral agreement. The Circuit Court, Oakland County, No. 2022-193925-CK, Jacob James Cunningham, J., 2022 WL 21878065, granted summary disposition to receiving attorney. Referring attorney appealed. Receiving attorney died while appeal was pending, and his estate and personal representative were substituted as defendants.

Holdings: The Court of Appeals, K.F. Kelly, J., held that:

[1] referring attorney was not misled by trial court's decision to decide summary disposition motion under different subrule than the subrule motion was originally brought under;

[2] trial court's grant of summary disposition was premature and prejudiced referring attorney;

[3] client's objection to attorney referral fee was not timely made; and

[4] genuine issue of material fact existed as to whether potential client actually met referring attorney and consulted him during medical malpractice claim.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Disposition.

West Headnotes (16)

[1] **Appeal and Error** De novo review

The Court of Appeals reviews de novo a trial court's decision on a motion for summary disposition. Mich. Ct. R. 2.116(C)(10).

[2] **Summary Judgment** In conjunction with right to judgment as matter of law
Summary Judgment Favoring nonmovant; disfavoring movant
Summary Judgment Materials Considered

A trial court may grant a motion for summary disposition if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. Mich. Ct. R. 2.116(C)(10).

[3] **Summary Judgment** Genuine Issue or Dispute as to Material Fact
Summary Judgment Favoring nonmovant; disfavoring movant

A genuine issue of material fact precluding summary disposition exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. Mich. Ct. R. 2.116(C)(10).

[4] **Summary Judgment** Form and Requisites

A trial court is not necessarily constrained by the subrule under which a party moves for summary disposition. Mich. Ct. R. 2.116(C).

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[5] **Summary Judgment**🔑Defects, objections, and waiver

In circumstances where a party brings a motion for summary disposition under the wrong subrule, the trial court may proceed under the proper rule provided the parties were not misled or otherwise prejudiced by the decision. Mich. Ct. R. 2.116(C).

[6] **Summary Judgment**🔑Conversion of Other Motions

Trial court's decision to grant summary disposition in favor of defendants based on absence of genuine issue of material fact after they had moved for summary disposition based on failure to state claim did not mislead plaintiff who acknowledged that defendants were relying on documents outside pleadings when arguing in plaintiff's suit for breach of referral agreement between attorneys that client's testimony demonstrated objection to referral fee and who claimed that defendants were bringing premature motion for summary disposition before discovery had begun, and, thus, trial court could proceed unless its decision prejudiced plaintiff. Mich. Ct. R. 2.116(C)(8), 2.116(C)(10).

[7] **Summary Judgment**🔑Continuance

Generally, a motion for summary disposition is premature if granted before discovery on a disputed issue is complete. Mich. Ct. R. 2.116(C)(10).

[8] **Summary Judgment**🔑Continuance

Summary disposition may be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. Mich. Ct. R. 2.116(C)(10).

[9] **Appeal and Error**🔑Summary judgment
Summary Judgment🔑Conversion of Other Motions
Summary Judgment🔑Continuance

Grant of summary disposition to receiving attorney based on absence of factual issue in action for breach of attorney referral agreement brought by referring attorney for failure to pay referral fee was premature and prejudiced referring attorney after receiving attorney had sought summary disposition based on failure to state a claim, thus requiring reversal; motion was based on testimony that contradicted allegations in referring attorney's complaint that he did not have an opportunity to challenge, there was potential that further discovery could reveal evidence that would rebut potential client's testimony, and document of this nature was in defendants' possession but was not produced to referring attorney, despite being the subject of document request, before referring attorney filed his response brief. Mich. Ct. R. 2.116(C)(8), 2.116(C)(10).

[10] **Attorneys and Legal Services**🔑Compensation; referral fees

Referring attorney stated claim for breach of attorney referral contract concerning referral fee; referring attorney alleged existence of referral agreement with receiving attorney, that he met with potential client, created attorney-client relationship with her, explained his referral fee to her, and received no objection.

[11] **Attorneys and Legal Services**🔑Compensation; referral fees

Client's objection to referral fee pursuant to attorney referral agreement was not timely made at settlement hearing in attorney's lawsuit for breach of referral agreement; client was required to object at time she was informed of agreement in order to render purported referral agreement unenforceable. Mich. R. Prof. Conduct 1.5(e).

[12] **Attorneys and Legal Services**🔑Compensation; referral fees

Clients must have objected at the time they were informed of the attorney referral agreement in order for there to be a violation of attorney fee rule. Mich. R. Prof. Conduct 1.5(e).

[13] **Attorneys and Legal Services**🔑Compensation;

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referral fees

Attorneys cannot obtain referral fees under attorney fee rule without entering into an attorney-client relationship with the individual being referred. Mich. R. Prof. Conduct 1.5(e).

[14] **Courts** Dicta

If the Supreme Court reverses a case in its entirety, statements from the Court of Appeals that are not explicitly rejected are considered dicta.

[15] **Courts** Previous Decisions as Controlling or as Precedents

An overruled proposition in a case is no reason to ignore all other holdings in the case.

[16] **Attorneys and Legal Services** Compensation; referral fees
Summary Judgment Fees and compensation

Genuine issue of material fact existed as to whether potential client actually met attorney who allegedly referred her to another attorney and consulted him during malpractice claim, precluding summary disposition in action brought by referring attorney against receiving attorney for failure to pay referral fee. Mich. Ct. R. 2.116(C)(10).

Oakland Circuit Court, LC No. 2022-193925-CK
Before: O'Brien, P.J., and K. F. Kelly and M. J. Kelly, JJ.

Opinion

K. F. Kelly, J.

***1** In this dispute over attorney referral fees, plaintiff appeals by right the trial court's opinion and order granting summary disposition in favor of defendants[1] under MCR 2.116(C)(10). Because the grant of summary disposition was premature as discovery had not begun in earnest, we reverse the trial court's order and remand for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

According to plaintiff's complaint, plaintiff and attorney Gregg E. Herman had a professional relationship wherein plaintiff would send Herman client referrals in exchange for a referral fee. In 2018, plaintiff had a meeting with a woman named Terri Poplichak whose husband had died and was seeking to begin a medical malpractice claim. On or about the same day as the meeting, plaintiff referred Poplichak to defendants.

Poplichak eventually settled her lawsuit, and at the settlement hearing, the following discussion took place between Poplichak and Herman after the attorney for one of the defendants raised the issue of an attorney's lien asserted by plaintiff against the settlement proceeds:

Q. Ms. Poplichak, this lien has been asserted by an attorney by the name of Melvin Babi. Do you know who Melvin Babi is?

A. No.

Q. Okay, have you ever entered into an attorney/client relationship with him?

A. No.

Q. Have you ever authorized him to refer you to my office?

A. No.

Q. Okay, was he the one who referred you to my office?

A. No.

Q. Was there any attorney who referred you to my office?

A. No.

Q. All right. Would you object to any attorney fee being paid to Melvin Babi or any other attorney?

A. Yes.

When it became clear that defendants were not going to pay plaintiff the referral fee he believed he was entitled to, plaintiff filed suit asserting that breached the agreement they had. In lieu of answering, defendants filed a motion for

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summary disposition under MCR 2.116(C)(8), in which they argued that on the basis of Poplichak's testimony during the settlement hearing in which she objected to the sharing of the fee, any agreement between plaintiff and defendants was unenforceable under MRPC 1.5(e). Plaintiff responded by arguing that defendants were relying on evidence outside the pleadings, and a decision under MCR 2.116(C)(10) would be premature because discovery had not begun in earnest. Plaintiffs also argued that Poplichak's objection was untimely. The trial court disagreed, and concluded that absent a written retainer agreement in which Poplichak agreed to the fee, there was no genuine issue of material fact that Poplichak objected to the fee and that "no further discovery can reveal a different result in the Court's mind."

After the parties had briefed the issue but before the trial court issued its opinion, defendants produced a signed and written copy of Poplichak's retainer agreement with defendants, in which she agreed that "in the event I have been referred by another attorney or law firm ... they may pay such attorney from their fee that portion they feel appropriate ...." Plaintiff did not notify the court that it received the document before the court issued its opinion.[2] Once the opinion was issued, plaintiff moved for relief from judgment or reconsideration, which the trial court denied. This appeal followed.

II. STANDARD OF REVIEW

***2** [1] [2] [3] This Court reviews de novo a trial court's decision on a motion for summary disposition. *Brightmoore Gardens, LLC v Marijuana Regulatory Agency*, 337 Mich App 149, 160, 975 N.W.2d 52 (2021). Under MCR 2.116(C)(10), summary disposition is proper when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

> A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Anderson v Transdev Servs, Inc*, 341 Mich App 501, 507, 991 N.W.2d 230 (2022) (quotation marks and citations omitted).]

III. ANALYSIS

On appeal, plaintiff argues that the trial court erred when it granted summary disposition in favor of defendants because discovery had not begun in earnest and it would be premature to grant summary disposition when discovery had a reasonable chance of uncovering relevant information to plaintiff's claim. Plaintiff also argued that the trial court erred to the extent it considered Poplichak's untimely objection made four years after the referral. We agree.

[4] [5] "A trial court is not necessarily constrained by the subrule under which a party moves for summary disposition." *Computer Network, Inc. v AM Gen. Corp.*, 265 Mich App 309, 312, 696 N.W.2d 49 (2005). In circumstances where a party brings a motion under the wrong subrule, the trial court may proceed under the proper rule provided the parties were not misled or otherwise prejudiced by the decision. *Id.*

[6] Plaintiff was not misled by defendants' motion. In his response brief, plaintiff clearly acknowledged that defendants were relying on documents outside of the pleadings when arguing that Poplichak's testimony demonstrated that she objected to the referral fee. In response to defendants' arguments, plaintiff asserted that defendants' motion was one brought under MCR 2.116(C)(10), and that the court should deny it because discovery had not yet begun in earnest. Accordingly, we agree with the trial court's conclusion that plaintiff was not misled by the motion.

[7] [8] However, the inquiry does not end there, as the Court must also consider whether plaintiff was prejudiced by the trial court's decision. See *Computer Network, Inc*, 265 Mich App at 312, 696 N.W.2d 49. "Generally, a motion for summary disposition is premature if granted before

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discovery on a disputed issue is complete." *Oliver v Smith*, 269 Mich App 560, 567, 715 N.W.2d 314 (2006) (quotation marks and citation omitted). "However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Id.* (quotation marks and citation omitted).

In the trial court's opinion granting defendants' motion for summary disposition, the court acknowledged the potential existence of evidence that would be relevant to rebut defendants' claim that Poplichak did not agree to the referral fee—the existence of a written agreement in which she agreed to the fee. Because plaintiff was not able to produce that agreement in response to defendants' motion, filed in lieu of answer and before discovery was complete, the court concluded there was no dispute of fact, but perplexingly also concluded that no evidence could dispute Poplichak's testimony. These conclusions by the trial court are at odds with one another: on the one hand, the court stated that Poplichak's testimony could be rebutted by some other evidence, such as a written agreement. On the other hand, however, the court stated that no further discovery would be necessary because "no further discovery can reveal a different result in the Court's mind."

***3** [9] [10] The trial court erred when it granted summary disposition under MCR 2.116(C)(10) because a decision under that subrule was premature and prejudiced plaintiff. Defendants based their motion on testimony that contradicted allegations in plaintiff's complaint that plaintiff did not have an opportunity to challenge.[3] As the trial court recognized, there was a potential that further discovery could reveal evidence that would rebut Poplichak's testimony, such as written evidence of her agreeing to plaintiff's fee. Indeed, such a document was in defendants' possession but was not produced to plaintiff, despite being the subject of a document request, before plaintiff filed his response brief. Once the trial court recognized this fact, it should have denied defendants' motion under MCR 2.116(C)(10).[4]

[11] The trial court also erred to the extent that it concluded Poplichak's 2022 objection to the referral fee was timely made. MRPC 1.5(e) states:

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the client is advised of *and does not object* to the participation of all the lawyers involved; and
>
> (2) the total fee is reasonable. [Emphasis added.]

Although the trial court did not directly address *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 326 Mich App 684, 930 N.W.2d 416 (2019), aff'd in part and rev'd in part, 507 Mich. 272, 968 N.W.2d 367 (2021), the court did conclude that Poplichak's testimony was dispositive, inferring that the trial court rejected *Sherbow*'s holding. Contrary to defendants' argument, the Michigan Supreme Court's decision in that case did not render the relevant portion of this Court's analysis as dicta, and this Court is bound to follow *Sherbow*.

In *Sherbow*, the plaintiff, a sole practitioner, was contacted by the son of two of multiple people injured in an automobile accident. *Sherbow*, 326 Mich App at 690, 930 N.W.2d 416. The plaintiff referred the matter to another attorney who worked at the defendant law firm. The attorneys agreed that the plaintiff would be paid one-third of the defendant's eventual recovery. *Id.* A meeting was eventually held between the attorneys and some, but not all, of the passengers of the vehicle in the accident, at which time retainer agreements were signed. *Id.* at 690-691, 930 N.W.2d 416. The plaintiff claimed that at the meeting, he disclosed his fee arrangement with the clients, and that no one objected. *Id.* at 691, 930 N.W.2d 416. Two of the attendees, however, stated they did not recall the conversation. *Id.* It was undisputed that one of the accident victims was in a medically-induced coma and was not present at the meeting. *Id.* The defendant eventually refused to pay the plaintiff the agreed referral fee, and the plaintiff brought suit for breach of contract. *Id.* at 692, 930 N.W.2d 416. The defendant sought summary disposition on the basis that the fee agreement was unenforceable under MRPC 1.5(e) because the accident victims were not aware of the referral fee agreement. *Id.* The court denied the motion, and the case proceeded to trial, where the plaintiff prevailed with respect to one of the clients but not the other three. *Id.* at 693, 930 N.W.2d 416.

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***4** [12] As relevant to this appeal, the plaintiff argued in this Court that the trial court abused its discretion during the trial when it permitted the accident victims to testify after the fact as to whether they objected to the referral fee. *Id.* at 702-703, 930 N.W.2d 416. Although the Court disagreed with the plaintiff that an untimely objection to a referral fee is completely irrelevant and therefore inadmissible, the Court did state that "the defendant was required to prove that the clients objected to the referral-fee agreement at the time they were informed ...." *Id.* at 704, 930 N.W.2d 416. The Court reasoned that "[t]o allow subsequent events, such as a mere change of heart, to upset the referral arrangement is inconsistent with basic contract law," and would be "unwise as a matter of policy ...." *Id.* (quotation marks and citations omitted). Thus, the Court concluded that "the clients must have objected at the time they were informed of the agreement in order for there to be a violation of MRPC 1.5(e)." *Id.* at 704-705, 930 N.W.2d 416.

[13] The Michigan Supreme Court affirmed in part and reversed in part this Court's decision in *Sherbow*. The Supreme Court reversed this Court's determination that MRPC 1.5(e) does not require an attorney-client relationship between the referring attorney and the client, concluding that "attorneys cannot obtain referral fees under MRPC 1.5(e) without entering into an attorney-client relationship with the individual being referred." *Sherbow*, 507 Mich. at 302, 968 N.W.2d 367. The Supreme Court otherwise affirmed this Court's opinion, but did not directly address the statement by this Court concerning the timing of the objection.

[14] [15] Defendants contend that as a result of the Michigan Supreme Court's decision in *Sherbow*, this Court's holding concerning when an objection must be made is dicta. We disagree. Defendants are correct that if the Michigan Supreme Court reverses a case in its entirety, statements from this Court that are not explicitly rejected are considered dicta. See *Horace v Pontiac*, 456 Mich. 744, 754-755, 575 N.W.2d 762 (1998). However, as the Court has explained, "an overruled proposition in a case is no reason to ignore all other holdings in the case." *Stein v Home-Owners Ins Co*, 303 Mich App 382, 389, 843 N.W.2d 780 (2013) (quotation marks and citation omitted). The Supreme Court's decision in *Sherbow* to reverse this Court was limited to the determination that an attorney-client relationship was not required under MRPC 1.5(e). Accordingly, because the Supreme Court did not reverse *Sherbow* in its entirety, the remaining portions of that opinion remain good law and are controlling. *Stein*, 303 Mich App at 389, 843 N.W.2d 780.

We pause to note here that even if *Sherbow* did not preclude the trial court from considering Poplichak's objection dispositive, and even if summary disposition were not premature as a result of discovery, the documentary evidence submitted by plaintiff in response to the motion for summary disposition raised a question of fact whether Poplichak testified accurately at the settlement hearing. Plaintiff submitted evidence in the form of e-mail and text message communications between plaintiff and defendants concerning plaintiff's referral in 2018. On June 27, 2018, plaintiff wrote to Herman that he wanted Herman to "call [Poplichak] for a med mal case," and related that she "was able to provide very detailed facts" about the case. Plaintiff received a response from someone in defendants' office that they would "call this client." Later the same day, plaintiff followed up with Herman with a text message, stating that he "just sent you a referral," to which Herman replied, "Thx."

[16] On the basis of these communications, the trial court should have denied defendants' motion for summary disposition under MCR 2.116(C)(10). The communications between plaintiff and defendants raise a genuine issue of material fact whether Poplichak actually met plaintiff and consulted with him regarding the malpractice claim in 2018, which she stated she did not do during her hearing in 2022. Poplichak's testimony was sufficiently undermined by the documentary evidence presented by plaintiff as to raise a question whether she testified accurately during that hearing. The evidence submitted by plaintiff was sufficient to rebut Poplichak's testimony and create an issue of fact, which necessitated denying the motion under MCR 2.116(C)(10).

***5** In sum, we are bound to follow *Sherbow*'s holding that "the clients must have objected at the time they were informed of the agreement in order for there to be a violation of MRPC 1.5(e)." *Sherbow*, 326 Mich App at 704-705, 930 N.W.2d 416. While Poplichak's objection at the settlement hearing was not completely irrelevant, it was not sufficient to render the purported referral fee agreement unenforceable under MRPC 1.5(e), and we reverse the trial court's order granting defendants' motion for summary disposition.

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Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax costs. MCR 7.219(A).

All Citations

--- N.W.3d ----, 2023 WL 8108080

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Footnotes

[1] While this case was pending on appeal, attorney Gregg E. Herman, who was a defendant in this case, passed away. The Court has, accordingly, granted the parties' request to substitute his estate and personal representative. For purposes of this opinion, however, we will refer to attorney Herman and his law firm as "defendants."

[2] Because the parties sought immediate consideration of defendants' motion for summary disposition, the trial court dispensed with oral argument.

[3] While it is true that plaintiff's brief in response to defendants' motion for summary disposition did include documentary evidence outside of the pleadings, plaintiff did not rely on that evidence when making his legal arguments. Moreover, the evidence that plaintiff did attach to his brief merely substantiated the direct quotes that plaintiff included in his complaint.

[4] Had the motion been considered under MCR 2.116(C)(8), it is apparent that the motion would have been denied. Plaintiff alleged the existence of a contractual agreement with defendants that was made on the basis of referrals from plaintiff to defendants. Plaintiff also alleged that he met with Poplichak, created an attorney-client relationship with her, and explained his referral fee to her and received no objection. On the basis of these allegations, plaintiff stated a claim for breach of contract concerning an attorney referral fee, and summary disposition under MCR 2.116(C)(8) would not have been proper.

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EXHIBIT 3

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STATE OF MICHIGAN
OTTAWA COUNTY CIRCUIT COURT

STACY PHOTHISAN, individually, and as a representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF HOLLAND, MICHIGAN, a municipal corporation, by and through THE HOLLAND BOARD OF PUBLIC WORKS,

Defendant.

Case No. 25-0000008184-CZ

Hon. Karen J. Miedema

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Jamie K. Warrow (P61521)
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AFFIDAVIT OF KEITH VAN BEEK

STATE OF MICHIGAN)
) SS.
COUNTY OF OTTAWA)

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I, Keith Van Beek, being first duly sworn, depose and say the following:

1. The information contained in this declaration is based on my own personal knowledge. I am competent to testify as to the contents of this affidavit if I am called as a witness.

2. I am the City Manager for the City of Holland, Michigan ("City"). I have served in my current position since April 2018. I previously served as the Deputy County Administrator for Ottawa County and the Deputy City Administrator for the City of Kentwood.

3. As City Manager, I provide leadership and direction for the City of Holland. I oversee nearly 200 employees and manage a City General Fund budget of roughly $35 million and an all-funds budget of approximately $224 million.

4. I have reviewed the motion and brief filed by the Plaintiff with this Court on July 1, 2025, along with the various exhibits that are attached to the Plaintiff's brief. I disagree with several statements contained in the brief and with Plaintiff's characterization of the exhibits attached to the brief.

5. First, there is nothing improper about using a percentage of gross revenues to estimate "net income" in connection with budgeting. A final net income calculation under the Charter (which requires reliance on actual expenses) could not be obtained until the fiscal year is completed and audited, which would be many months after a budget is prepared. This is why an estimate or "proxy" has to be used for purposes of budgeting. The City has used a percentage of gross revenues as a "proxy" for the net income calculation because doing so has been successful in generating a set amount that both HBPW and City Council can reliably use in budgets.

6. Second, the Plaintiff's repeated statements that the HBPW's electric utility fund had no net income for fiscal years 2022 through 2025 mischaracterizes the calculation the City uses to calculate "net income" for purposes of compliance with the City's Charter – specifically,

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§12.16. Notably, §12.16 suggests that the amount that may be transferred from HBPW to the City is "[u]p to 50% of the annual net income of the board," not just the electric utility. Pl's Mot, Ex 2 (§12.16) (emphasis added). The City's resolutions adopted an even more conservative approach than the Charter by relying on a proxy to estimate what 50% of the annual net income of the electric utility might be and then approving any proxy estimate to the extent it was ultimately more than 50% of the electric utility's net income.

7. Third, the Plaintiff (inappropriately) takes excerpts from the City's budgets (see Pl's Mot, Exs 6-9) and claims that these numbers reflect the City's net income from the electric utility. But the budget appropriations do not reflect actual receipts or expenses. And they include expenses that should not be counted for purposes of calculating net income – e.g., certain capital outlay expenses that are funded from cash reserves or bonds, voluntary debt service payments from reserves, and depreciation. Nothing in these budget summaries suggests that these calculations reflect "net income" per the Charter and relying on them is improper.

8. By relying on the budget summary excerpts, Plaintiff overstates the amount that should be set aside "for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness." Pl's Mot, Ex 2 (§12.16). The only principal and interest that should be reflected in the net income calculation are those payments that are required per fiscal year.

9. Plaintiff also incorrectly includes "depreciation expense" in its supposed calculation of "net income" under §12.16 – even though depreciation expense is a non-cash item that is not an actual operating expense or cash outlay.

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Keith Van Beek

Subscribed and sworn to me before
this 16 day of July 2025

Notary Public
Ottawa County, Michigan
My Commission Expires: April 25, 2031

KARA PRICE-SANCHEZ
Notary Public, State of Michigan
County of Ottawa
My Commission Expires April 25, 2031
Acting in the County of Ottawa

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EXHIBIT 4

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STATE OF MICHIGAN
OTTAWA COUNTY CIRCUIT COURT

STACY PHOTHISAN, individually, and as a representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF HOLLAND, MICHIGAN, a municipal corporation, by and through THE HOLLAND BOARD OF PUBLIC WORKS,

Defendant.

Case No. 25-0000008184-CZ

Hon. Karen J. Miedema

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Jamie K. Warrow (P61521)
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AFFIDAVIT OF DAVID KOSTER

STATE OF MICHIGAN)
) SS.
COUNTY OF OTTAWA)

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I, David Koster, being first duly sworn, depose and say the following:

1. The information contained in this declaration is based on my own personal knowledge. I am competent to testify as to the contents of this affidavit if I am called as a witness.

2. I am the General Manager for the Holland Board of Public Works ("HBPW"), a department of the City of Holland, Michigan ("City"). I have served in my current position at HBPW since December 2011. I have been an employee of HBPW for more than 33 years, holding a variety of positions including power supply engineer, production engineering supervisor, power resources director and operations director.

3. As the General Manager of HBPW, I have overall responsibility for the electric, water, wastewater, and broadband utility functions of HBPW. I am familiar with all facets of HBPW's day-to-day operations including, but not limited to, the managerial, administrative and financial aspects.

4. HBPW's electric utility rates are supported by cost-of-service studies developed by HBPW's rate consultant, Utility Financial Solutions, LLC. The most recent study was conducted in June 2022.

5. HBPW regularly holds public meetings where electric utility business is discussed. When HBPW adopts an electric utility budget and/or rates for a given fiscal year, it discusses these matters at its public meetings before the City finally adopts its full budget. See, e.g. March 11, 2024 HBPW Board Meeting Agenda (attached as **Exhibit A**). Attendees are allowed to comment.

6. The City's electric utility rates are among the lowest in Michigan. An American Public Power Association ("APPA") survey of electric utility rates in 2023 shows that of the 57 public power, investor-owned and cooperative utilities in the state, the City has the second lowest

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residential, commercial and industrial rates, and generates the third lowest revenue per kWh (kilowatt hour). See excerpt attached as **Exhibit B**.

7. Based on my understanding of publicly-owned utilities, transfers from a public power utility to a municipality's general fund are common. Unlike investor-owned utilities, public power utilities, like HBPW, do not pay local income tax or property tax. Instead, they benefit the communities they serve by providing them with payments in lieu of taxes, transfers to the general fund, and/or free or reduced-cost services. These payments and contributions not only reflect the benefits that the utility receives from the community (e.g., police and fire protection or road maintenance), but also support the value of local utility ownership. Local governments determine how these benefits of local ownership will be delivered to the community. Here, the City's voter-approved Charter governs the appropriations from HBPW to the City. Notably, the contributions and payments from a public utility reflect a community's choice to collect less tax revenue from residents or to enhance existing municipal services. And publicly-owned utilities give residents much greater say over operations through locally elected and appointed officials, public hearings and forums, and ultimately, the ballot box.

8. I have reviewed the motion and brief filed by the Plaintiff with this Court on July 1, 2025, along with the various exhibits that are attached to Plaintiff's brief. I disagree with several statements contained in the brief and with Plaintiff's characterization of the exhibits attached to the brief.

9. In particular, I do not agree with Plaintiff's calculation of net income under §12.16 of the Charter. A proper, but also conservative, net income calculation under §12.16 (i.e., one that considers the net income of the electric utility as opposed to "the annual net income of the board") should reflect actual (not budgeted) receipts and expenses. The attached **Exhibit C** reflects

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information obtained from the cash flow statement in HBPW's audited financial reports and reveals that in fiscal years 2020 through 2024, the City had net income each fiscal year. These audited reports, and the information reflected in **Exhibit C**, are prepared and maintained as part of HBPW's regularly conducted business activities. As part of my job duties for HBPW, I am familiar with these reports and the information contained therein and rely on them in connection with HBPW's day-to-day business activities.

10. As shown in **Exhibit C**, the percentage of net income transferred for general purposes each fiscal year is the following:

FY 2020	16.24%
FY 2021	19.50%
FY 2022	98.01%
FY 2023	25.51%
FY 2024	36.92%

The transfer for general purposes each fiscal year is less than 50% except in fiscal year 2022. However, HBPW and seven members of City Council approved this transfer as required under §12.16 of the Charter.

David Koster

Subscribed and sworn to me before
this 16 day of July 2025

CARLOTTA ELLISON
Notary Public, State of Michigan
County of Ottawa
My Commission Expires April 15, 2028
Acting in the County of Ottawa

Notary Public
Ottawa County, Michigan
My Commission Expires: 4-15-28

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EXHIBIT A

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Board of Directors Regular Meeting

HOLLAND BOARD OF PUBLIC WORKS
625 HASTINGS AVENUE
HOLLAND, MICHIGAN

March 11, 2024
4:00 p.m.

Meeting Agenda

1. **Call to Order**
2. **Approval of the Agenda**
3. **Communications from the Audience**
4. **Consent Agenda**
   - A. Minutes for Approval
     2024-02-12 Minutes
     2024-02-26 Minutes
   - B. Water Treatment Plant High Service Pump #2 Repairs
     Recommendation - Water Treatment Plant High Service Pump #2 Repairs
   - C. SW Heights Engineering Services Contract Contingency Increase
     Recommendation - SW Heights Engineering Services Contract Contingency Increase
     2024-03-11 28th & Wildwood Additional Construction Services
     2024-03-11 28th & Wildwood Engineering Change Order 1
     2024-03-11 28th & Wildwood Engineering Change Order 2
5. **Major Projects Update**
   - A. 2024-03-11 Project Closeout Memo - East Point Substation
   - B. 2024-03-11 SW Heights Project Closeout Memo
   - C. 2024-03-11 UIS SCADA Project Closeout Memo
   - D. 2024-03-11 Secondary Clarifiers 3 and 4 Project Closeout Memo
6. **Regular Agenda Items**
   - A. FY 2025 Budget and Rate Recommendations
     Recommendation - FY 2025 Budget and Rate Recommendations
     2024-03-11 FY2025 Budget and Rates Presentation
     2024-03-11 FY2025 Budget Book
     2024-03-11 FY2025 Proposed Rate Schedules Electric v2
     2024-03-11 FY2025 Proposed Rate Schedules Fiber
     2024-03-11 FY2025 Proposed Rate Schedules Water_Wastewater_Surcharges
   - B. Notice of Intent to Sell Water Utility Bonds

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Recommendation - Notice of Intent to Sell Water Utility Bonds
2024-03-11 Adoption Copy - BPW Resolution Declaring Official Intent and Requesting Publication of Notice of Intent (2024 Water Bonds)
2024-03-11 Adoption Copy - City Council Resolution Declaring Official Intent and Authorizing Publication of Notice of Intent (2024 Water Bonds)

C. Unit 8 Combustion Inspection Service Board Recommendation
Recommendation - Unit 8 Combustion Inspection Service Board Recommendation
2024-03-11 HBPW Unit 8 CI Draft Contract
2024-03-11 GE Vernova Unit 8 CI Bid Form

7. Communication from the General Manager

8. Communications From the Board

Adjourn

AUDIENCE PARTICIPATION:

Members of the audience may address the Board of Directors during public hearings and under “Communications from the Audience”. Audience participation includes stating name and address and limiting speaking time to five minutes.The City of Holland will provide necessary services and auxiliary aids, such as signers for the hearing impaired and audiotapes of printed materials, to individuals with disabilities, upon receipt of seven days prior notice. Person with disabilities requiring auxiliary aids services should contact the City of Holland by writing or calling: Human Relations c/o City Clerk’s Office Esther Fifelski,
270 S River Avenue Holland, MI 49423 Telephone (616) 355-1328.
Document(s) available for translation upon request

La Ciudad de Holland proporcionara servicios necesarios y ayudas auxiliaries, tales como personas que usan leguaje de señas aquellos con discapacidad auditiva y Cintas de audio de materiales impresos, a las personas con discapacidad, con un aviso previo de siete días de anticipación. Las personas con discapacidades que necesiten servicios de ayudas auxiliaries deben ponerse en contacto con la Ciudad de Holland escribiendo o llamando a:Human Relations c/o City Clerk’s Office,a comunicándose con
270 S River Avenue, Holland, MI 49423, telefono (616) 355-1328.
Documento(s) en traducción disponible(s) a peticion.

Posted: 2024.03.07 @ 625 Hastings Avenue

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EXHIBIT B

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AVERAGE REVENUE PER KILOWATT-HOUR, 2023

AMERICAN PUBLIC POWER ASSOCIATION
Powering Strong Communities

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PREPARED BY
Lindsey Buttel, Manager, Research and Statistics
American Public Power Association

The American Public Power Association is the voice of not-for-profit, community-owned utilities that power approximately 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the 55 million people that public power utilities serve across the United States and its territories. We advise on electricity policy, grid technology and operations, and workforce development in support of safe, modern, and resilient utilities.

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www.PublicPower.org
Contact MediaRelations@PublicPower.org or 202-467-2900

AMERICAN PUBLIC POWER ASSOCIATION
Powering Strong Communities

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ABOUT THIS REPORT

We are pleased to present the summary report of average revenue per kilowatt-hour for U.S. electric utilities for calendar year 2023. The report contains state averages by type of ownership, as well as individual averages for each utility in the country.

In 35 out of 49 states with comparable data, public power customers have the lowest average total rates, and in 34 out of 45 states with comparable data, public power customers have the lowest average residential rates. Nationwide, residential rates increased 7.2% between 2022 and 2023, however, the increase is primarily led by investor-owned utilities, whose residential rates increased 8.4% compared to the rates of cooperatives (0.9% increase) and public power utilities (0.1% increase).

Note that the report showing each utility's average revenue per kilowatt-hour covers full-service sales only, so average values for states with retail choice do not include sales to customers that purchase power from alternate energy suppliers. To see rates for alternate energy supplier sales in states that have retail choice, please see the final section, "Unbundled Sales." This also contains national averages for bundled, unbundled, and total rates.

The American Public Power Association calculated the revenue per kilowatt-hour from 2023 data reported by each utility to the Energy Information Administration on Form EIA-861 (and on Form EIA-861S for smaller utilities). These calculations can help you compare your average rate with other utilities in your state.

The average public power residential rate was 20% lower than the IOU residential rate in 2023.

Please note that beginning with 2020 data, EIA increased the size threshold for utilities to complete the shorter Form EIA-861S. On this form, utilities do not need to report sales for each distinct rate class, and thus report only total revenue and sales. Nearly three-quarters of all public power utilities complete the short form; therefore, residential, commercial, and industrial rates are not available for these utilities, as well as for the nearly 300 rural electric cooperatives who complete the shorter form. Utilities with less than 200,000 megawatt-hours in sales are required to complete the detailed Form EIA-861 every eight years. The next year that small utilities are required to complete EIA-861 is 2027.

Public power customers had the lowest average total rate in 35 states.

Utilities reporting data on EIA-861S are indicated throughout the tables in the report in italics. Note that state averages for residential, commercial, and industrial rates do not include utilities that complete the short form. Starting this year, state total averages represent all utilities and are calculated using data from both the full and short form. Historically, EIA-861S data was not used to compute the state total averages.

If you have any questions or would like data from this report as an excel spreadsheet, please contact our team at (202) 467-2920 or Statistics@PublicPower.org.

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MICHIGAN

AVERAGE REVENUE PER KWH, 2023 (IN CENTS)

State Averages	Residential Rev/kWh	Commercial Rev/kWh	Industrial Rev/kWh	Total Rev/kWh
Public Power	16.4	14.3	8.8	12.4
Investor-Owned	19.2	13.8	8.3	14.4
Cooperative	17.5	14.3	9.2	15.1
Public Power				
Baraga, Village of	14.7	13.4	-	13.6
Bay City, City of	15.9	14.6	12.4	14.7
Charlevoix, City of	-	-	-	*15.1*
Chelsea Light and Power	-	-	-	*10.3*
Clinton, Village of	-	-	-	*14.2*
Coldwater Board of Public Utilities	13.9	14.8	8.9	9.8
Croswell Municipal Light & Power Dept.	-	-	-	*9.8*
Crystal Falls, City of	18.3	15.8	-	16.9
Daggett Electric Department	-	-	-	*11.2*
Dowagiac, City of	-	-	-	*14.3*
Eaton Rapids, City of	-	-	-	*11.8*
Escanaba, City of	-	-	-	*10.5*
Gladstone, City of	15.1	13.7	-	14.4
Grand Haven Board of Light & Power	14.8	13.8	11.5	13.2
Harbor Springs, City of	-	-	-	*9.9*
Hart, City of	-	-	-	*13.3*
Hillsdale Board of Public Utilities	-	-	-	*12.0*
Holland Board of Public Works	11.2	10.5	6.7	8.4
L'Anse, Village of	16.5	14.7	-	15.5

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MICHIGAN

AVERAGE REVENUE PER KWH, 2023 (IN CENTS)

	Residential Rev/kWh	Commercial Rev/kWh	Industrial Rev/kWh	Total Rev/kWh
Lansing Board of Water & Light	19.6	15.7	10.4	15.4
Lowell Light & Power	-	-	-	*12.4*
Marquette Board of Light & Power	17.8	16.0	-	16.7
Marshall, City of	-	-	-	*13.6*
Negaunee Dept. of Public Works, City of	20.2	15.6	-	18.1
Newberry Water and Light Board	-	-	-	*8.3*
Niles Utilities Department	-	-	-	*10.5*
Norway, City of	16.6	15.2	-	16.1
Paw Paw, Village of	-	-	-	*10.5*
Petoskey, City of	-	-	-	*12.3*
Portland, City of	-	-	-	*15.9*
Sebewaing Light & Water	-	-	-	*13.8*
South Haven, City of	-	-	-	*13.2*
St. Louis, City of	-	-	-	*12.7*
Stephenson, City of	-	-	-	*12.8*
Sturgis, City of	14.9	17.6	10.9	13.0
Traverse City Light & Power	13.1	12.4	9.5	11.5
Union City Electric Department	-	-	-	*14.2*
Wakefield, City of	-	-	-	*10.5*
Wyandotte Municipal Services	15.5	12.6	8.1	11.3
Zeeland Board of Public Works	10.4	9.9	8.2	8.6

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MICHIGAN

AVERAGE REVENUE PER KWH, 2023 (IN CENTS)

Investor-Owned	Residential Rev/kWh	Commercial Rev/kWh	Industrial Rev/kWh	Total Rev/kWh
Alpena Power Co	15.9	13.9	7.0	11.5
Consumers Energy Co	18.8	14.2	8.3	14.4
DTE Electric Company	19.7	13.5	8.6	14.7
Indiana Michigan Power Co	15.7	11.2	11.1	13.1
Northern States Power Co	14.8	13.2	7.7	12.6
Upper Michigan Energy Resources Corp.	14.2	13.2	6.0	7.6
Upper Peninsula Power Company	25.4	21.8	8.2	17.5
Cooperative				
Alger-Delta Coop Electric Assn	22.6	15.4	12.6	18.2
Bayfield Electric Coop, Inc	-	-	-	*32.7*
Cherryland Electric Coop Inc	15.5	11.2	13.9	14.2
Cloverland Electric Co-op	14.3	12.0	8.9	12.3
Great Lakes Energy Coop	17.7	15.4	8.6	14.4
Midwest Energy Cooperative	19.8	17.5	-	18.9
Ontonagon County R E A	-	-	-	*25.4*
Presque Isle Elec & Gas Coop	20.0	13.8	13.7	18.1
Thumb Electric Coop of Mich	-	-	-	*13.6*
Tri-County Electric Coop	17.1	17.4	10.2	15.3

Source: U.S. Department of Energy, Energy Information Administration, Form EIA-861 and EIA-861S, 2023 data.
Data for EIA-861 utilities represent full-service ("Bundled") sales only. See "Unbundled Sales" for unbundled rates. Data for EIA-861S utilities contain all sales to ultimate customers.
Italicized rows represent utilities that completed EIA-861S. Only total Rev/kWh is available for these utilities.
State averages for residential, commercial, and industrial data include only utilities that report data on Form EIA-861 (long form). State total averages include all utilities.

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EXHIBIT C

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Holland Board of Public Works

Calculation of the percentage of the City appropriation

Fiscal Year ending June 30 of:	2020	2021	2022	2023	2024
Revenue:					
Cash receipts from operations	$ 104,267,711	$ 109,140,035	$ 98,637,740	$ 106,331,548	$ 103,126,911
Investment Income	$ 4,551,866	$ 1,288,901	$ 350,953	$ 1,182,726	$ 2,000,217
Total income per Charter 12.16	**$108,819,577.00**	**$110,428,936.00**	**$98,988,693.00**	**$107,514,274.00**	**$105,127,128.00**
Charges Against Revenue:					
Expenses incurred	$ 57,496,905	$ 62,163,478	$ 69,009,945	$ 73,317,598	$ 65,099,936
Charges made or allowed	$0	$0	$0	$0	$0
Required principal payments on debt	$ 885,303	$ 905,762	$ 20,929,939	$ 955,979	$ 13,743,877
Required interest payments on debt	$ 3,301,959	$ 6,486,167	$ 278,646	$ 88,747	$ 166,670
Total Expenses & bond payments	**$61,684,167.00**	**$69,555,407.00**	**$90,218,530.00**	**$74,362,324.00**	**$79,010,483.00**
Net Income (Total Revenue less Total Charges)	**$47,135,410.00**	**$40,873,529.00**	**$8,770,163.00**	**$33,151,950.00**	**$26,116,645.00**
Transfer to General City	$7,656,276	$7,968,900	$8,595,384	$8,456,856	$9,641,232
Transfer as a percentage of net income	**16.24%**	**19.50%**	**98.01%**	**25.51%**	**36.92%**

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APPENDIX EXHIBIT 5

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STATE OF MICHIGAN
OTTAWA COUNTY CIRCUIT COURT

STACY PHOTHISAN, individually, and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF HOLLAND, MICHIGAN, a municipal corporation, by and through THE HOLLAND BOARD OF PUBLIC WORKS,

Defendant.

Case No. 2025-008184-CZ

Hon. Karen J. Miedema

HEARING DATE:
July 25, 2025

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PLAINTIFF'S REPLY BRIEF IN SUPPORT OF HER MOTION FOR PARTIAL SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10) AS TO THE CHARTER VIOLATION CLAIM IN COUNT I OF THE COMPLAINT

The City's response to Plaintiff's Motion for Partial Summary Disposition advances two principal defenses to Plaintiff's Motion: (1) the Charter does not require voter approval even if the City seeks to transfer more than the entire "net income" of the Electric Fund to the City's General Fund, and (2) even if the Charter required such voter approval, the City did not transfer more than the entire "net income" of the Electric Fund to the City's General Fund in relevant years. For the reasons discussed below, however, both of these "defenses" fail as a matter of law.

FILED IN OTTAWA COUNTY 20TH CIRCUIT COURT; 7/21/2025 8:58 PM

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I. THE CITY FAILS TO ADDRESS THE FACT THAT ITS HIGHEST-RANKING OFFICIALS CONCEDE THAT VOTER APPROVAL IS REQUIRED IF THE ELECTRIC FUND SEEKS TO TRANSFER MORE THAN THE "NET INCOME" OF THE ELECTRIC FUND.

The City contends that the City can transfer **more than** the "net income" of the Electric Fund to the City for the City's general purposes without the transfer being approved by the required percentage of the City's voters. Taken to its logical extreme, the City (with the cooperation of the HBPW Board) could bankrupt its Electric Fund by siphoning off its assets even during times when the Electric Fund did not have any profits. But the truth remains that, back in 2019, long before the City was sued, the City Manager (Keith Van Beek) and the General Manager of the HBPW (David Koster) wrote a memorandum to the City Council and the HBPW Board regarding the annual Transfers made by the HBPW to the City. In the memorandum (before they had an incentive to fabricate the truth) Van Beek and Koster honestly advised both the City Council and the HBPW Board that the City's Charter imposed the following strict limitation on the Transfers: "**Only the voters can approve an appropriation if it exceeds net income, as determined under the Charter."** *See* Exhibit 6 to the Complaint at fn 1 (emphasis added).

The City cannot meaningfully address these devastating admissions, so it engages in misdirection. In its Response Brief, the City even chastises Plaintiff for her reliance on the City's own interpretation of its Charter. Among other false or misleading statements, the City states that Plaintiff "relies on an out-of-context footnote in a memorandum that was never circulated to HBPW or City Council." City Br. at p. 10. But the City never even attempts to explain **how** Plaintiff has taken the footnote "out of context." Even worse, the face of the memorandum – showing that it was **directed** to the City Council and the HBPW Board – conclusively refutes the City's false contention that the memorandum "was never circulated to HBPW or City Council."[1]

[1] Interestingly, both Van Beek and Koster submitted affidavits in response to Plaintiff's Motion. Thus, if Plaintiff

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II. THE CITY'S RELIANCE ON THE PURPORTED ACTUAL HISTORICAL NET INCOME OF THE ELECTRIC FUND IS UNAVAILING.

The City's reliance on the purported actual – as opposed to budgeted – "net income" to justify the Transfers is improper because (1) the Charter clearly and unambiguously requires consideration of the budgeted "net income," and (2) even if the City could use the actual "net income," in determining the Transfer amounts authorized by the Charter, the City still had no actual "net income" in relevant years when all relevant expenses are considered.

A. THE CHARTER REQUIRES CONSIDERATION OF ONLY THE BUDGETED NET INCOME OF THE ELECTRIC FUND, AND THERE WAS NO BUDGETED NET INCOME FOR FY 2022 THROUGH FY 2025.

The City does not contest that its Electric Fund's approved budgets for FY 2022 through FY 2024 show that the Electric Fund had no "net income" if all budgeted expenses are included in the calculation. Nonetheless, the City claims that the Electric Fund actually had net income during FY 2022 through 2025. But the City's arguments improperly rely on purported actual financial results untethered to budget appropriations, which are contrary to the Charter.

The Charter provision that the City claims authorizes the City's Transfer Charge (§ 12.16) provides in pertinent part:

> The **net income shall be determined by deducting from the receipts from operations and income from investments all expenses incurred and charges made or allowed for and on behalf of such utility in accordance with budget appropriations, or by appropriate action under authority of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness.** [Emphasis added.]

Section 12.16 confirms two salient facts: (1) the "net income" must be determined by reference

truly had taken the footnote "out of context," one would think that the memo's authors—Van Beek and Koster—would attempt to explain away the devastating admissions in the footnote which have been repeatedly highlighted by Plaintiff. But tellingly, neither affidavit even discusses these admissions, much less offers an explanation of them that could possibly stave off summary disposition. These admissions doom the Transfer Charges.

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to "budget appropriations," and (2) the City must determine the "net income" by including "all expenses incurred and charges made or allowed for on behalf of" the Electric Fund.[2] The City's arguments require the Court to disregard the express language of § 12.16.[3]

B. To The Extent The Actual Financial Performance Of The Electric Fund Matters, The Transfers Still Exceeded The Properly Calculated Total Net Income Of The Electric Fund During The Relevant Years.

Even if the City could engage in this *post-hoc* adjustment of the Electric Fund's "net income," the City's financial statements confirm that, for FY 2022 through FY 2024, the City had no "net income" when **all** of the applicable and required expenses are considered. For example, the City's financial statements for FY 2022 (Exhibit A hereto) confirm that the City's Electric Fund experienced a net loss when all operating and capital expenses are included in the calculation. The financial statements show that the Electric Fund had "operating income" of $16,206,183 during that fiscal year. Exhibit A at p. 56. But the Electric Fund also had $27,896,688 in net expenses for "capital and related financing activities" during FY 2022. When those additional expenses are considered, the City's $16+ million operating income flips to a loss in excess of $10 million. There are similar losses for FY 2023 and FY 2024.[4]

In an effort to evade the reality of its own financial statements, the City creates "net income"

---

[2] The City does not rely upon "appropriate action under authority of section 9" of Chapter 12 of the Charter. Accordingly, the first clause of that sentence – requiring consideration of "budget appropriations" – is controlling.

[3] There is a very good reason that the Charter requires consideration of the budgeted "net income" – the amount of the annual Transfer is necessarily included in the City's Budget, which is a **prospective** document. *See* Exhibits 6-9 to Plaintiff's Brief. It would be nonsensical to determine the amount of the Transfer in the budget for, say fiscal year 2022, and then determine the amount of the "net income" based upon the actual financial results in the City's FY 2022 financial statements – which is a **retrospective** document. But this fundamental truth apparently is lost on the City Manager, who acknowledges that the Electric Fund's "final net income calculation" "could not be obtained until the fiscal year is completed and audited, which would be many months after a budget is prepared." Van Beek Affidavit (Exhibit 3 to City's Response Brief) at para. 5.3 Because the City's Electric Fund had no budgeted "net income" in FY 2022 through FY 2025, the Charter prohibited the City from including the Transfer Charge in the City's Electric Rates

[4] *See* Exhibits B and C hereto (confirming that operating expenses and expenses for "capital and related financing activities" during those years exceeded the revenues of the Electric Fund).

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by excluding expenses that the Charter requires the City to include in the "net income" calculation. For example, the City claims that it "is improper to include certain capital outlay expenses that are funded from cash reserves or bonds, voluntary debt service payments, and depreciation expense." City Response Brief at p. 12 (citing Van Beek Aff., Exhibit 3 to City's Brief). But, again, the City's contentions are contrary to the Charter, for the following reasons:

1. The Charter does not make a distinction between expenses (including capital outlay expenses) simply because those expenses are funded from cash reserves or bonds. Indeed, § 12.16 expressly includes within the definition of "budget appropriations" the "payment of bonds outstanding or which may be issued for the purposes of such utilities and the interest thereon." And, of course, depleting cash reserves to repay debt certainly will impact the "net income" of any business.
2. For the same reasons, the Charter does not allow "debt service payments" to be excluded from the calculation of "net income" simply because those payments might be "voluntary."
3. Finally, depreciation expense is an explicit line item in the City's budgets. *See* Exhibits 6-9 to Plaintiff's Br. Therefore, the Charter expressly prohibits the City from omitting this expense from the calculation of budgeted "net income."

CONCLUSION

For all of the foregoing reasons, the Court should grant Plaintiff's Motion for Partial Summary Disposition Pursuant to MCR 2.116(C)(10).

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/s/ Gregory D. Hanley
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Counsel for Plaintiff and the Class

Date: July 21, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2025, I electronically filed the foregoing document with the Clerk of the Court using the court's electronic filing system.

/s/ Jamie Warrow
Jamie Warrow

4931-2179-4135, v. 1

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EXHIBIT A

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Holland
MICHIGAN

Annual Comprehensive Audit Report for Fiscal Year End
June 30, 2022

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CITY OF HOLLAND, MICHIGAN

Statement of Revenues, Expenses and Change in Fund Net Position
Proprietary Funds
For the Year Ended June 30, 2022

	Business-type Activities - Enterprise Funds		
	Electric Utility	Wastewater Utility	Water Utility
Operating revenues			
Usage fees and charges for services	$ 99,596,066	$ 13,403,130	$ 12,468,325
Premiums	-	-	-
Admissions and fares	-	-	-
Rentals	-	-	-
Miscellaneous	-	-	-
Total operating revenues	99,596,066	13,403,130	12,468,325
Operating expenses			
Personnel services	9,044,529	2,553,238	2,312,020
Other current expenses	60,877,880	6,844,729	3,465,652
Depreciation and amortization	13,467,474	2,912,406	2,226,964
Total operating expenses	83,389,883	12,310,373	8,004,636
Operating income (loss)	16,206,183	1,092,757	4,463,689
Nonoperating revenues (expenses)			
Property taxes	-	-	-
Other private donations	-	-	-
Investment loss	(1,246,319)	(67,426)	(69,047)
Interest expense	(69,278)	(250,959)	(477,819)
Other income (expense), net	167,722	-	(17,660)
Insurance recovery	-	-	-
Gain (loss) on sale of capital assets	19,631	16,205	(195,157)
Total nonoperating revenues (expenses)	(1,128,244)	(302,180)	(759,683)
Income (loss) before contributions and transfers	15,077,939	790,577	3,704,006
Contributions and transfers			
Capital contributions	-	493,094	201,012
Contributions from other local units	-	7,337,801	-
Regulatory credits	-	(7,251,015)	-
Federal and/or state capital grants	-	701,782	-
Transfers in	-	-	-
Transfers out	(8,595,384)	-	-
Net contributions and transfers	(8,595,384)	1,281,662	201,012
Change in net position	6,482,555	2,072,239	3,905,018
Net position, beginning of year, as restated	348,255,690	63,328,280	60,084,984
Net position, end of year	$ 354,738,245	$ 65,400,519	$ 63,990,002

The accompanying notes are an integral part of these financial statements.

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CITY OF HOLLAND, MICHIGAN

Statement of Cash Flows
Proprietary Funds
For the Year Ended June 30, 2022

	Business-type Activities - Enterprise Funds		
	Electric Utility	Wastewater Utility	Water Utility
Cash flows from operating activities			
Receipts from customers and users	$ 98,637,740	$ 13,124,329	$ 11,288,164
Receipts from interfund services provided	-	-	-
Payments to suppliers	(60,526,416)	(8,646,320)	(4,344,874)
Payments to employees	(8,483,529)	(2,378,971)	(2,174,228)
Net cash provided by operating activities	29,627,795	2,099,038	4,769,062
Cash flows from noncapital financing activities			
Property taxes	-	-	-
Private donations	-	-	-
Insurance refunds	-	-	-
Other income (expense)	167,722	-	(17,660)
Intergovernmental receipts	-	-	-
Intragovernmental receipts	-	-	-
Intragovernmental payments	(8,595,384)	-	-
Principal paid on pension bonds	(929,939)	(267,710)	(211,350)
Interest paid on pension bonds	(163,468)	(47,059)	(37,152)
Net cash provided by (used in) noncapital financing activities	(9,521,069)	(314,769)	(266,162)
Cash flows from capital and related financing activities			
Principal paid on capital related debt	(20,000,000)	(437,500)	(2,795,000)
Interest paid on capital related debt	(115,178)	(191,170)	(347,584)
Proceeds from Clean Water State Revolving Fund bonds	-	5,614,262	-
Issuance of capital related debt	-	-	15,335,000
Premium on issuance of bonds	-	-	1,282,287
Capital grant - Clean Water State Revolving Fund	-	701,782	-
Capital contributions	-	1,920,269	381,012
Proceeds from sale of capital assets	68,167	-	-
Regulatory cost for future recovery	(541,084)	-	-
Purchase/construction of capital assets	(7,308,593)	(11,179,640)	(6,643,729)
Net cash provided by (used in) capital and related financing activities	(27,896,688)	(3,571,997)	7,211,986
Cash flows from investing activities			
Proceeds from sales of investments	49,843,042	4,925,075	6,458,393
Purchase of investments	(54,862,746)	(5,032,297)	(16,690,928)
Investment income (loss)	350,953	21,827	39,791
Net cash used in investing activities	(4,668,751)	(85,395)	(10,192,744)
Net increase (decrease) in cash and pooled investments	(12,458,713)	(1,873,123)	1,522,142
Cash and pooled investments, beginning of year	31,791,164	14,967,414	7,764,033
Cash and pooled investments, end of year	$ 19,332,451	$ 13,094,291	$ 9,286,175

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EXHIBIT B

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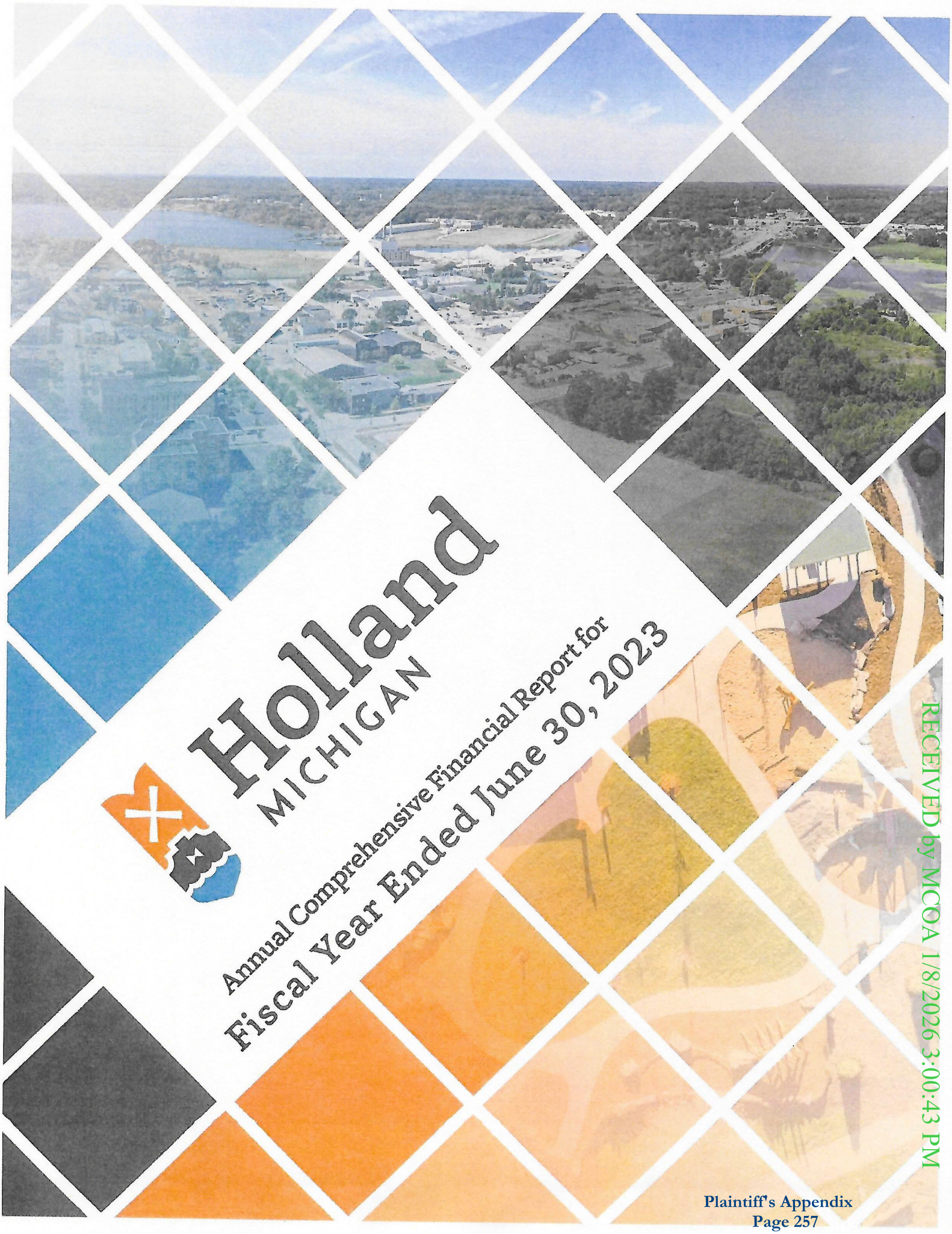

Holland
MICHIGAN

Annual Comprehensive Financial Report for Fiscal Year Ended June 30, 2023

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CITY OF HOLLAND, MICHIGAN

Statement of Revenues, Expenses and Change in Fund Net Position
Proprietary Funds
For the Year Ended June 30, 2023

	Business-type Activities - Enterprise Funds		
	Electric Utility	Wastewater Utility	Water Utility
Operating revenues			
Usage fees and charges for services	$ 104,412,007	$ 13,094,805	$ 13,047,847
Premiums	-	-	-
Admissions and fares	-	-	-
Rentals	-	-	-
Miscellaneous	-	-	-
Total operating revenues	104,412,007	13,094,805	13,047,847
Operating expenses			
Personnel services	8,805,020	2,741,766	2,362,304
Other current expenses	60,095,847	7,627,092	5,015,122
Depreciation and amortization	13,583,483	2,954,698	2,291,696
Total operating expenses	82,484,350	13,323,556	9,669,122
Operating income (loss)	21,927,657	(228,751)	3,378,725
Nonoperating revenues (expenses)			
Property taxes	-	-	-
Other private donations	-	-	-
Investment income	1,376,877	185,468	188,595
Interest expense	35,378	(370,088)	(567,768)
Other income (expense), net	136,206	-	(71,368)
Insurance recovery	-	-	-
Gain (loss) on sale and disposal of capital assets	(3,710,817)	20,718	526
Total nonoperating revenues (expenses)	(2,162,356)	(163,902)	(450,015)
Income (loss) before contributions and transfers	19,765,301	(392,653)	2,928,710
Contributions and transfers			
Capital contributions	-	535,432	200,300
Contributions from other local units	52,087	4,780,187	342,000
Regulatory credits	(418,011)	(6,297,960)	(342,000)
Federal and/or state capital grants	418,011	1,556,368	-
Transfers in	-	-	-
Transfers out	(8,456,856)	-	-
Net contributions and transfers	(8,404,769)	574,027	200,300
Change in net position	11,360,532	181,374	3,129,010
Net position, beginning of year	354,738,245	65,400,519	63,990,002
Net position, end of year	$ 366,098,777	$ 65,581,893	$ 67,119,012

The accompanying notes are an integral part of these financial statements.

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CITY OF HOLLAND, MICHIGAN

Statement of Cash Flows
Proprietary Funds
For the Year Ended June 30, 2023

	Business-type Activities - Enterprise Funds		
	Electric Utility	Wastewater Utility	Water Utility
Cash flows from operating activities			
Receipts from customers and users	$ 106,331,548	$ 13,165,053	$ 13,953,980
Receipts from interfund services provided	-	-	-
Payments to suppliers	(65,306,454)	(7,570,477)	(10,891,278)
Payments to employees	(8,011,144)	(2,593,408)	(2,240,843)
Net cash provided by (used in) operating activities	33,013,950	3,001,168	821,859
Cash flows from noncapital financing activities			
Property taxes	-	-	-
Private donations	-	-	-
Insurance refunds	-	-	-
Other income (expense)	136,206	-	(71,368)
Intragovernmental receipts	-	-	-
Intragovernmental payments	(8,456,856)	-	-
Principal paid on pension bonds	(955,979)	(275,206)	(217,268)
Interest paid on pension bonds	(113,812)	(32,764)	(25,866)
Net cash provided by (used in) noncapital financing activities	(9,390,441)	(307,970)	(314,502)
Cash flows from capital and related financing activities			
Principal paid on capital related debt	-	(450,000)	(295,000)
Interest paid on capital related debt	25,065	(244,880)	(677,231)
Proceeds from Clean Water State Revolving Fund bonds	-	12,450,944	-
Capital contributions	470,098	4,590,268	722,300
Proceeds from sale of capital assets	41,184	20,718	526
Cost incurred on disposal of capital assets	(3,731,412)	-	-
Purchase/construction of capital assets	(18,377,873)	(11,011,615)	(11,196,868)
Net cash provided by (used in) capital and related financing activities	(21,572,938)	5,355,435	(11,446,273)
Cash flows from investing activities			
Proceeds from sales of investments	53,560,035	4,848,183	16,487,612
Purchase of investments	(57,146,937)	(13,794,574)	(4,835,606)
Investment income	1,182,726	167,543	125,094
Net cash provided by (used in) investing activities	(2,404,176)	(8,778,848)	11,777,100
Net increase (decrease) in cash and pooled investments	(353,605)	(730,215)	838,184
Cash and pooled investments, beginning of year	19,332,451	13,094,291	9,286,175
Cash and pooled investments, end of year	$ 18,978,846	$ 12,364,076	$ 10,124,359

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EXHIBIT C

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FISCAL YEAR 2024

ANNUAL COMPREHENSIVE FINANCIAL REPORT FOR FISCAL YEAR ENDED JUNE 30, 2024

Holland
MICHIGAN

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CITY OF HOLLAND, MICHIGAN

Statement of Revenues, Expenses and Change in Fund Net Position
Proprietary Funds
For the Year Ended June 30, 2024

	Business-type Activities - Enterprise Funds		
	Electric Utility	Wastewater Utility	Water Utility
Operating revenues			
Usage fees and charges for services	$ 106,999,062	$ 13,980,597	$ 14,007,722
Premiums	-	-	-
Admissions and fares	-	-	-
Rentals	-	-	-
Miscellaneous	-	-	-
Total operating revenues	106,999,062	13,980,597	14,007,722
Operating expenses			
Personnel services	9,264,158	2,720,421	2,213,591
Other current expenses	57,524,377	6,509,803	5,335,254
Depreciation and amortization	14,032,593	3,072,668	2,760,944
Total operating expenses	80,821,128	12,302,892	10,309,789
Operating income (loss)	26,177,934	1,677,705	3,697,933
Nonoperating revenues (expenses)			
Property taxes	-	-	-
Other private donations	-	-	-
Investment income	3,407,196	686,006	265,562
Interest expense	(89,272)	(439,338)	(556,441)
Other income (expense), net	123,324	-	(11,896)
Insurance recovery	-	-	-
Gain (loss) on sale and disposal of capital assets	(3,370,045)	5,676	18,425
Total nonoperating revenues (expenses)	71,203	252,344	(284,350)
Income (loss) before contributions and transfers	26,249,137	1,930,049	3,413,583
Contributions and transfers			
Capital contributions	-	901,392	-
Contributions from other local units	283,484	1,962,593	577,565
Regulatory credits	(3,726,931)	(1,297,831)	-
Federal and/or state capital grants	3,726,931	181,555	-
Transfers in	-	-	-
Transfers out	(9,641,232)	-	-
Net contributions and transfers	(9,357,748)	1,747,709	577,565
Change in net position	16,891,389	3,677,758	3,991,148
Net position, beginning of year	366,098,777	65,581,893	67,119,012
Net position, end of year	$ 382,990,166	$ 69,259,651	$ 71,110,160

The accompanying notes are an integral part of these financial statements.

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CITY OF HOLLAND, MICHIGAN

Statement of Cash Flows
Proprietary Funds
For the Year Ended June 30, 2024

	Business-type Activities - Enterprise Funds		
	Electric Utility	Wastewater Utility	Water Utility
Cash flows from operating activities			
Receipts from customers and users	$ 103,126,911	$ 13,868,817	$ 13,365,094
Receipts from interfund services provided	-	-	-
Payments to suppliers	(56,374,352)	(10,917,859)	(4,900,302)
Payments to employees	(8,725,584)	(2,550,504)	(2,072,336)
Net cash provided by (used in) operating activities	38,026,975	400,454	6,392,456
Cash flows from noncapital financing activities			
Property taxes	-	-	-
Private donations	-	-	-
Insurance refunds	-	-	-
Intragovernmental receipts	-	-	-
Intragovernmental payments	(9,641,232)	-	-
Principal paid on pension bonds	(983,877)	(283,237)	(223,609)
Interest paid on pension bonds	(133,812)	(32,764)	(25,866)
Net cash provided by (used in) noncapital financing activities	(10,758,921)	(316,001)	(249,475)
Cash flows from capital and related financing activities			
Principal paid on capital related debt	(12,760,000)	(1,452,500)	(1,545,000)
Interest paid on capital related debt	(32,858)	(421,012)	(657,713)
Proceeds from Clean Water State Revolving Fund bonds	-	1,452,436	-
Capital contributions	4,010,414	1,925,465	757,565
Proceeds from sale of capital assets	90,841	11,773	35,040
Regulatory cost for future recovery	(796,458)	-	-
Cost incurred on disposal of capital assets	(2,229,823)	-	-
Purchase/construction of capital assets	(22,278,358)	(5,059,977)	(8,295,202)
Net cash provided by (used in) capital and related financing activities	(33,996,242)	(3,543,815)	(9,705,310)
Cash flows from investing activities			
Proceeds from sales of investments	57,225,104	13,794,943	4,832,794
Purchase of investments	(58,569,269)	(14,382,641)	(4,994,822)
Investment income	2,000,217	600,381	204,773
Net cash provided by (used in) investing activities	656,052	12,683	42,745
Net increase (decrease) in cash and pooled investments	(6,072,136)	(3,446,679)	(3,519,584)
Cash and pooled investments, beginning of year	18,978,846	12,364,076	10,124,359
Cash and pooled investments, end of year	$ 12,906,710	$ 8,917,397	$ 6,604,775

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APPENDIX EXHIBIT 6

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STATE OF MICHIGAN
OTTAWA COUNTY CIRCUIT COURT

STACY PHOTHISAN, individually, and as a representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF HOLLAND, MICHIGAN, a municipal corporation, by and through THE HOLLAND BOARD OF PUBLIC WORKS,

Defendant.

Case No. 25-0000008184-CZ

Hon. Karen J. Miedema

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DEFENDANT CITY OF HOLLAND'S MOTION FOR SUMMARY DISPOSITION OF PLAINTIFF'S CLASS ACTION COMPLAINT UNDER MICHIGAN COURT RULE 2.116(C)(8) AND INCORPORATED BRIEF IN SUPPORT

FILED IN OTTAWA COUNTY 20TH CIRCUIT COURT; 5/20/2025 9:19 AM

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INTRODUCTION

Nearly seventy-five years ago, the voters of the City of Holland (the "City") approved a Charter provision specifically empowering the City with the authority to appropriate more than 50% of the net income of the City's electric utility for the general purposes of the City provided that the City Council and the Holland Board of Public Works ("HBPW") consent to this appropriation. Yet, Plaintiff now brings a purported class action claiming that the City has been unjustly enriched to the tune of more than $40 million by doing not only what its voter-approved Charter permits, but also what is expressly allowed under the Michigan Revenue Bond Act. There is nothing unjust about the City's conduct. Because Plaintiff fails to allege any inequitable conduct, this Court should dismiss her Complaint against the City as a matter of law.

Each of Plaintiff's purported unjust enrichment claims is predicated on conduct that is patently lawful. First, Plaintiff's equitable claim for "Charter Violation" fails because the plain language of the City Charter explicitly authorizes the City to allocate electric utility funds as alleged in the Complaint. Plaintiff bemoans these annual "transfers" in the Complaint but fails to mention (per Rule 2.113(C)(1)(a)) that these appropriations were made pursuant to joint resolutions located at City Hall and also fails to attach these written instruments in accordance with Rule 2.113(C)(1). Perhaps it is because doing so would reveal that in accordance with the City Charter, both HBPW and City Council unanimously adopted the resolutions increasing the appropriations. Second, nothing about the Revenue Bond Act ("RBA") prohibits the City's appropriation of electric fund revenues for the general purposes of the City. On the contrary, the RBA specifically states that once the City has budgeted for certain expenses, it may utilize any remaining funds (i.e. surplus) in its best interest. Finally, Plaintiff cannot plausibly allege that the City's assessment of electric utility charges pursuant to its Charter is "unreasonable" where – as here – the basis for that allegation is unmoored from any standard against

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which the alleged unreasonableness may be assessed. Indeed, it is hard to claim that the City's conduct is "unreasonable" when it complies both with the City Charter and Michigan statutory law.

Effectively, Plaintiff's claims are an attempt by Class Counsel to siphon millions of dollars from a municipality that is engaging in conduct already approved by its voters and the Michigan Legislature. The Michigan Supreme Court has confirmed that municipalities have broad discretion to conduct local affairs – such as the assessment of utility charges. Were there any question about the City's legal authority (which there is not), the Michigan Constitution mandates that both Michigan constitutional and statutory law be liberally construed in a municipality's favor. If permitted to proceed, this lawsuit will frustrate these principles and open the door to more litigation challenging voter-authorized conduct simply because a single resident disagrees with decisions made by its elected officials. Plaintiff's lawsuit should be dismissed with prejudice under Michigan Court Rule 2.116(C)(8).

FACTUAL BACKGROUND

The City of Holland is a municipality located in Ottawa County, Michigan. (Complaint, "Compl.," ¶9.) The Holland Board of Public Works ("HBPW") is a department of the City that maintains and operates an electric utility that provides energy to customers in the City and surrounding townships. (*Id.* ¶¶11-13.) The City, through HBPW, establishes electric rates for customers of the electric utility pursuant, among other things, to Chapter 12 of the City Charter (the "Charter"). (*Id.* ¶¶14, 18.) The current version of the Charter was adopted in 1950 by a vote of the City's electors. See Compl., Ex. 1 (also attached herein as Ex. A (Charter Excerpts)).

Section 12.16 of the Charter relates, among other things, to the City's use of funds from the operation of its electric utility and provides, in pertinent part:

> The receipts from the operation of the electric and water utilities and income from investments shall be applied to the purposes thereof, in accordance with the budget appropriations, including the payment of bonds outstanding or which may be issued for the purposes of such utilities and the interest thereon. The net income shall be determined by deducting from the receipts from operations and income from investments all expenses incurred and charges made or allowed for

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> and on behalf of such utility in accordance with budget appropriations, or by appropriate action under authority of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness. Up to 50% of the annual net income of the board may be appropriated by the council to the general purposes of the city. All such net income which is not so appropriated shall be placed in proper accounts or funds of the city which shall be established as reserves for future operations, replacement, extension, or improvement of such utilities. . .
>
> **The foregoing limitation of 50% of such net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council**.

(Compl. ¶18, citing Charter §12.6)(emphasis added).

Plaintiff alleges that the City has annually appropriated a portion of the funds from its electric utility to the general purposes of the City during fiscal years 2020 through the present. (Compl. ¶¶20-26). In each of these fiscal years, Plaintiff contends that the City has elected to appropriate such funds in an amount exceeding 50% of the net income of the electric utility. (Compl. ¶¶21-26.) Plaintiff argues that these appropriations are inconsistent with Charter §12.16 because the appropriations can "only" be a percentage of net income, and any authorized increases can "only" be predicated on there being net income. (Compl. ¶¶19, 30-32.) Plaintiff fails to attach or refer to the written instruments authorizing these appropriations as required by court rule (see MCR 2.113(c)(1) and infra, p.5-6), but the budgeted appropriations are authorized via joint resolutions as required by the plain language of Charter §12.16. The City attaches them here. See Ex. B, FY 2020-2025 Resolutions, (collectively, the "Joint Resolutions").

Via the Joint Resolutions, both HBPW and City Council unanimously approved the budgeted transfers that are at the center of the Complaint. Each of the Joint Resolutions explicitly states: "[p]ursuant to Section 12.16 of the Charter of the City of Holland, there is hereby appropriated to the general purposes of the City of Holland from the Electric Utility funds of the City of Holland for the fiscal year [X] the sum of [Y]," with Y defined for each given fiscal year. (*Id.*) Further, the Joint

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Resolutions each explicitly provide that "**this Joint Resolution is passed for the purposes of complying with the requirements of Section 12.16 of the Charter of the City of Holland in the event that the appropriation should exceed or be less than fifty percent (50%) of the net income of the Public Works Electric Utility, as defined in said section**." (*Id.*)(emphasis added).

Plaintiff is a customer of the City who has paid the City's electric charges. (Compl. ¶8.) On or about March 14, 2025, Plaintiff filed the Complaint, a purported class action alleging that the City's electrical charges are inequitable under various theories of unjust enrichment. See generally Compl. ¶¶44-66. Plaintiff asks this Court to order the City to "disgorge" more than $40 million in electric charges paid by Plaintiff and the purported class during the class period. (Compl. ¶27; p. 15 (Prayer for Relief)). Plaintiff specifically disputes the validity of the City's use of electric utility funds for the general purposes of the City. (*Id.* ¶3.) Plaintiff has concocted the term "Transfer Charges" to apply to the appropriations that she deems improper. *Id.*

In Count I of the Complaint ("Unjust Enrichment – Charter Violation"), Plaintiff alleges that the City has violated Section 12.16 of the Charter by "transferring monies from the Electric Fund to the City that exceed the limitations on such Transfers set forth in the Charter," and further claims that the City's electrical charges violate the Charter because transfers from the Electric Fund appropriated for the general purposes of the City pursuant to §12.16 "exceeded 50% of the net income of the Electric Fund." (Compl. ¶¶40, 51.)

Count II of the Complaint ("Unjust Enrichment – Violation of MCL 141.121) alleges that "[t]he City's practice of transferring a percentage of its electric utility revenues to the City's General Fund and other funds of the City for the general purposes of the City is . . . unlawful under the Revenue Bond Act [MCL 141.121] because it allocates electric utility revenues to other City funds for non-electric utility purposes." (Compl. ¶36, see also *id.* ¶¶44-54.)

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In Count III of the Complaint ("Unjust Enrichment – Unreasonable Utility Rates"), Plaintiff alleges that "[b]ecause the City's Electric Rates includes and continue to include the Transfer Charge, those overall Rates are and have been unreasonable in violation of common-law ratemaking principles." (*Id.* ¶63.) Thus, according to Plaintiff, "the City's Electric Rates, 'viewed as a whole,' have been 'excessive.'" (*Id.*, quoting *Youmans v Bloomfield Twp*, 336 Mich App 161; 969 NW2d 570 (2021).)

LEGAL STANDARD

I. Michigan Court Rule 2.116(C)(8) Standard.

A motion under Rule 2.116(C)(8) tests the legal sufficiency of the complaint and may be granted if "[t]he opposing party has failed to state a claim on which relief can be granted." *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004); MCR 2.116(C)(8). A complaint fails to state a claim if no factual development justifies the plaintiff's claim for relief as pled. See *Johnson-Mcintosh v City of Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). Courts are directed to grant summary disposition under Rule 2.116(C)(8) when the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119-20; 597 NW2d 817, 823 (1999).

The Court may consider the Charter and the resolutions authorizing the appropriations in connection with this Rule 2116(C)(8) motion because they are a part of the Complaint per Rule 2.113(C)(2) (treating references to written instruments that are public records as part of the pleadings for all purposes). See *El-Khalil v Oakwood Healthcare, Inc.*, 504 Mich 152, 163; 934 NW2d 665 (2019); cf *Krieger v Dep't of Enivronment, Great Lakes, and Energy*, 348 Mich App 156, 177-79; 17 NW3d 700 (2023). Plaintiff's claims are based on allegedly unlawful "transfers" that supposedly violate the Charter. The Plaintiff has adopted as true the fact of the appropriations. These appropriations were made via the Joint Resolutions and thus, the Plaintiff's claims are based on written instruments that, under Rule 2.113(C)(1) must be attached to complaint. Plaintiff attached the Charter but failed to

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attach the Joint Resolutions (see Ex. B), nor did Plaintiff properly refer to the Joint Resolutions per Rule 2.113(C)(1)(a), which requires Plaintiff to identify the location of public records upon which claims are based.

Irrespective of Rule 2.113(C)(2), this Court may also take judicial notice of the City's Charter, ordinances, and resolutions. See MRE 202(a)(3)(providing that "a Court may take judicial notice on its own of . . . ordinances and regulations of Michigan governmental subdivisions or agencies); *Rudolph Steiner Sch of Ann Arbor v Ann Arbor Charter Twp*, 237 MichApp 721, 723 n1; 605 NW2d 18, 20 (1999)(taking judicial notice of municipal charter); *Petersen Fin, LLC v City of Kentwood,* 337 Mich App 460 n7; 976 NW2d 691, 706 (2021)(taking judicial notice of municipal resolution); *Krieger*, 156 Mich App at 180 (courts may take "judicial notice of public records . . . at any stage of the proceeding.").

II. Construction of Laws in Favor of Municipalities.

The Michigan Constitution expressly recognizes the power of local governments, mandating that "**the provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor.**" Const 1963, art 7, §34 (emphasis added). Section 34 was added to the Constitution to guide courts on how to treat municipalities. The Michigan Constitutional Convention of 1961 remarked that this section was intended

> to direct the courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments. Home rule cities and villages already enjoy a broad construction of their powers and it is the intention here to extend to counties and townships within the powers granted to them equivalent latitude in the interpretation of the constitution and statues.

2 Official Record, Constitutional Convention 1961, p 3395.[1]

[1] This right to self-governance is further underscored by Michigan courts. See *Adams Outdoor Advertising, Inc v City of Holland*, 234 Mich App 681, 687-690; 600 NW2d 339 (1999) (recognizing the broad powers of home rule cities to not only exercise powers "specifically granted," but also those "not expressly denied."); *Hughes v Almena Township*, 284 Mich App 50, 62; 771 NW2d 453 (2009) (courts must construe statutory powers in favor of local government).

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The Michigan Supreme Court has held that the current Michigan Constitution directly reflects "the people's will to give municipalities even greater latitude to conduct their business." See *Associated Builders and Contractors v City of Lansing*, 499 Mich 177, 186-87; 880 NW2d 765 (2016)(holding that municipality did not exceed its constitutional authority in enacting a prevailing wage ordinance); see also Const 1963, art 7, §22 (providing cities with the power and authority to frame their own charters, and to adopt resolutions and ordinances "relating to [their] municipal concerns, property and government" subject to law). The Supreme Court has accordingly reaffirmed the belief that municipalities have extensive authority over "municipal concerns, property and government," and should be allowed to exercise their powers without fear that every single action will be reviewed or second-guessed by the judiciary. *Associated Builders*, 499 Mich at 186-87. The Court emphasized that "[u]nder our current Constitution, there is simply no room for doubt about the expanded scope of authority of Michigan's cities and villages." *Id.* at 187.

Article 7, Section 34 of the Michigan Constitution applies to each of the laws that Plaintiff claims the City has violated: the City's Charter and the RBA. Both laws concern "counties, townships, cities and villages." A municipal charter "is the definition of [a city's] rights and obligations as a municipal entity, so far as they are not otherwise legally granted or imposed." *Common Council of City of Jackson v Harrington*, 160 Mich 550, 552; 125 NW 383, 384 (1910). And the RBA was "enacted for the purpose of creating 'full and complete additional and alternate methods' for public corporations [including cities] to exercise the powers authorized by the RBA, including the powers to operate and finance public improvements." *Hartfiel v City of Eastpointe*, 333 Mich App 438, 452; 960 NW2d 174, 183 (2020), citing MCL 141.102, MCL 141.106. Because both the Charter and the RBA concern "cities," this Court must construe both laws liberally in the City's favor to preserve the City's right to self-direct its municipal affairs.

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ARGUMENT

Taking all Plaintiff's allegations as true, Plaintiff cannot state a viable claim against the City. Plaintiff asserts three purported claims for unjust enrichment (Counts I-III). Unjust enrichment is "the unjust retention of money or benefits which in justice and equity belong to another." *Tkachik v Mandeville*, 487 Mich 38, 47–48; 790 NW2d 260, 266 (2010)(citations omitted). "No person is unjustly enriched unless the retention of the benefit would be unjust." *Id.* at 48. Here, Plaintiff has not alleged any inequitable conduct. Instead, Plaintiff claims that the City has made appropriations contrary to law and *this* renders the City's conduct inequitable. However, these transfers are explicitly authorized by Section 12.16 of the Charter and permissible under the Revenue Bond Act. And while Plaintiff implicitly claims that the appropriations lead to an electric utility rate that is too high, there is no freestanding "common law of reasonableness" that would support her claim for unjust enrichment where a voter-approved Charter and associated Joint Resolutions authorize the disputed appropriations. Legally authorized transfers are neither illegal nor improper. The Court should dismiss Plaintiff's Complaint under MCR 2.116(C)(8).

I. PLAINTIFF FAILS TO STATE A CLAIM FOR "UNJUST ENRICHMENT - CHARTER VIOLATION" BECAUSE THE CHARTER AND JOINT RESOLUTIONS AUTHORIZE THE CITY'S ALLEGED CONDUCT.

Count I fails as a matter of law because it is belied by the Charter's plain language. "The prevailing rules regarding statutory construction are well established and extend to the construction of home rule charters." *City of Detroit v Walker,* 445 Mich 682, 691; 520 NW2d 135, 139 (1994); see also infra, p.11-12. "The provisions [of charters] are to be read in context, with the plain and ordinary meaning given to every word [and]. . . judicial construction is not permitted when the language is clear and unambiguous." *Barrow v Detroit Election Comm'n*, 305 Mich App 649, 663; 854 NW2d 489, 497 (2014). Rather, "the framers of the charter, and the people of the City . . . in its adoption, must be

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presumed to have intended that the provision be construed as it reads." *Woods v Bd of Trustees of Policemen & Firemen Ret Sys of City of Detroit*, 108 Mich App 38, 43; 310 NW2d 39, 40 (1981).

Although Plaintiff claims that the City has violated Section 12.16 the Charter by making "transfers" from the City's Electric Fund that "exceeded 50% of the net income of the Electric Fund" (Compl. ¶51), Plaintiff ignores that the Charter explicitly authorizes the City to do exactly what Plaintiff alleges it has done. In particular, immediately after the Charter notes that "[u]p to 50% of the annual net income of the board may be appropriated by the council to the general purposes of the city," the Charter plainly states that **"[t]he foregoing limitation of 50% of such net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council**." (Charter § 12.16)(emphasis added). This provision reflects the intent of the City's voters – who approved the Charter in 1950 – to permit the City's officials to budget more than 50% of the net income of the electric utility to use for the City's general purposes provided that HBPW and seven members of City Council agree to do so.

While Plaintiff concedes that §12.16 authorizes the City to appropriate more than 50% of the net income of the electric utility, her assertion that the City's alleged conduct nevertheless violates this provision hinges on a contorted interpretation of the Charter's plain terms. In particular, Plaintiff asserts that, under §12.16, "[t]he Electric Utility is permitted to transfer 50% of its net income – or a higher percentage of the net income, **but only the net income** and then only if approved by the City's Council – for the 'general purposes of the City.'" (Compl. ¶19)(emphasis in original). Plaintiff then asserts that the City has violated this provision permitting transfers of "only the net income" by miscalculating the "net income" and making appropriations to the general purposes of the City to the Electric Fund based on that miscalculation even though the Electric Fund allegedly "had no net income" under Plaintiff's preferred calculation for fiscal years 2021-2025. (*Id.* ¶¶31-32.)

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First, §12.16 simply **does not say** that the City may use "only the net income" to calculate the increased amount of the appropriations to general purposes of the City that the HBPW and Council may approve. Indeed, the word "only" – emphasized starkly in Plaintiff's Complaint – appears nowhere in §12.16. Instead, the relevant provision states that the "**limitation** of 50% of such net income which may be appropriated by the council for general purpose **may be increased in any year**" with HBPW and City Council consent. See Charter §12.16 (emphasis added). On its face, this provision does not require the City to use a particular calculation of "net income" to budget an increase in a general fund appropriation. Instead, it plainly gives discretion to the City—by and through its officials—to increase the earlier-referenced limitation on the general fund transfer upon joint consent of HBPW and seven members of City Council. The plain intent of §12.16 is to give the City and HBPW voter-approved authority to increase the budgeted appropriation if needed. What is being "increased" is the limitation on the amount of the appropriation. How that increase to the appropriation is determined is irrelevant and independent from net income or any calculations of it. Thus, the City's alleged appropriations for the purported class period(s) (which are allegedly greater than 50% net income) still comply with the Charter's requirements.

Second, Plaintiff's assertion ignores the Joint Resolutions that authorized the appropriations that are the gravamen of the Complaint. Through the Joint Resolutions, HBPW and the City Council authorized for each year of the purported class period an increase in budgeted transfers beyond the stated limitation – i.e., 50% of the net income of the electric utility. (Ex. B.) The Joint Resolutions show that, far from violating the Charter, the City followed the approval requirement in §12.16 to the letter. Each fiscal year, HBPW and City Council clearly acknowledged that the City was appropriating funds "[p]ursuant to Section 12.16 of the Charter . . . to the general purpose of the City of Holland from the Electric Utility," and each fiscal year, HBPW and City Council made clear that the Joint Resolutions were passed for the express "purposes of complying **with the requirements of Section**

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12.16 of the Charter of the City of Holland in the event **that the appropriation should exceed or be less than fifty percent (50%) of the net income** of the Public Works Electric Utility, as defined in said section." (Ex. B)(emphasis added). The Plaintiff does not (and cannot) allege that HBPW and City Council did not authorize the transfers. The City has the authority to make the very appropriations Plaintiff's lawsuit disputes and has complied with the plain language of its Charter directly addressing these transfers. Plaintiff cannot sustain a claim based on the violation of §12.16 where the City's alleged conduct accords with this provision.

II. PLAINTIFF FAILS TO STATE A CLAIM FOR "UNJUST ENRICHMENT - VIOLATION OF MCL 141.121" BECAUSE THE RBA PERMITS THE CITY'S ALLEGED CONDUCT.

Count II also lacks legal merit, resting on another misreading of the statutory language on which it is supposedly based. Although Plaintiff claims that MCL 141.121 "requires the City to use funds collected through the imposition of the City's Electric Rates only to support the Electric Fund itself" and "prohibit[s] the City from charging Electrical Rates which intentionally generate surpluses that can be devoted to non-electric utility purposes" (Compl. ¶¶57-58), the RBA does not say this, or anything like it; instead, it permits the very conduct Plaintiff challenges.

This Court must apply well-settled standards of statutory construction to interpret the RBA and the Charter. "[T]he purpose of statutory construction is to discern and give effect to the intent of the Legislature." *Potter v McLeary,* 484 Mich 397, 410; 774 NW2d 1, 8 (2009)(citations omitted). "In determining the intent of the Legislature, the Court must first look to the language of the statute." *Potter*, 484 Mich at 410. Further,

> [a]s far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. Moreover, when considering the correct interpretation, the statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. In defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in

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> the statutory scheme. A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained.

Id. at 410–11 (citations omitted). "[T]he statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme." *Id.* at 411. It is appropriate to consider dictionary definitions when construing undefined terms. *Bate v City of St. Clair Shores*, 347 Mich App 771, 782; 16 NW3d 338 (2023).

First, the plain language of the RBA does not limit what utility rates may fund. The RBA simply requires the City to assess rates that are sufficient to fulfill the purposes stated in the Act. MCL 141.121 provides in pertinent part:

> (1) Rates for services furnished by a public improvement shall be fixed before the issuance of the bonds. The rates **shall be sufficient to provide** for all the following:
> (a) The payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement **as may be necessary to preserve** the public improvement in good repair and working order.
> (b) The payment of the interest on and the principal of bonds payable from the public improvements when the bonds become due and payable.
> (c) The creation of any reserve for the bonds as required in the ordinance.
> (d) Other expenditures and funds for the public improvement as the ordinance may require.
>
> (2) The rates shall be fixed and revised by the governing body of the borrower so as to produce the amount described in subsection (1). The borrower shall covenant and agree in the ordinance authorizing the issuance of the bonds and on the face of each bond to maintain at all times the **rates for services furnished by the public improvement sufficient to provide** for the amount described in subsection (1) […]

MCL 141.121 (emphasis added). Thus, the Legislature intended that municipalities assess charges that are sufficient to fund both the operation and maintenance of the public improvement (here, the electrical utility) and the payment of principal and interest on bonds issued for the public improvement's benefit. The word "sufficient" does not mean "only;" it means "enough to meet the needs of a situation or proposed end."[2] Similarly, the phrase "as may be necessary to preserve" reveals

[2] See "Sufficient." Def 1(a). Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/sufficient. Accessed 28 Apr. 2025.

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and intent to secure essential funding for the public improvement through charges – not to cap the rate once amounts "that may be necessary" are secured.[3]

Collectively, then, these provisions are intended to secure enough funding to meet the requirements in MCL 141.121(a)-(d). Plaintiff's lawsuit does not and cannot suggest that the City has failed to secure sufficient funding to fulfill the purposes for which the RBA requires charges to be assessed. Further, nothing in these provisions suggests that the Legislature intended the RBA to "only" authorize rates "to support the Electric Fund itself," or to "prohibit" additional uses of electrical charge revenues to support general purposes of the City, as Plaintiff claims. Again, neither the word "only" nor the word "prohibit" appears in these provisions. These are terms that Plaintiff has inserted into the statute, in violation of bedrock principles of construction requiring this Court to construe plain statutory language as written. *Potter*, 484 Mich at 410-411.

Second, as a whole, the RBA demonstrates that MCL 141.121 does not circumscribe the rate assessed under the Act. The Legislature has directed that the RBA "shall be liberally construed to effect the purposes hereof" – namely, "to secure the public health, safety, convenience and welfare of the counties, cities, incorporated villages, townships, school districts, port districts, and metropolitan districts of the state of Michigan." MCL 141.134. The Legislature's insistence on a liberal construction of the Act's terms to "secure" the public health, safety and welfare is directly at odds with Plaintiff's interpretation of MCL 141.121 as a prohibitive rather than protective provision. This legislative emphasis on liberal construction also accords with the clear Constitutional mandate that that "the provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." Const 1963, art 7, §34.

[3] See "Necessary." (Def 1(a): "absolutely needed: required.") Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/necessary. Accessed 28 Apr. 2025.

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Third (and most importantly), the RBA specifically contemplates that budgeted funds may remain after satisfying the requirements of MCL 141.121 (i.e. "surplus"). The RBA does not restrict the use of those revenues in the way Plaintiff suggests. For instance, MCL 141.122 ("Accounting of revenues, priority; disposition of surplus") provides in pertinent part:

> (1) . . . [T]he revenues of the public improvement be accounted for separately from the other funds and accounts of the borrower in the following order of recorded priority:
> (a) After provision for the payment for the next succeeding period of all current expenses of administration and operation and the current expenses for that period for maintenance **as may be necessary to preserve** the public improvement in good repair and working order.
> (b) There shall be next set aside **a sum sufficient to provide** for the payment of the principal of and the interest upon all bonds payable from those revenues, **as and when the bonds become due and payable**. This account shall be designated "bond and interest redemption account" [. . .]
>
> **(2) Revenues remaining, after satisfaction of subsection (1), at the end of any operating year shall be considered surplus and shall be disposed of by the governing body as provided in this act.**

MCL 141.122 (emphasis added). Like MCL 141.121, this statutory provision illustrates the Legislature's intent to secure "necessary" and "sufficient" funding to maintain and operate the public improvement in good repair and working order, and to pay the principal and interest on bonds issued in connection with the public improvement in a given operating year. MCL 141.122 further acknowledges that the utility's budgeted revenues may exceed these prioritized expenses, noting that the "surplus" revenues "shall be disposed of by the governing body as provided in this act."

In turn, MCL 141.126 ("Disposition of surplus funds at end of operating year; transfer of funds to address deficiencies in particular accounts") confirms that the governing body has broad discretion to use the budgeted "surplus" as it sees fit:

> **Any money remaining in the accounts of the public improvement at the end of any operating year, which under the provisions of section 221 shall be considered surplus, may be transferred to other accounts of the public improvement or may be used for the purpose or purposes as the governing body may determine to be for the best interests of the borrower**, unless some other

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> disposition shall have been made in the ordinance authorizing the issuance of bonds under this act [. . .]

MCL 141.126 (emphasis added). Here, the RBA not only confirms that the governing body may elect to transfer a surplus (as framed by the RBA) to other accounts benefitting the public improvement, but also states that the governing body may elect to "use [the surplus] for the purpose or purposes **as the governing body may determine to be for the best interests of the borrower** [i.e., the City]." See *id.* Thus, once HBPW has budgeted for its operating, administration, maintenance, and principal and interest expenses for the current year, HBPW and City Council are authorized by statute to use remaining revenue on other public improvement needs (e.g. paying off long-term debt to minimize future expenses) and/or for purposes that – in the City's judgment – are in the City's best interests. Again, this statutory language is permissive rather than prohibitive. Nothing about this broad statutory language suggests that the City's alleged appropriation of funds from the electric utility for general purposes of the City violates the RBA. Instead, the plain language of the RBA authorizes the very conduct Plaintiff claims is inequitable.

III. PLAINTIFF'S CLAIM FOR "UNJUST ENRICHMENT – UNREASONABLE RATES" FAILS BECAUSE IT IS UNSUPPORTED BY ANY COGNIZABLE STANDARD OF "REASONABLENESS."

Count III is an unjust enrichment claim generally alleging "unreasonable rates" based on so-called "common law ratemaking principles." This claim fails as a matter of law because Michigan precedent demonstrates that municipal rates are presumed reasonable, and ratepayers cannot advance freestanding equitable claims claiming "unreasonable municipal rates" where – as in Count III – these claims fail to identify any standard or authority for "reasonableness" rendering the challenged rates unjust. As set forth above, the City has complied with the plain terms of its Charter and the RBA.

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Because Count III fails to identify any additional, cognizable legal standard on which Count III is based, the Court should dismiss Count III under MCR 2.116(C)(8).[4]

"Michigan courts, as well as those in other jurisdictions, have recognized the longstanding principle of presumptive reasonableness of municipal utility rates." *City of Novi v City of Detroit,* 433 Mich 414; 428, 446 NW2d 118 (1989). Municipal utility rates are "assumed to be reasonable in absence of a showing to the contrary or a showing of fraud or bad faith or that it is capricious, arbitrary or unreasonable." *City of Detroit v City of Highland Park*, 326 Mich 78, 100-101; 39 NW2d 325, 334 (1949). The Michigan Supreme Court has cautioned that "[c]ourts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." *City of Novi,* 433 Mich App at 414. The judiciary must refrain from strictly scrutinizing rate-making because, among other things, "[t]he rate-making authority of a municipal utility is expressly reserved to the legislative body giving the power to set rates under the municipal charter." *City of Novi,* 433 Mich at 430 (citing MCL 141.103(d); 141.121). And, "[t]he burden of proof is on the plaintiff to show that any given rate or ratemaking practice is unreasonable." *Trahey v City of Inkster*, 311 Mich App 582, 594; 876 NW2d 582 (2015), *citing City of Novi,* 433 Mich at 432–33. Plaintiffs challenging the reasonableness of municipal utility rates thus bear a heavy burden: "Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." *Trahey*, 311 Mich App at 595 (emphasis added).

[4] Plaintiff cannot sustain an equitable claim for "unreasonable rates" based on the bare allegation that the City earns a "profit" for the City. See *Chocolay Charter Twp v City of Marquette*, 138 Mich App 79, 84; 358 NW2d 636 (1984)("A municipality is not required to furnish utility services at cost, but may charge a rate which will yield a profit."); McQuillin: The Law of Municipal Corporations, § 35.60 ("While in theory, water from a municipally owned plant should come to the consumer without profit to the municipality, this does not exclude the idea of profit in operation. A city is entitled to a reasonable profit and it may even use that profit for other valid municipal purposes.").

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In *Brunet v City of Rochester Hills*, No 354110, 2021 WL 5750616, at *6-9 (Mich Ct App Dec 2, 2021)(attached as Ex. C), the Michigan Court of Appeals affirmed dismissal of Plaintiff's counsel's class action lawsuit challenging the defendant municipality's water rates under (among other things) an unjust enrichment theory of "unreasonableness" like the claim alleged here in Count III. Acknowledging the "longstanding principle that municipal utility rates are presumed reasonable," the Court concluded that the plaintiff's rate challenge could be "considere[d] . . . abandoned" because the plaintiff "fail[ed] to identify a basis for 'reasonableness'" the rates allegedly violated. *Brunet*, 2021 WL 5750616, at *6. The *Brunet* court supported its unpublished decision with a robust analysis of published Michigan appellate opinions, all demonstrating that cognizable claims for unreasonable rates are – at a minimum – based on "a statute, contractual provision, or ordinance establishing the underlying basis for 'reasonableness.'" *Id.* at *8. Cases standing for this principle include *Meridian Twp v City of E Lansing, Mich*, 342 Mich 734; 71 NW2d 234 (1955); *City of Plymouth v City of Detroit*, 423 Mich 106; 377 NW2d 689 (1985); *City of Novi*, *supra*; and *Trahey*, *supra*, all of which concerned plaintiffs who alleged that municipal utility rates were "unreasonable" in light of explicitly identified legal standards of "reasonableness":

> In *Meridian Twp*, for example, the basis for "reasonableness" was a contractual provision stating that water rates must be "reasonable in relation to the costs incurred by the City for the supply of water." *Meridian Twp.*, 342 Mich. at 748, 71 N.W.2d 234. In *City of Plymouth*, the basis for "reasonableness" was a contractual provision stating that water rates "shall always be reasonable in relation to the costs incurred by the Board for the supply of water." *City of Plymouth*, 423 Mich. at 111, 377 N.W.2d 689. In *City of Novi*, the basis for "reasonableness" was a statute [MCL 123.141(2)] stating that "[t]he price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of rate-making." *City of Novi*, 433 Mich. at 419, 446 N.W.2d 118. And in *Trahey*, the basis for "reasonableness" was a municipal ordinance stating that water rates must be "just and reasonable." *Trahey*, 311 Mich.App. at 594, 876 N.W.2d 582.

Brunet, 2021 WL 5750616, at *8.

In contrast to these previous municipal rate challenges, the Court of Appeals found that the plaintiff in *Brunet* was "attempting to maintain a freestanding claim of 'reasonableness' that is not

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grounded in any specific law nor in any type of cogent reasoning." *Id.* While the plaintiff was "nominally correct that municipal utility rates must be 'reasonable,' . . . he overlooks the fact that the standard for 'reasonableness' is often uniquely determined by reference to the specific law, cost basis, or contract at issue." *Id.*

Plaintiff's freestanding claim for "unjust enrichment – unreasonable utility rates" is similarly groundless. Plaintiff cites no "statute, contractual provision, or ordinance establishing the underlying basis for 'reasonableness'" alleged in this claim.[5] The only authority referenced in Count III is *Youmans v Bloomfield Twp*, 336 Mich App 161; 969 NW2d 570 (2021) – a case that undermines this very Count. *Youmans* is another unsuccessful class action rate challenge brought by Plaintiff's counsel based in part on unjust enrichment theories. There, the Court of Appeals reversed the trial court's $9 million-plus judgment in favor of the plaintiff, holding that the trial court erred by failing to apply the presumption that the disputed utility rates were reasonable. *Youmans*, 336 Mich App at 211-212. The Court's opinion rejecting the plaintiff's claims emphasized the centrality of the presumption of reasonableness for municipal utility rates; the directive that courts defer to the discretion of governmental bodies authorized to set rates when reviewing ratemaking; and the binding precedent set forth in *Trahey* confirming that courts have no authority to disturb municipal utility rates absent "clear evidence of illegal or improper expense" included in the rates. *Id.* at 212-221, citing *Trahey*, 311 Mich App at 595.

Youmans does not stand for the principle that a plaintiff may advance unjust enrichment claims for "unreasonable utility rates" untethered from any governing authority. Indeed, even the plaintiff in *Youmans* lodged her unjust enrichment claim for unreasonable water rates based on an alleged violation of MCL 123.141(3) – a statutory provision stating that "the retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer . . . shall not exceed the actual cost

[5] Nor can Plaintiff now try to claim her assertion of "unreasonableness" is based on violations of the City Charter or the RBA because any such claims are futile. See *supra* Section I, II.

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of providing the service." See *Youmans*, 336 Mich App at 224. Moreover, the *Youmans* Court specifically held that the plaintiff's failure to show evidence that the defendant had been unjustly enriched was fatal to her equitable claims for fee refunds. *Youmans,* 336 Mich App at 219-220. The Court noted parallels between the presumption of reasonableness afforded to utility rates and general equitable principles of unjust enrichment.[6] Despite the equitable nature of her claims, the plaintiff could not rebut the presumption that the township's utility rates were reasonable because she did not present any evidence that the township had been unjustly enriched by assessing the disputed rates:

> Whether the Township would receive an unjust "benefit" . . . depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were "excessive," not on whether some aspect of the Township's ratemaking methodology was improper. [. . .] Unjust enrichment . . . doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense. And the . . . remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded *excessive and unjust benefits* to his or her rightful position. . . plaintiff's strained interpretation of *Trahey* would permit an order of restitution in this case without any evidence or finding that the Township was enriched, let alone excessively compensated, by collecting and retaining the disputed utility charges.

Id. at 219 (emphasis in original)(citations omitted).

Here, the Court needs no evidence to dismiss Count III. The challenged portion of the City's rates (i.e., the so-called "Transfer Charges") are budgeted transfers that are permitted under the City's voter-approved Charter and the RBA. They are per se lawful. Plaintiff fails to allege how its legally authorized transfers constitute improper conduct or unjustly enrich the City. At best, Plaintiff alleges that the City's electric utility rate is unreasonable because she says so. That is not the basis of an actionable or viable claim. Because Plaintiff's freestanding "unreasonable rates" claim fails to allege that the City has violated any cognizable standard of "reasonableness," Plaintiff may not sustain a claim that the City was unjustly enriched by the electric utility transfers to the City for general purposes.

[6] "In contemporary municipal utility ratemaking cases, a . . . focus on principles of 'unjust enrichment' is encapsulated within the rebuttable presumption that a municipality's municipal utility rates are reasonable." *Youmans,* 336 Mich App at 214 (citations omitted).

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CONCLUSION

For the foregoing reasons, Defendant City of Holland respectfully requests that this Honorable Court grant its Motion for Summary Disposition of Plaintiff's Complaint in its entirety under Michigan Court Rule 2.116(C)(8) and dismiss this action with prejudice.

Respectfully Submitted,

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Dated: May 20, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2025, I electronically filed the foregoing document using the electronic court filing system, which will send notification of such filing to all counsel of record.

43701241.2/114802.00010

By: */s/ Sonal Hope Mithani*

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EXHIBIT A

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Chapter C

CHARTER

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Sec. 9.8. **Budget control.**
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Sec. 10.8. Same—Organization, functions and proceedings generally; oath of members; quorum; unauthorized changes, etc., of assessment roll.
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Sec. 10.18. Assessor to certify taxes, etc.; treasurer's bond, etc.
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Sec. 11.6. Election commission.
Sec. 11.7. Notice of election.
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Sec. 12.2. Procedures and requirements controlling franchise ordinances, etc.
Sec. 12.3. General powers relative to municipal utilities and services.
Sec. 12.4. Board of public works generally—Management of electric and water utilities of the city.
Sec. 12.5. Same—Status of board.
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Sec. 12.7. Same—Organization; officers; quorum.

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Sec. 12.8. **Same—Public service planning; annual report.**
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Sec. 12.10. **Same—Employment of superintendent of utilities and other operating personnel.**
Sec. 12.11. **Same—Expenses and funds generally.**
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Sec. 12.13. **Same—Annual audit; other reports to council.**
Sec. 12.14. **Same—Purchase of water or electricity by city.**
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Sec. 12.18. **Lien for utility charges; collection of delinquent charges.**
Sec. 12.19. **Disposal of plants, etc.**
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Sec. 15.3. **Resolution to proceed with public improvement.**
Sec. 15.4. **Cost of acquired property added.**
Sec. 15.5. **Report of city manager.**
Sec. 15.6. **Resolution of determination on project.**
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Sec. 15.8. **Determination by the council; resolution of approval, etc.**
Sec. 15.9. **Special assessment roll generally—preparation, etc.**
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Sec. 15.12. **Same—Changes and corrections in assessment roll; confirmation of roll; liens for special assessments generally.**
Sec. 15.13. **Deviation from plans and specifications.**
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Sec. 15.18. Additional assessments; refunds.
Sec. 15.19. Provisions particularly applicable to sidewalks.
Sec. 15.20. Assessments on single lots.
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Sec. 15.23. Contesting, etc., assessments.
Sec. 15.24. Reassessment for benefits.

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Sec. 16.1. Liability of city for damages; notice to city of claim for injuries; proof of claim, etc.
Sec. 16.2. Limitation on platting.
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Sec. 16.4. City records to be public.
Sec. 16.5. No estoppel by representation.
Sec. 16.6. Continuation of rights and liabilities.
Sec. 16.7. Tense.
Sec. 16.8. Number and gender.
Sec. 16.9. Public schools of the city.
Sec. 16.10. Chapter headings and catchlines not part of Charter.
Sec. 16.11. Effect of illegality of any part of Charter.
Sec. 16.12. Amendments.

[HISTORY: Adopted by the electors of the City of Holland at a special election held on 11-7-1950, under the provisions of the Home Rule City Act. Amendments noted where applicable.]

PREAMBLE

We, the people of the City of Holland, mindful of the ideals and labors of our fathers in founding and developing this community, grateful to Almighty God for the blessings of freedom, peace, health, safety, and justice, and desirous of further securing these blessings to ourselves and our posterity, do hereby ordain and establish this Charter for the City of Holland.

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Sec. 12.13. Same—Annual audit; other reports to council.

The cost of making the annual audit of the accounts of the board of public service [works][8] shall be defrayed from the funds of the board. The annual audit of the affairs of the board of public service [works] shall show the financial status of the affairs of the board and, as nearly as possible, the financial results of the city ownership and operation of the public service works of the city for which the board is responsible. The board shall also make such other reports and furnish such other information to the council as that body shall require by ordinance or resolution.

Sec. 12.14. Same—Purchase of water or electricity by city.

With the consent of the council, the board of public service [works][9] may purchase water or electricity from any person, firm, or corporation, municipal or private, if such purchase may be deemed by the board to be in the best interest of the city and the inhabitants thereof.

Sec. 12.15. Other city utility services.

The council shall be charged with the responsibility for constructing, maintaining, improving and extending the sewage disposal facilities, the fire alarm system, and such other utilities of the city as existed on the date this Charter became law or which may thereafter have been acquired by the city. Such facilities shall constitute one or more separate departments of the city government or may be assigned by resolution of the council to an appropriate department or division of the city government, or shall be under the administrative charge and responsibility of the city manager as the council shall determine.

Sec. 12.16. Limitation on use of utility funds.

The receipts from the operation of the electric and water utilities and income from investments shall be applied to the purposes thereof, in accordance with the budget appropriations, including the payment of bonds outstanding or which may be issued for the purposes of such utilities and the interest thereon. The net income shall be determined by deducting from the receipts from operations and income from investments all expenses incurred and charges made or allowed for and on behalf of such utility in accordance with budget appropriations, or by appropriate action under authority of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness. Up to 50% of the annual net income of the board may be appropriated by the council to the general purposes of the city. All such net income which is not so appropriated shall be placed in proper accounts or funds of the city which shall be established as reserves for future operations, replacement, extension, or improvement of such utilities. Nothing herein contained shall be interpreted to limit the power of the council to place, for any year, in such accounts or funds a larger percentage than 50% of such net income to the purposes of such utilities, in the event that such appropriation shall be requested by the board of public service [works][10] and be approved by seven members of the council.

The foregoing limitation of 50% of such net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council.

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8. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**
9. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**
10. **Editor's Note: See section 12.20 of this Charter which changes the name of the "board of public service" to the "board of public works."**

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Such funds so established as reserves for the purposes of the utilities may be invested and reinvested by the city auditor as the board of public service [works] shall direct, by and with the approval of the council, in such investments as are authorized by law for investment by fiduciaries. Said funds may be used for the purposes of such utilities upon the recommendation of the board of public service [works], by and with the consent of the council.

The electors of the city may, by a 3/5 vote of the qualified electors voting on such proposal at a regular or special election, approve an appropriation of more than 50% of the net income for any year for general purposes, or may approve the placing of more than 50% of the net income for any year in the reserve accounts or funds as above provided for the purposes of such utilities, or may approve for other municipal purposes the use of such accumulated and unallocated accounts or funds as have been established.

Sec. 12.17. Utility rates and charges generally.

With the approval of the council, the board of public service [works][11] shall fix the rates to be charged for all public utility services under its control. The council shall fix the rates to be charged for all public utility services of the city which are not under the control of the board of public service [works]. When any person, firm, or corporation, shall fail or refuse to pay to the city any sums due on utility bills, such service upon which such delinquency exists may be shut off or discontinued by the proper board or department of the city and suit may be instituted by the city for the collection of the same in any court of competent jurisdiction.

Sec. 12.18. Lien for utility charges; collection of delinquent charges.

Except as otherwise provided, or limited by state law, the city shall have as security for the collection of all charges, a lien upon the premises to which such utility services were supplied. Such lien shall become effective immediately upon the distribution or supplying of such utility service or services to such premises.

All unpaid charges for utility services furnished to any such premises, which, on the 30th day of June of each year, have remained unpaid for a period of three months, or more, shall be reported by the city auditor to the council at the first meeting thereof in the month of July. The council thereupon shall order the publication in a newspaper published in the city, of notice to all owners of property within the city that all unpaid utility charges which have remained unpaid for a period of three months or more prior to the 30th day of June, and which have not been paid by the thirty-first day of July, shall be assessed upon the city's tax roll against the premises to which the utility services, for which the unpaid charges accrued, were supplied or furnished; and that such charges shall be collected in the same manner as the city taxes on said tax roll.

All such utility charges, which remain unpaid on the 31st day of July, shall be transferred to the city's tax roll and assessed against the premises to which the utility service, for which the unpaid charges accrued, was supplied or furnished, and shall be collected with, and in the same manner as, city taxes. If the same have remained delinquent and unpaid after the expiration of the time limited in the treasurer's warrant for the collection of taxes levied in said tax roll, such charges shall be returned to the county treasurer to be collected in the same manner as the lien created by city taxes on the delinquent tax roll of the city.

In the event that any provision of this section shall prove to be incomplete or inadequate for the carrying out of the purposes thereof, the council shall provide by ordinance such additional procedures as may be

11. **Editor's Note: See section 12.20 of the Charter which changes the name of the "board of public service" to the "board of public works."**

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EXHIBIT B

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RESOLUTION

IT IS HEREBY JOINTLY RESOLVED, between the Board of Public Works of the City of Holland and the City Council of the City of Holland as Follows:

1. Pursuant to Section 12.16 of the Charter of the City of Holland, there is hereby appropriated to the general purposes of the City of Holland from the Electric Utility funds of the City of Holland for the fiscal year July 1, 2019, through June 30, 2020, the sum of $7,656,276.
2. The amount of money so appropriated shall be paid to the City of Holland in equal monthly installments, commencing with the regular Board of Public Works meeting in July 2019.
3. This Joint Resolution is passed for the purposes of complying with the requirements of Section 12.16 of the Charter of the City of Holland in the event that the appropriation should exceed or be less than fifty percent (50%) of the net income of the of Public Works Electric Utility, as defined in said section.

This Resolution shall become effective immediately upon its adoption by the Holland Board of Public Works and the Council of the City of Holland and shall remain in full force and effect for the period July 1, 2019, to June 30, 2020.

The Holland Board of Public Works Board of Directors adopted this resolution on July 8, 2019.

Ayes: Hemingway, Haworth, Miller, Franz, Lilly

Nays: None

Janet S Lemson

Janet Lemson, Secretary to the Board

The Council of the City of Holland adopted this resolution on July 17, 2019.

Ayes: Council Members Byrd, Peters, Garcia, Lynn, Corbin, Hoekstra, Klomparens and Mayor Pro-Tem Trethewey

Nays: None

Kathy Grimm

Kathy Grimm, City Clerk

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(R2020.25)

RESOLUTION

IT IS HEREBY JOINTLY RESOLVED, between the Board of Public Works of the City of Holland and the City Council of the City of Holland as Follows:

1. Pursuant to Section 12.16 of the Charter of the City of Holland, there is hereby appropriated to the general purposes of the City of Holland from the Electric Utility funds of the City of Holland for the fiscal year July 1, 2020, through June 30, 2021, the sum of $7,968,900.
2. The amount of money so appropriated shall be paid to the City of Holland in equal monthly installments, commencing with the regular Board of Public Works meeting in July 2020.
3. This Joint Resolution is passed for the purposes of complying with the requirements of Section 12.16 of the Charter of the City of Holland in the event that the appropriation should exceed or be less than fifty percent (50%) of the net income of the of Public Works Electric Utility, as defined in said section.

This Resolution shall become effective immediately upon its adoption by the Holland Board of Public Works and the Council of the City of Holland and shall remain in full force and effect for the period July 1, 2020, to June 30, 2021.

The Holland Board of Public Works Board of Directors adopted this resolution on July 6, 2020.

Ayes: Hemingway, Haworth, Lilly, Franz, Thompson

Nays: None

Janet Lemson

Janet Lemson, Secretary to the Board

The Council of the City of Holland adopted this resolution on July 15, 2020.

Ayes: Council Members Byrd, Trethewey, Peters, Garcia, Arendshorst, Corbin, Hoekstra, Raymond and Mayor Bocks

Nays: None

Kathy Grimm

Kathy Grimm, City Clerk

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(R2021.30)

RESOLUTION

IT IS HEREBY JOINTLY RESOLVED, between the Board of Public Works of the City of Holland and the City Council of the City of Holland as Follows:

1. Pursuant to Section 12.16 of the Charter of the City of Holland, there is hereby appropriated to the general purposes of the City of Holland from the Electric Utility funds of the City of Holland for the fiscal year July 1, 2021, through June 30, 2022, the sum of $8,595,384.
2. The amount of money so appropriated shall be paid to the City of Holland in equal monthly installments, commencing with the regular Board of Public Works meeting in July 2021.
3. This Joint Resolution is passed for the purposes of complying with the requirements of Section 12.16 of the Charter of the City of Holland in the event that the appropriation should exceed or be less than fifty percent (50%) of the net income of the of Public Works Electric Utility, as defined in said section.

This Resolution shall become effective immediately upon its adoption by the Holland Board of Public Works and the Council of the City of Holland and shall remain in full force and effect for the period July 1, 2021, to June 30, 2022.

The Holland Board of Public Works Board of Directors adopted this resolution on July 12, 2021.

Ayes: Thompson, Lilly, Maalouf, Hemingway

Nays: None

Janet Lemson, Secretary to the Board

The Council of the City of Holland adopted this resolution on July 21, 2021.

Ayes: Council Members Byrd, Trethewey, Peters, Garcia, Arendshorst, Corbin, Hoekstra, Raymond and Mayor Bocks.

Nays: None.

Kathy Grimm, City Clerk

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(R2022.36)

RESOLUTION

IT IS HEREBY JOINTLY RESOLVED, between the Board of Public Works of the City of Holland and the City Council of the City of Holland as Follows:

1. Pursuant to Section 12.16 of the Charter of the City of Holland, there is hereby appropriated to the general purposes of the City of Holland from the Electric Utility funds of the City of Holland for the fiscal year July 1, 2022, through June 30, 2023, the sum of $8,456,856.

2. The amount of money so appropriated shall be paid to the City of Holland in equal monthly installments, commencing with the regular Board of Public Works meeting in July 2022.

3. This Joint Resolution is passed for the purposes of complying with the requirements of Section 12.16 of the Charter of the City of Holland in the event that the appropriation should exceed or be less than fifty percent (50%) of the net income of the of Public Works Electric Utility, as defined in said section.

This Resolution shall become effective immediately upon its adoption by the Holland Board of Public Works and the Council of the City of Holland and shall remain in full force and effect for the period July 1, 2022, to June 30, 2023.

The Holland Board of Public Works Board of Directors adopted this resolution on July 11, 2022.

Ayes: Thompson, Hemingway, Franz, Lilly

Nays: None

Janet Lemson

Janet Lemson, Secretary to the Board

The Council of the City of Holland adopted this resolution on July 20, 2022.

Ayes: Council Members Byrd, Vreeman, Peters, Coronado, Arendshorst, Corbin, Raymond and Mayor Bocks.

Nays: None

Kathy Grimm

Kathy Grimm, City Clerk

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RESOLUTION

IT IS HEREBY JOINTLY RESOLVED, between the Board of Public Works of the City of Holland and the City Council of the City of Holland as Follows:

1. Pursuant to Section 12.16 of the Charter of the City of Holland, there is hereby appropriated to the general purposes of the City of Holland from the Electric Utility funds of the City of Holland for the fiscal year July 1, 2023, through June 30, 2024, the sum of $9,641,232.
2. The amount of money so appropriated shall be paid to the City of Holland in equal monthly installments, commencing with the regular Board of Public Works meeting in July 2023.
3. This Joint Resolution is passed for the purposes of complying with the requirements of Section 12.16 of the Charter of the City of Holland in the event that the appropriation should exceed or be less than fifty percent (50%) of the net income of the of Public Works Electric Utility, as defined in said section.

This Resolution shall become effective immediately upon its adoption by the Holland Board of Public Works and the Council of the City of Holland and shall remain in full force and effect for the period July 1, 2023, to June 30, 2024.

The Holland Board of Public Works Board of Directors adopted this resolution on July 10, 2023.

Ayes: Thompson, Lilly, Snyder, Lynn

Nays: _____

Janet Lemson

Janet Lemson, Secretary to the Board

The Council of the City of Holland adopted this resolution on July 19, 2023.

Ayes: Council Members Byrd, Vreeman, Peters, Coronado, Arendshorst, Corbin, Hoekstra and Mayor Bocks

Nays: None

Kathy Grimm

Kathy Grimm, City Clerk

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RESOLUTION

IT IS HEREBY JOINTLY RESOLVED, between the Board of Public Works of the City of Holland and the City Council of the City of Holland as Follows:

1. Pursuant to Section 12.16 of the Charter of the City of Holland, there is hereby appropriated to the general purposes of the City of Holland from the Electric Utility funds of the City of Holland for the fiscal year July 1, 2024, through June 30, 2025, the sum of $9,163,402.
2. The amount of money so appropriated shall be paid to the City of Holland in equal monthly installments, commencing with the regular Board of Public Works meeting in July 2024.
3. This Joint Resolution is passed for the purposes of complying with the requirements of Section 12.16 of the Charter of the City of Holland in the event that the appropriation should exceed or be less than fifty percent (50%) of the net income of the of Public Works Electric Utility, as defined in said section.

This Resolution shall become effective immediately upon its adoption by the Holland Board of Public Works and the Council of the City of Holland and shall remain in full force and effect for the period July 1, 2024, to June 30, 2025.

The Holland Board of Public Works Board of Directors adopted this resolution on July 8, 2024.

Ayes: Thompson, Maalouf, Lilly, Lynn

Nays: None

Janet Lemson

Janet Lemson, Secretary to the Board

The Council of the City of Holland adopted this resolution on July 17, 2024.

Ayes: Council Members Byrd, Vreeman, Sol, Corbin, Shea and Mayor Bocks.

Nays: None.

Brenda Katerberg

Brenda Katerberg, City Clerk

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(R2025.10)

RESOLUTION

IT IS HEREBY JOINTLY RESOLVED, between the Board of Public Works of the City of Holland and the City Council of the City of Holland as follows:

1. Pursuant to Section 12.16 of the Charter of the City of Holland, there is hereby appropriated to the general purposes of the City of Holland from the Electric Utility funds of the City of Holland for the fiscal year July 1, 2024, through June 30, 2025, the sum of $9,163,402.
2. The amount of money so appropriated shall be paid to the City of Holland in equal monthly installments, commencing with the regular Board of Public Works meeting in July 2024.
3. This Joint Resolution is passed for the purposes of complying with the requirements of Section 12.16 of the Charter of the City of Holland in the event that the appropriation should exceed or be less than fifty percent (50%) of the net income of the of Public Works Electric Utility, as defined in said section.

This Resolution shall become effective immediately and shall remain in full force and effect for the period of July 1, 2024, to June 30, 2025.

The Holland Board of Public Works Board of Directors adopted this resolution on July 8, 2024.

This resolution amends City Council resolution R2024.037. Any prior resolution, to the extent inconsistent with this resolution, is rescinded.

The Council of the City of Holland adopted this resolution on April 2, 2025.

Ayes: Council Members Byrd, Vreeman, Raymond, Sol, Rowan, Shea, Schultheis and Mayor Bocks.

Nays: None.

Brenda Katerberg

Brenda Katerberg, City Clerk
Date: April 2, 2025

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EXHIBIT C

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2021 WL 5750616
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Daniel BRUNET, Individually and as Representative of a Class of Similarly Situated Persons and Entities, Plaintiff-Appellant,
v.
CITY OF ROCHESTER HILLS, Defendant-Appellee.

No. 354110
|
December 2, 2021

Oakland Circuit Court, LC No. 18-164764-CZ

Before: Murray, C.J., and Jansen and Riordan, JJ.

Opinion

Per Curiam.

***1** Plaintiff Daniel Brunet, individually and as class representative, appeals as of right the trial court's opinion and order granting defendant City of Rochester Hills's motion for summary disposition and denying his motion for partial summary disposition. This case concerns charges imposed by defendant for municipal water and sewer services. Defendant asserts that these charges are unlawfully excessive, unreasonable, and in violation of MCL 141.91 and a now-amended municipal ordinance. We affirm.

I. FACTS AND PROCEEDINGS

Defendant operates a municipal water supply system, of which plaintiff is a customer.[1] The water system has two central purposes: (a) supply treated or "potable" water to municipal water customers, and (b) provide excess capacity for public fire protection. In March 2018, plaintiff filed a 10-count complaint against defendant, generally alleging that the water charges imposed by defendant on its customers since 2012 have been unlawful for the following two principal reasons. First, defendant accumulated surplus funds to allegedly pay for future capital improvements to its water system, and these surplus funds are unnecessary to provide service to the *present* water customers. According to plaintiff, defendant may only charge its water customers for the present costs of supplying water. Second, defendant charges its water customers for the fire protection component of its water system. However, because fire protection operates for the benefit of the general public, not only the water customers themselves, the general public should be charged for the fire protection.[2] Plaintiff also noted that defendant had an ordinance providing that the fire protection component would be paid by defendant itself from its general fund. Plaintiff requested that the trial court certify the instant action as a class action with plaintiff himself as the class representative of all persons or entities who paid the water charges at any time in the preceding six years. He further requested that defendant disgorge the excess funds that it had received to the putative class in equity and that the trial court declare that the water charges are unlawfully excessive to the extent outlined in the complaint.

In March 2019, the trial court certified the class, which it defined as "all persons and entities who/which have paid the City for water and/or sewage disposal service at any time since March 30, 2012 or who/which pay the City for water and/or sewage disposal service during the pendency of this action."

***2** In December 2019, plaintiff moved for partial summary disposition, arguing that the water charges were unreasonable as a matter of law until November 2018 because defendant had the following ordinance in effect concerning the cost of fire protection services:

> (b) Fire Service Fee. As a fire service fee for providing a water system with extra capacity available for fighting fires and protecting property in the city, the city shall be charged based on a base-extra capacity approach attributing to fire protection the difference between total system capacity and capacity required by other customer classes. The fire service fee shall be required and adjusted annually to reflect actual versus budgeted revenue requirement for the water fund for the previous year.
>
> (c) Quarterly billing. Charges against the City shall be payable in quarterly installments from the current city's fire fund or from the proceeds of taxes which the city, within constitutional limitations, is authorized and required to levy in an amount sufficient for this purpose. [Rochester Hills Ordinance, § 102-124.]

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Plaintiff argued that although Rochester Hills Ordinance, § 102-124 essentially required that the fire protection component be paid for by defendant itself, defendant violated the ordinance during the class period until November 2018 by charging its water customers for this service. [3] Thus, plaintiff argued, he and the class were entitled to a refund for monies paid for the fire protection component.

Defendant moved for summary disposition of the entire complaint. [4] Defendant acknowledged that the fund for its water system had accumulated a substantial surplus of about $46 million in recent years. However, defendant asserted, the majority of the water system will need to be replaced in the upcoming five to 10 years, and it will likely use substantially all of its surplus funds to do so. Defendant explained that it always has intended to use the surplus funds for these upcoming capital improvement projects and that paying for the projects with cash is more fiscally responsible than doing so with bonds. Defendant argued that it was authorized by MCL 141.121 to charge its customers for these future capital improvement projects and that its water charges were reasonable in all respects. Defendant also argued that a municipal regulation passed in 1999 authorized charging its water customers for the fire protection component, so its water charges were not unlawful to that extent.

The parties presented competing evidence concerning the reasonableness of the water charges, with plaintiff's experts opining that the water charges were unreasonably excessive, and defendant's experts opining that the charges were reasonable. The trial court discussed this evidence in a 37-page opinion and ultimately granted summary disposition in favor of defendant. In relevant part, the trial court reasoned that the water charges did not violate MCL 141.91 because they were "user fees," not "taxes," under *Bolt v. City of Lansing*, 459 Mich. 152, 587 N.W.2d 264 (1998); that the water charges were reasonable because plaintiff "has submitted no evidence of anything illegal or improper" and otherwise failed to overcome the presumption of reasonableness; and that plaintiff was not entitled to equitable relief with respect to the fire protection component of the water charges because his "sole evidence" in that regard was "an ordinance that was mistakenly left on the books and was arguably already overridden by lawful resolution." [5] Plaintiff now appeals.

II. MCL 141.91

***3** Plaintiff first argues that the water charges are an unlawful tax in violation of MCL 141.91. We disagree.

We review de novo whether a municipal charge is a "tax." See *Mapleview Estates, Inc. v. City of Brown City*, 258 Mich.App. 412, 413-414, 671 N.W.2d 572 (2003). We also review de novo questions of statutory interpretation. *PNC Nat'l Bank Ass'n v. Dep't of Treas.*, 285 Mich.App. 504, 505, 778 N.W.2d 282 (2009). Finally, "[t]his Court reviews de novo a trial court's ruling on a motion for summary disposition." *Hartfiel v. City of Eastpointe*, 333 Mich.App. 438, 444, 960 N.W.2d 174 (2020).

It is initially noted that plaintiff brought alternative claims for assumpsit and unjust enrichment. [6] "At common law, assumpsit was a proper vehicle for recovering unlawful fees, charges, or exactions—including unlawful utility charges—that the plaintiff had paid to a municipality under compulsion of local law." *Youmans v. Charter Twp. of Bloomfield*, —— Mich.App. ——, ——, —— N.W.2d ——, 2021 WL 67885 (2021) (Docket No. 348614); slip op. at 27 (cleaned up). "With the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished. But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved." *Id.* (cleaned up). "Hence, an assumpsit claim is modernly treated as a claim arising under quasi-contractual principles, which represent a subset of the law of unjust enrichment." *Id.* (quotation marks and citations omitted). "Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another." *Wright v. Genesee Co.*, 504 Mich. 410, 417, 934 N.W.2d 805 (2019). Consequently, if plaintiff is correct that the water charges violated MCL 141.91 (or any other law), he and the class would arguably be entitled to equitable relief to recover the charges unlawfully paid.

MCL 141.91 provides as follows:

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

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> being imposed by the city or village on January 1, 1964.

MCL 141.121 provides, in relevant part, as follows:

> (1) Rates for services furnished by a public improvement shall be fixed before the issuance of the bonds. The rates shall be sufficient to provide for all the following:
>
> (a) The payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement as may be necessary to preserve the public improvement in good repair and working order.
>
> * * *
>
> (d) Other expenditures and funds for the public improvement as the ordinance may require.
>
> (2) The rates shall be fixed and revised by the governing body of the borrower so as to produce the amount described in subsection (1).... [7]

***4** MCL 141.121 places "the amount of the charge within the sound discretion of the city officials, especially when considered in relation to the objectives of the program in maintaining the system and paying off the bonds in the manner required by statute." *Yurek v. City of Sterling Heights*, 37 Mich.App. 386, 390, 194 N.W.2d 474 (1971) (cleaned up).

In *Bolt v. City of Lansing*, 459 Mich. 152, 587 N.W.2d 264 (1998), our Supreme Court considered whether a "storm water service charge" was either a valid user fee or a tax that violated the Headlee Amendment, Const. 1963, art. 9, § 31, which generally prohibits the imposition of new municipal "taxes" that are not ratified by the voters. The charge was imposed on "each parcel of real property located in the city using a formula that attempts to roughly estimate each parcel's storm water runoff," and it was intended to fund the separation of combined sanitary and storm sewers within the city that had not already been separated. *Id.* at 155, 587 N.W.2d 264. In its analysis, the Court first observed that "a 'fee' is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A 'tax,' on the other hand, is designed to raise revenue." *Id.* at 161, 587 N.W.2d 264 (cleaned up). The Court then identified the following three factors to distinguish between a user fee and a tax: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose," (2) "user fees must be proportionate to the necessary costs of the service," and (3) user fees contain an element of "voluntariness." *Id.* at 161-162, 587 N.W.2d 264. The Court ultimately ruled that application of the three-factor test compelled the conclusion that the charge at issue was a tax for the purposes of the Headlee Amendment. *Id.* at 169, 587 N.W.2d 264.

In this case, plaintiff acknowledges in his brief on appeal that he is not maintaining a Headlee claim, but he argues that *Bolt* is persuasive authority for the proposition that the water charges at issue are unlawful "taxes" under MCL 141.91. In other words, because MCL 141.91 generally prohibits municipal taxes that are not otherwise authorized by law, and because application of the *Bolt* test indicates that the water charges here are "taxes," it necessarily follows that the water charges violate MCL 141.91. However, plaintiff simply fails to address defendant's argument that the water charges are authorized because they are fully consistent with MCL 141.121(1)(a) and (d). "An appellant's failure to properly address the merits of an argument constitutes the abandonment of an issue." *In re Application of Detroit Edison Co for 2012 Cost Recovery Plan*, 311 Mich.App. 204, 214, 874 N.W.2d 398 (2015). Thus, this issue is abandoned. [8]

Regardless, plaintiff's argument is meritless. In essence, plaintiff argues that because a municipality generally may not charge current ratepayers for future capital improvements—as recognized by older cases such as *Wolgamood v. Village of Constantine*, 302 Mich. 384, 4 N.W.2d 697 (1942), and newer cases such as *Bolt*—it follows that the water charges here are not permissible "rates" or "fees" but are instead "taxes" because defendant acknowledges that the cash reserve will be used for future capital improvements. In our view, plaintiff overstates the principle derived from such cases.

***5** In *Wolgamood*, our Supreme Court explained as follows:

> A municipally owned utility is built and operated, not for a corporate profit, but for the purpose of providing utility services at a reasonable cost to the citizens of the municipality, who are generally identical with the customers. For a municipally owned light plant to charge rates which will, in addition to the necessary expenses of construction and operation, build up a reserve for

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> depreciation equaling the replacement cost of the plant, is to require the citizens and customers not only to pay for construction of their own utility but also to provide the capital for the construction of a new plant to serve future users. [*Wolgamood*, 302 Mich. at 404-405, 4 N.W.2d 697.]

In other words, a municipality may not charge current ratepayers for the costs of constructing the original municipal utility (typically though bonds that must be paid over time) *and* the future costs of replacing that same utility. Doing so "is to ask the consumers to pay off the capital investment twice, once as a debt service and again in the establishment of a depreciation reserve." *Id.* at 405, 4 N.W.2d 697 (quotation marks and citation omitted). Of course, there is nothing in *Wolgamood*, or any other case of which we are aware, to suggest that a municipality may not charge current ratepayers *once* for the cost of the municipal utility. Thus, there is no question that current ratepayers may be charged for the cost of servicing bonds that were issued years ago to pay for the costs of constructing the original municipal utility. It follows that if the municipality originally constructed its utility through cash and intends to replace the utility in a similar manner, then current ratepayers may properly be charged for accumulating that cash reserve. That is, there is no conceptual difference between requiring ratepayers to service bonds and requiring ratepayers to contribute to a cash reserve that will be used for future capital improvements to the utility.

Accumulating such a cash reserve by charging ratepayers based on depreciation is an appropriate way to do so. In *City of Detroit v. City of Highland Park*, 326 Mich. 78, 39 N.W.2d 325 (1949), Highland Park argued that the water and sewage rates charged by Detroit were unreasonable because, among other reasons, Detroit included depreciation in its rates, and "to charge depreciation sufficient to amortize the cost over the service life of the system is to charge this generation for improvements to be used by the next generation." *Id.* at 95, 39 N.W.2d 325. Our Supreme Court rejected that argument, explaining that Detroit advanced "huge sums ... as an investment in a utility on which Detroit may earn a reasonable return." *Id.* Although Detroit issued bonds as well, "the bonds so issued were only for a small part of the total cost." *Id.* "[O]n a utility basis where the city is not recovering its capital as part of the expense, depreciation charges sufficient to rebuild and restore the system over its service are proper items of expense in determining the rate to be charged." *Id.* at 98, 39 N.W.2d 325. "It is incumbent on the city of Detroit, the owner, to keep up, repair or rebuild the system to the extent that it becomes necessary through depreciation in order to protect its large investment, the advance of almost $12,000,000 in cash besides the issuance of the bonds." *Id.* Simply put, our Supreme Court approved of depreciation charges "sufficient to rebuild and restore the system" because Detroit was entitled to "protect its large investment."

***6** *Bolt* presented the same concern as *Wolgamood*. In *Bolt*, the Court reasoned that the charge at issue was a "tax" because, in relevant part, "[a]t the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter.... The revenue to be derived from the charge is clearly in excess of the direct and indirect costs of actually using the storm water system over the next thirty years and, being thus disproportionate to the costs of the services provided and the benefits rendered, constitutes a tax." *Bolt*, 459 Mich. at 163, 587 N.W.2d 264. Thus, in *Bolt*, the ratepayers were expected to pay for the benefits of the improved system that they would enjoy *and* pay for the benefits of the improved system that future ratepayers, who would not pay the charge at issue, would enjoy. This constituted a similar "double charge" as in *Wolgamood*.

Accordingly, it is not enough for plaintiff to simply show that the water charges at issue are funding a reserve to pay for future capital improvements. Our Supreme Court approved of such a practice in *Highland Park*. Rather, at a minimum, plaintiff must also show that current ratepayers are being "double charged" for the water system, contrary to cases such as *Wolgamood* and *Bolt*. We consider that issue below.

III. REASONABLENESS

Plaintiff argues that the water charges are unreasonable. We disagree. We review de novo whether a municipal charge is reasonable. See *Mapleview Estates, Inc.*, 258 Mich.App. at 413-414, 671 N.W.2d 572.

It is a longstanding principle that municipal utility rates are presumed to be reasonable. See *Highland Park*, 326 Mich. at 100-101, 39 N.W.2d 325 ("The rate lawfully established by the plaintiff is assumed to be reasonable in absence of a showing to the contrary or a showing of fraud or bad faith or that it is capricious, arbitrary or unreasonable, and the

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burden of proof is on the defendant to show that the rate is unreasonable."). In *Meridian Twp. v. City of East Lansing*, 342 Mich. 734, 71 N.W.2d 234 (1955), Meridian Township challenged the water rates set by East Lansing, arguing that East Lansing violated a provision of the contract between the parties stating that "such rates shall always be reasonable in relation to the costs incurred by the City for the supply of water." *Id.* at 748, 71 N.W.2d 234. Our Supreme Court explained that the question before it was whether the water rates were "reasonable" as defined by the contract:

> We are asked by the appellant to find that the rate charged is not reasonable as above prescribed. It will be noted that the clause under examination does not equate rates to costs. Identity is not required. Obviously there is elbow-room for adjustment. The requirement merely is that they shall be 'reasonable' in relation to costs. *The word 'reasonable' with respect to rates charged by utilities is a word of the most universal employment. It may be provided by ordinance, statute, or constitution, that rates shall be 'reasonable,' or 'fair and reasonable.'* Moreover, should the question of rate arise on a contract implied in law, the judicial requirement is that the rate to be paid shall be 'reasonable.' It may also be employed (as in the case at bar) in a contract. The determination of its meaning, in any case, is not subject to mathematical computation with scientific exactitude but depends upon a comprehensive examination of all factors involved, having in mind the objective sought to be attained in its use. Here it is related to the costs incurred by the city in the supply of water. [*Id.* at 749, 71 N.W.2d 234 (internal citations omitted; emphasis added).]

Ultimately, our Supreme Court ruled in favor of East Lansing, stating that Meridian Township failed "to show that the rates charged were, in fact, unreasonable with relation to costs." *Id.* at 753, 71 N.W.2d 234.

In *City of Plymouth v. City of Detroit*, 423 Mich. 106, 377 N.W.2d 689 (1985), Detroit increased water rates it imposed on suburban Detroit municipalities by 39 percent. *Id.* at 109, 377 N.W.2d 689. Plymouth sued Detroit, alleging that the increase was unreasonable. *Id.* Detroit argued that the increase was necessarily reasonable under the version of MCL 123.141 in effect at the time, which essentially provided that "the city may charge its outlying customers not more than twice what it charges its own users." *Id.* at 123, 377 N.W.2d 689. According to Detroit, because it did not charge the suburban municipalities more than twice what it charged its own customers, and because MCL 123.141 "represents the only applicable standard of reasonableness," it logically followed that the 39-percent increase was reasonable. *Id.* Plymouth responded that a contractual provision between the parties stated that "rates shall always be reasonable in relation to the costs incurred by the Board for the supply of water." *Id.* at 111, 377 N.W.2d 689. Thus, Plymouth argued, "the statute only provides for a statutory floor and ceiling of reasonableness and that the specific provisions of the contracts between the parties govern their relationship." *Id.* at 124, 377 N.W.2d 689. In resolving the dispute, our Supreme Court agreed with our conclusion that "the statute does not render reasonable as a matter of law rates within its maximum and minimum provisions in the face of a contractual provision which states that rates shall be reasonable in relation to costs. Regardless of how the statute reads, [Detroit] has limited its discretion in setting rates by agreeing to the contractual provision." *Id.* at 124-125, 377 N.W.2d 689 (quotation marks and citation omitted). Ultimately, however, the Supreme Court ruled in favor of Detroit, concluding that Plymouth failed to sustain its burden of showing that the water rates were unreasonable in violation of the contract:

> ***7** The plaintiff had ample opportunity to substantiate its claim on the theory with which it had chosen to prove that the rates in question were violative of the contract between the parties. The trial court concluded that the rates charged had not been shown to be unreasonable. We find no error in the trial court's conclusion.... [*Id.* at 137, 377 N.W.2d 689.]

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In *City of Novi v. City of Detroit*, 433 Mich. 414, 446 N.W.2d 118 (1989), Novi challenged the water rates set by Detroit, arguing that they violated the newly enacted MCL 123.141(2), see 1981 PA 89, which provided, in relevant part, as follows:

> The price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of ratemaking....

The trial court ruled in favor of Detroit, but we reversed, explaining that MCL 123.141(2) established the standard that water rates must "reflect the actual cost of providing the service," and as a result, the concept of reasonableness was no longer relevant. *Id.* at 427-428, 446 N.W.2d 118 (quotation marks and citation omitted). Our Supreme Court reversed this Court, stating as follows:

> We acknowledge that the Legislature intended that municipal water rates more accurately reflect the actual cost of service when it eliminated the artificial limits imposed by the previous version of MCL 123.141. However, the Legislature's use of the phrase "based on the actual cost of service as determined under the utility basis of rate-making" cannot be construed to mean "exactly equal to the actual cost of service," in light of the difficulties inherent in the rate-making process and the statutory and practical limitations on the scope of judicial review. The concept of reasonableness, as recognized by the courts of this state and other states in utility rate-making contexts, must remain operable, in order to provide a meaningful and manageable standard of review.
>
> * * *
>
> For these reasons, we hold that 1981 PA 89 did not render inoperable the concept of reasonableness in the process of judicial review of municipal utility water rates. The burden of proof remains on the plaintiff to show that a given rate or rate-making method does not reasonably reflect the actual cost of service as determined under the utility basis of rate-making pursuant to MCL 123.141(2). [*Id.* at 430-433, 446 N.W.2d 118 (cleaned up).]

Our Supreme Court ultimately concluded that "the plaintiff City of Novi did not meet its burden of proving that the City of Detroit Water and Sewerage Department's rate-making method, or the resulting rates charged, did not comply with the utility basis of rate-making." *Id.* at 438, 446 N.W.2d 118.

More recently, in *Trahey v. City of Inkster*, 311 Mich.App. 582, 876 N.W.2d 582 (2015), this Court summarized the following pertinent principles concerning the presumption of reasonableness:

> The determination of reasonableness is generally considered by courts to be a question of fact. Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable. This presumption exists because courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making. However, the presumption of reasonableness may be overcome by a proper showing of evidence. The burden of proof is on the plaintiff to show that any given rate or ratemaking practice is unreasonable. [*Id.* at 594, 876 N.W.2d 582 (cleaned up).]

***8** Here, plaintiff argues that the water charges imposed by defendant are unreasonable for the following reasons: (1) "the City has charged far more than necessary to operate its water and sewer systems," i.e., that "the City has been operating its Water and Sewer Fund for a profit because its revenues have consistently exceeded its expenses"; (2) his experts opined that the water charges were unreasonable because, among other things, "[b]y including depreciation in setting its rates, the City's rates double count certain capital expenses"; and (3) defendant did not accumulate the surplus *with the intent* of funding future capital improvements.

Plaintiff, however, does not identify the standard or authority for "reasonableness." In other words, plaintiff does not identify a statute, contractual provision, or ordinance establishing the underlying basis for "reasonableness." In

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Meridian Twp, for example, the basis for "reasonableness" was a contractual provision stating that water rates must be "reasonable in relation to the costs incurred by the City for the supply of water." *Meridian Twp.*, 342 Mich. at 748, 71 N.W.2d 234. In *City of Plymouth*, the basis for "reasonableness" was a contractual provision stating that water rates "shall always be reasonable in relation to the costs incurred by the Board for the supply of water." *City of Plymouth*, 423 Mich. at 111, 377 N.W.2d 689. In *City of Novi*, the basis for "reasonableness" was a statute stating that "[t]he price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of rate-making." *City of Novi*, 433 Mich. at 419, 446 N.W.2d 118.[9] And in *Trahey*, the basis for "reasonableness" was a municipal ordinance stating that water rates must be "just and reasonable." *Trahey*, 311 Mich.App. at 594, 876 N.W.2d 582.

Plaintiff apparently is attempting to maintain a freestanding claim of "reasonableness" that is not grounded in any specific law nor in any type of cogent reasoning. A bald assertion of some type of unknown reasonableness standard is not consistent with the caselaw discussed above, in which "reasonableness" was linked to a statute, contractual provision, ordinance, or other source of authority. Of course, plaintiff is nominally correct that municipal utility rates must be "reasonable," but he overlooks the fact that the standard for "reasonableness" is often uniquely determined by reference to the specific law, cost basis, or contract at issue. In one case, a "reasonable" water rate had to simply reflect the costs of supplying water, whereas in another case, a "reasonable" water rate had to reflect the costs of supplying water as determined under the utility basis of rate-making. Yet, in other cases, as in *Trahey*, the concept of "reasonableness" was that referred to by ordinance. Thus, in light of plaintiff's failure to identify a basis for "reasonableness" here, we could consider this issue abandoned. See *In re Application of Detroit Edison Co. for 2012 Cost Recovery Plan*, 311 Mich.App. at 214, 874 N.W.2d 398.

Regardless, most of plaintiff's arguments in regard to his understanding of reasonableness are meritless and we dispose of them quite briefly. First, plaintiff argues that the mere fact that defendant accumulated a reserve of about $50 million shows that the water charges were unreasonable.[10] However, as explained previously, our Supreme Court in *Highland Park* approved of such accumulated reserves to pay cash for future capital improvements. Second, plaintiff argues that his experts' opinion created a genuine issue of material fact as to whether the water charges were unreasonable, given that they opined that defendant "collected more than $24 million in excess of the amounts it was entitled to collect." However, one of those experts acknowledged during his deposition that he was unaware of the particular depreciating nature of defendant's water system, the critical justification offered by defendant in support of its reserve.[11] Such a lack of knowledge fundamentally undermines the opinion of plaintiff's experts. A plaintiff cannot proceed to trial simply because his or her expert was unaware of the pertinent facts. Compare *Pete v. Iron Co.*, 192 Mich.App. 687, 689, 481 N.W.2d 731 (1991) (concluding that summary disposition was properly granted to the defendant in a slip-and-fall case because, in relevant part, "[p]laintiff's expert testified during deposition that he did not know what caused plaintiff's fall, but opined that she may have 'misstepped' "). In other words, where defendant argues that it accumulated its reserve to pay for substantial capital improvements in the upcoming five to 10 years and that its water charges are therefore reasonable, plaintiff's experts cannot ignore that fact but nonetheless conclude that the water charges are unreasonable. Third, plaintiff argues that there is a question of fact as to whether defendant had a specific plan to use its reserve to fund future capital improvements before the instant action was filed. However, notwithstanding the testimony of defendant's officers that defendant did have a specific plan for its reserve, and notwithstanding that plaintiff does not dispute that the reserve will actually be used to fund future capital improvements, plaintiff provides no authority for the proposition that defendant was obligated to have a specific plan for its reserve before the instant action was filed. See *Bohn v City of Taylor*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2019 (Docket No. 339306, 2019 WL 360730) ("Instead, plaintiffs contend that the City must have a specific plan for capital improvements equivalent to the amount in the reserve fund and that without such a plan, the fund's existence is evidence that the rates are excessive. Plaintiffs do not provide any authority (legal or otherwise) to support this contention.").[12]

***9** Plaintiff's best argument for reversal is that defendant "double counted" both debt service and depreciation for six particular assets, such that water customers were charged for both the original construction of those assets (funded through bonds) and anticipated future construction (funded through depreciation as a proxy for anticipated costs). However, the trial court did not address this argument. In his lower court brief discussing this position, plaintiff summarily directed the trial court to the three particular exhibits:

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[FN 14]: *See* Exhibit 23 hereto (City's Objections and Responses to Plaintiff's Fourth Interrogatories and Fourth Requests for Production of Documents).

[FN 15]: See Exhibit 24 hereto (excerpts from City's annual financial statements showing principal debt expense for the assets listed below). See also Budget documents (Exhibit 20 hereto).

With this glaring lack of analysis and citation to the record, the trial court cannot be reasonably faulted for its failure to consider plaintiff's "double counting" argument. Plaintiff submitted dozens of pages of detailed accounting statements and responses to interrogatories, but he did not inform the trial court how it should consider these documents or where the pertinent facts relating to plaintiff's argument could be found. While true that MCR 2.116(G)(5) provides that "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)," this subrule does not mean that a party may submit hundreds of pages of documents to the trial court and expect that court to parse through the documents to find the relevant facts establishing a genuine issue of material fact. Rather, this Court has explained that a trial court is "not obligated under MCR 2.116(G)(5) to scour the record to determine whether there exists a genuine issue of fact to preclude summary disposition." *Barnard Mfg. Co., Inc. v. Gates Performance Engineering, Inc*, 285 Mich.App. 362, 381, 775 N.W.2d 618 (2009) (quotation marks and citation omitted). "It is absurdly difficult for a judge to perform a search, unassisted by counsel, through the entire record, to look for such evidence." *Id.* at 379, 775 N.W.2d 618 (citation omitted).

Similarly, MCR 7.212(C)(7), which concerns briefs filed in this Court, provides, in relevant part, that "[f]acts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." Thus, the mere citation to a multipage exhibit is insufficient. See *Derderian v. Genesys Health Care Sys.*, 263 Mich.App. 364, 388, 689 N.W.2d 145 (2004) ("In support of this claim, plaintiffs provide general citations from Dr. Derderian's deposition, testimony from the profusionist in one patient's case, and one patient's medical records. Such general citations are insufficient."). Accordingly, because plaintiff failed to cite supporting documentary evidence for his assertion that defendant engaged in improper "double counting," both in the trial court and in this Court, he is not entitled to relief on this basis.

IV. VIOLATION OF ORDINANCE

Finally, plaintiff argues that the water charges were unreasonable as a matter of law before November 2018 to the extent that defendant included a component for fire protection, contrary to former Rochester Hills Ordinance, § 102-124.

Initially, we note that plaintiff appears to be arguing only that the violation of former Rochester Hills Ordinance, § 102-124 resulted in the water charges being unreasonable. See *Trahey*, 311 Mich.App. at 595, 876 N.W.2d 582 ("Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable."). While plaintiff cites multiple cases for the basic proposition that a municipality is bound by its own ordinances, see, e.g., *Taber v. City of Benton Harbor*, 280 Mich. 522, 526, 274 N.W. 324 (1937), he does not challenge the basis for the trial court's dismissal of the counts of the complaint seeking relief for a violation of former Rochester Hills Ordinance, § 102-124 alone. [13] To the extent that plaintiff intended to challenge that dismissal, his argument is waived. See *Houghton ex rel Johnson v. Keller*, 256 Mich.App. 336, 339-340, 662 N.W.2d 854 (2003) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue."). Thus, we need only address the argument that the alleged violation of the November 2009 version of Ordinance § 102-124 resulted in the water charges being unreasonable.

***10** "This Court must presume the amount of the [municipal utility] fee to be reasonable, unless the contrary appears upon the face of the law itself, or is established by proper evidence." *Jackson Co. v. City of Jackson*, 302 Mich.App. 90, 109, 836 N.W.2d 903 (2013) (cleaned up). Here, the fire protection component of the water charges was substantively a component for "excess capacity" of the water system, i.e., water capacity that was beyond that necessary to service the ordinary needs of the water customers. In *Novi*, our Supreme Court explained that "excess capacity is includable in the rate base where it is reasonably necessary to fulfill contractual obligations." *Novi*, 433 Mich. at 435, 446 N.W.2d 118. Moreover, the Court suggested that when "facilities that are arguably excess capacity are constantly in use," the excess capacity is properly includable for that additional reason as

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well. See *id.* ("In the instant case, because the DWSD system is integrated, the facilities that are arguably excess capacity are constantly in use.").

Assuming that plaintiff is correct that the language of former Rochester Hills Ordinance, § 102-124 resulted in the water charges including an illegal component for excess capacity and thereby rebutting the presumption of reasonableness, the trial court correctly held that plaintiff is not entitled to equitable relief. In *Youmans*, another case involving a claim for equitable relief for allegedly inflated water charges, this Court explained that "[w]hether the Township would receive an unjust 'benefit' from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were 'excessive,' not on whether some aspect of the Township's ratemaking methodology was improper." *Youmans*, —— Mich App at ——, —— N.W.2d ——, slip op. at 30. Thus, this Court rejected the plaintiff's argument that "in the face of illegal or improper expenses included in the disputed rates, she is not required to demonstrate that the rates actually *overcharged* for the related water and sewer services." *Id.* (emphasis in original).

The same is true here. It would not be inequitable to allow defendant to retain the money for excess capacity because that excess capacity, i.e., the "fire service fee," provided exclusive benefits to water customers. The fire service fee under former Rochester Hills Ordinance, § 102-124 was determined by "a base-extra capacity approach attributing to fire protection the difference between total system capacity and capacity required by other customer classes." Simply, this means that the fire service fee was the difference between the capacity *required* by water customers and the overall water system capacity. This excess-capacity difference supported the fire protection services, which admittedly benefitted the general public, but also the water customers themselves. Defendant's public utilities engineering manager explained the benefits of the excess capacity in an affidavit as follows:

> 4. One benefit of the water system's capacity is that it ensures that the City will have sufficient water flow to fight fires. The system's capacity also provides numerous benefits to ratepayers who purchase and use City water, including meeting customers' minimum needs for average daily water flow.
>
> 5. The system's capacity also allows the City to provide service under emergency conditions, maintain service during an event that causes failure, and quickly recover from these events.
>
> 6. In addition, extra water system capacity allows system users to access sufficient water flow to irrigate their lawns. Many of the City's water ratepayers take advantage of this benefit and use sprinkler systems to irrigate their lawns in summer months.

Thus, the excess-capacity costs that plaintiff attributes entirely to the costs of fire protection services actually provide unique benefits to water customers alone. Similarly, for example, our Supreme Court in *Novi* explained that the "base-extra capacity method" in that case required separating "base costs," which were "[t]hose costs associated with furnishing water at average annual rates of use," with other costs, such as "[t]hose additional costs associated with meeting water demands on the day or days of maximum use" and "[t]hose additional costs associated with meeting demands during the peak hour of use." *Novi*, 433 Mich. at 421-422, 446 N.W.2d 118. In *Novi*, as in this case, charging water customers for excess capacity provided exclusive benefits to those customers.

***11** It is impossible to disentwine the "fire protection" aspect of excess capacity with the "potable water" aspect of excess capacity. As noted, excess capacity is necessary to provide potable water during times of heightened demand or emergencies. [14] Moreover, even when excess capacity is used to provide fire protection, i.e., the water supply is used to fight a fire, that excess capacity still benefits water customers because those customers are (typically) able to maintain ordinary water use. If the water system had no excess capacity, then fighting a fire would result in water customers not having access to the ordinary water supply. Essentially, "fire protection" is but one example of heightened demand or emergency. If water customers may properly be charged for excess capacity to protect against heightened demand during a hot summer day—as plaintiff does not seem to dispute—it follows that they may also be charged for excess capacity to protect against fighting a large fire.

At a minimum, even if plaintiff is correct that the "fire protection" aspect of excess capacity exclusively benefits the general public and does not provide any unique benefits to water customers themselves, which would perhaps raise *Bolt*-type concerns, it is apparent that "fire protection" is so intertwined with the concept of excess capacity itself that the two cannot be disentangled by this Court, at least

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where plaintiff has simplistically equated "fire protection" with excess capacity. Under these circumstances, equity does not entitle plaintiff and the class to relief.

V. CONCLUSION

The trial court correctly granted summary disposition in favor of defendant because plaintiff did not show that the water charges violated MCL 141.91 or were "unreasonable," or that he was entitled to equitable relief for the alleged violation of former Rochester Hills Ordinance, § 102-124. Therefore, we affirm.

Jansen, J. (concurring).
I concur in the result only.

All Citations

Not Reported in N.W. Rptr., 2021 WL 5750616

Footnotes

1 To be precise, this case involves the water and sewer system, water and sewer customers, and water and sewer charges. For ease of discussion, we simply refer to the "water system," "water customers," and "water charges," respectively.

2 Plaintiff refers to the future capital improvement component of the water charges as the "Reserve Charge" and the fire protection component as the "Fire Service Charge." To be clear, however, defendant does not separately itemize or charge its water customers for these components. These terms are created by plaintiff for the purposes of this litigation.

3 Rochester Hills Ordinance, § 102-124 was amended in November 2018 to remove such language.

4 The trial court dismissed two counts of the complaint months earlier, so defendant's motion concerned the remaining eight counts.

5 The trial court also ruled in favor of defendant on other issues that plaintiff does not challenge on appeal.

6 Plaintiff also sought declaratory relief in his "Prayer for Relief."

7 MCL 141.121 is part of the Revenue Bond Act of 1933, MCL 141.101 *et seq.* Although MCL 141.121 seems to contemplate only those situations in which bonds are issued, MCL 141.104 provides that "[t]he powers in this act granted may be exercised notwithstanding that no bonds are issued hereunder." Thus, the parties do not dispute that MCL 141.121 may apply in this case, notwithstanding that defendant apparently does not intend to exclusively issue bonds to fund the future capital improvements. See *Seltzer v. Sterling Twp*, 371 Mich. 214, 219, 123 N.W.2d 722 (1963) ("It was clearly the intention of the legislature to give townships the power and authority under the Revenue Bond Act of 1933 to purchase, acquire, construct, improve, enlarge, extend or repair a water supply system and a sewage disposal system, and to own, operate and maintain the same, notwithstanding no bonds are issued in connection therewith.").

8 Recently, our Supreme Court noted in different circumstances that merely because a particular "charge" is a "tax" for the purposes of the Headlee Amendment does not necessarily render it unlawful. See *Gottesman v. City of Harper Woods*, 964 N.W.2d 365 (2021).

9 Although the statute did not expressly include the word "reasonable," our Supreme Court explained that the concept must nonetheless be imposed within the statute. See *id.* at 433, 446 N.W.2d 118.

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10 Plaintiff relies on *Mich. Ass'n of Home Builders v. City of Troy*, 504 Mich. 204, 934 N.W.2d 713 (2019), for the proposition that a municipal utility charge that consistently returns a profit is evidence (perhaps conclusive) that the charge is unreasonable. In that case, our Supreme Court favorably cited the dissenting opinion of Judge Jansen, who explained that consistent annual profits generated by the city's building fees was evidence that the fees were unauthorized by statute. See *id.* at 220, 934 N.W.2d 713. According to plaintiff, the same reasoning should apply here. Plaintiff's argument misses the mark because the statute at issue in that case provided that the building fees "shall be intended to bear a reasonable relation to the cost, including overhead." MCL 125.1522(1)-(2). Thus, as Judge Jansen observed, consistent annual profits indicated that the building fees were not, in fact, intended to bear a reasonable relation to the cost of operating the regulatory scheme. Here, in contrast, plaintiff does not ground his argument of "unreasonableness" in a similarly worded statute.

We also note that municipal utilities are not necessarily precluded from generating a reasonable profit. See *Chocolay Charter Twp. v. City of Marquette*, 138 Mich.App. 79, 84, 358 N.W.2d 636 (1984) ("A municipality is not required to furnish utility services at cost, but may charge a rate which will yield a profit."); McQuillin: The Law of Municipal Corporations, § 35:60 ("While in theory, water from a municipally owned plant should come to the consumer without profit to the municipality, this does not exclude the idea of profit in operation. A city is entitled to a reasonable profit and it may even use that profit for other valid municipal purposes.").

11 Although the expert only testified in the first person, the most reasonable inference is that neither expert was aware of the particular depreciating nature of defendant's water system. Tellingly, there is nothing in the experts' 27-page written opinion to suggest otherwise.

12 "Although unpublished opinions of this Court are not binding precedent, MCR 7.215(C)(1), they may, however, be considered instructive or persuasive." *Adam v. Bell*, 311 Mich.App. 528, 533 n.1, 879 N.W.2d 879 (2015) (quotation marks and citation omitted).

In any event, the law is contrary to plaintiff's argument that charges by a municipal utility are unreasonable if the municipality does not have a specific plan for use of its reserve before a lawsuit is filed. "A city has no duty to justify or explain its actions in setting rates until the party contesting their validity shows their invalidity by competent evidence." McQuillin: The Law of Municipal Corporations, § 35:57. In other words, a party contesting the validity of municipal charges (i.e., rates) must *first* produce evidence that the charges are unreasonable, and *then* the municipality must justify its actions in setting those charges. As applied here, defendant does not have to justify its actions in setting the water charges at issue—its alleged lack of a preexisting specific plan for use of the reserve—unless plaintiff first shows that the charges are unreasonable. Plaintiff cannot simply demand a justification for the water charges and subsequently argue that the purported insufficiency of the justification establishes that the water charges are unreasonable.

Moreover, plaintiff's argument is illogical for the simple reason that "[m]unicipal utility rates may include a profit margin," and "[t]he profit may be transferred to the general fund and used for purposes other than supplying the utility service." *Id.* Thus, so long as the charges are reasonable, the municipality may use accumulating reserves from those charges (i.e., profit) for any municipal purpose whatsoever. See *id.* It therefore cannot be the case that defendant is obligated to have a specific plan providing that accumulated reserves from its water charges must be used for one particular municipal purpose, or future capital improvements, rather than for some other lawfully allowed purpose.

13 The trial court ruled that Rochester Hills's ordinances are only enforceable by certain government officials and entities. Plaintiff does not argue otherwise on appeal.

14 Compare *In re Reliability of Electric Utilities for 2017-2021*, 505 Mich. 97, 103 n 1, 949 N.W.2d 73 (2020) ("Regulators overseeing capacity calculate peak demand using the hottest days of the year and add a

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'reserve margin'—that is, some *extra* capacity—to ensure that suppliers meet even unexpectedly high spikes of demand.") (emphasis in original).

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APPENDIX EXHIBIT 7

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STATE OF MICHIGAN
OTTAWA COUNTY CIRCUIT COURT

STACY PHOTHISAN, individually, and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF HOLLAND, MICHIGAN, a municipal corporation, by and through THE HOLLAND BOARD OF PUBLIC WORKS,

Defendant.

Case No. 2025-008184-CZ

Hon. Karen J. Miedema

HEARING DATE:
July 25, 2025

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PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8)

I. INTRODUCTION

This action challenges the electric rates (the "Electric Rates") imposed by the City on citizens (the "Electric Customers") who receive electricity from the City's Electric Fund. The City has illegally garnered millions from its Electric Customers through its excessive rate practices.

Michigan has long recognized that a "municipally-owned utility must be built and operated, not for a corporate profit, but for the purpose of providing utility services at a reasonable cost to the

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citizens…" *Wolgamood v. Village of Constantine*, 302 Mich. 384, 404-405, 4 N.W.2d 697 (1942). Contrary to this principle, since at least 2019, the City has set its Electric Rates at a level far in excess of the rates that were necessary to finance the actual costs of providing electric services.

The City has grossly overcharged its Electric Customers by including in its Electric Rates an illegal charge (the "Transfer Charge") that is designed to raise millions of dollars of revenues that the Electric Fund then transfers to the City's General Fund (and other City funds) to be used for "the general purposes of the City." The City has made no attempt to prove that it provides "consideration" to the Electric Fund for these gratuitous Transfers.

Purportedly relying on certain provisions in its Charter, the City allocates approximately 6.25% of its budgeted Electric Fund "**revenues**" to the Transfer Charge. That translates to about $8 million per year. Between July 1, 2021 and June 30, 2024 the City transferred over $30 million from the Electric Fund to the City's General Fund.

Plaintiff is an electric customer of the City who has paid the Transfer Charges. In addition to the claim in Count I alleging a violation of § 12.16 of the City's Charter (which strictly limits the Transfers), Count II of the Complaint alleges that the Revenue Bond Act of 1933, MCL § 141.121 et seq. (the "RBA"), governs the City's Electric Rate practices and prohibits the charging of Rates which intentionally generate surpluses that can be devoted to non-utility purposes. Count III of the Complaint alleges that because the City's Electric Rates included the Transfer Charge as a utility expense, those overall Rates have been unreasonable in violation of common-law ratemaking principles. Indeed, because of the Transfer Charge, the City's Electric Rates, "viewed as a whole," have been "excessive." *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 969 N.W.2d 570 (2021).

In lieu of filing an answer, the City filed a motion for summary disposition pursuant to MCR 2.116(C)(8). The City contends that each of Plaintiff's claims must fail for the following reasons:

1. The claim in Count I (alleging a violation of § 12.16 of the City Charter) must fail because the Transfers "were made pursuant to joint resolutions located at City Hall." City Br. at p. 1;

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2. The claim in Count II (alleging a violation of the RBA) must fail because the RBA purportedly authorizes the City to use surplus funds "in its best interest." *Id.*; and

3. The claim in Count III (alleging a violation of the common law requirement that municipal utility rates be "reasonable") must fail because the law presumes that the rates are reasonable and the claim is "unmoored from any standard against which the alleged unreasonableness may be assessed." *Id.* at pp. 1-2, 16.

Contrary to the City's arguments, however, none of the counts of the Complaint is deficient, and each states an independent cognizable claim based upon the following:

- First, as it relates to the claim in Count I based upon the City's violation of § 12.16 of the Charter, for the reasons set forth in Plaintiff's pending Motion for Summary Disposition as to Count I (filed July 2, 2025), the fact that the Transfers "were made pursuant to joint resolutions" is completely irrelevant to the Charter violation claim because Plaintiff's Complaint alleges that, during the fiscal years ending June 30, 2021 through June 30, 2025, the City's Transfers exceeded the "net income" of the Electric Fund. The City has conceded that "**[o]nly the voters can approve an appropriation if it exceeds net income, as determined under the Charter.** *See* Exhibit 6 to the Complaint at fn 1 (emphasis added). Thus, the City was and is powerless to authorize the Transfers through joint resolutions—rendering *ultra vires* each resolution the City touts in support of its Motion;

- Second, the RBA requires that a municipal utility rates be "reasonable," and prohibits the utility from establishing rates that are intended to generate revenues in excess of the utility's costs. The City's reliance on RBA provisions which purport to author the transfer of "surplus" revenues is misplaced because: (1) the Complaint alleges there were no "surpluses" as defined by the RBA in the relevant fiscal years; and (2) the RBA requires the City to set its Electric Rates to generate **only** the revenues the City requires to pay the operations and capital costs of the Electric Fund and prohibits Rates that are intentionally designed to generate surplus amounts. Accordingly, Count II states a claim for violation of the RBA.

- Third, the common law requirement that municipal utility rates be reasonable does not require a party challenging municipal utility rates to identify "a statute, contractual provision, or ordinance establishing an underling basis for 'reasonableness.'" The single unpublished case the City relies upon – *Brunet v. Rochester Hills*, COA No. 354110 (Mich. App. 2021) – is contrary to long-established binding precedent, including the Court of Appeals' published opinion in *Youmans v. Bloomfield Township*, 336 Mich. App. 161 (2021). In any event, Plaintiff here has "moored" her unreasonable rate claim to other authorities, such as the City Charter, state statutes, and well-established industry ratemaking standards which "establish an underlying basis for "reasonableness." Accordingly, the Court cannot determine the "reasonableness" of the City's Rates in the context of a motion under MCR 2.118(C)(8).

II. THE FACTUAL ALLEGATIONS OF PLAINTIFF'S COMPLAINT.

By Charter and ordinance, the Holland Board of Public Works ("HBPW") is a department of the City established to construct, maintain, improve, and extend the electric plants and

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distribution systems of the City. Complaint, ¶ 11.

Through the HBPW, the City maintains and operates the Electric Fund purportedly to provide "electrical energy to meet the requirements of [its] electric system customers; and to provide that energy at the lowest cost possible at a high level of reliability as needed by those customers." Complaint, ¶ 12, *citing* HBPW 2016 Mission Statement. HBPW provides electricity not only to the City of Holland but the surrounding townships of Holland Township, Park Township, Laketown Township, and Fillmore Township. Complaint, ¶ 13. The City, through the HBPW, establishes its Electrical Rates from time to time pursuant to its Charter and enacted ordinances. Complaint, ¶ 14, citing City Charter § 12.17.

The Complaint alleges that the City has grossly overcharged its Electric Customers by including in its Electric Rates a cost component designed to generate millions of dollars of revenues that are transferred from the Electric Fund to other City funds (the "Transfer Charge"). The transferred funds, generated by the Electric Rates and Charges, are used for the general support of the City, and for purposes wholly unrelated to providing electric services. Complaint, ¶ 16.

The Charter provision that the City claims authorizes the City's Transfer Charge (§ 12.16) provides in pertinent part:

> The **net income shall be determined by deducting from the receipts from operations and income from investments all expenses incurred and charges made or allowed for and on behalf of such utility in accordance with budget appropriations, or by appropriate action under authority of section 9 of this chapter, and after the setting aside of moneys for the payment of principal and interest on indebtedness in accordance with any ordinance or resolution authorizing such indebtedness.**
>
> **Up to 50% of the annual net income of the board may be appropriated by the council to the general purposes of the city**. All such net income which is not so appropriated shall be placed in proper accounts or funds of the city which shall be established as reserves for future operations, replacement, extension, or improvement of such utilities.
>
> Nothing herein contained shall be interpreted to limit the power of the council to place, for any year, in such accounts or funds a larger percentage than 50% of such net income to the purposes of such utilities, in the event that such appropriation shall be requested by the board of public service [works] and be approved by seven members of the council.

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> **The foregoing limitation of 50% of such net income which may be appropriated by the council for general purposes may be increased in any year by and with the consent of the board of public service [works], and the consent of seven members of the council**. …
>
> The electors of the city may, by a 3/5 vote of the qualified electors voting on such proposal at a regular or special election, approve an appropriation of more than 50% of **the** net income for any year for general purposes, or may approve the placing of more than 50% of **the** net income for any year in the reserve accounts or funds as above provided for the purposes of such utilities, **or may approve for other municipal purposes the use of such accumulated and unallocated accounts or funds as have been established**. [Complaint, ¶ 18, citing Exhibit 1 to Complaint, § 12.16 (emphasis added).]

Thus, pursuant to the City's Charter, the Electric Utility is permitted to transfer 50% of its net income, or a higher percentage of the net income—**but only the net income** and then only if approved by the City's Council—for the "general purposes of the city." Complaint, ¶ 19.

The City prepares financial statements for its Electric Fund. These financial statements show that, in the six years preceding the filing of this Complaint, the City has systematically transferred, on an annual basis, at least $7 million per year from the Electric Fund to the City's General Fund or other City funds. Complaint, ¶ 20.

The formula for determining the amount of the Transfer varies from year to year but is purportedly based upon a percentage of the Electric Fund's **budgeted revenues** (not net income) of the same fiscal year. Complaint, ¶ 21. ¶¶ 22 through 26 of the Complaint specifically identify the amounts of each annual Transfer for FY 2021 through FY 2025.

The amounts used to support the Transfers are incorporated into the City's Electric Rates through the Transfer Charge. The City's electric customers were assessed the Transfer Charge in each and every electric bill they received.[1] Moreover, as Electric Customers of the City, Plaintiff and each member of the Class paid the Transfer Charge when they paid their electric bill. Due to the

[1] The City makes no attempt to justify the Transfer Charges as representing reimbursement for services provided to the Electric Fund by other City departments. To the contrary, the historical amounts of the Transfers have been determined **solely** by reference to the financial needs of the City's General Fund. Complaint, ¶ 28.

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Transfer Charge alone, the City has overcharged its customers by over $40 million during the Class Period. Complaint, ¶ 27.

In a memorandum dated March 27, 2019, the City Manager and the General Manager of the HBPW advocated for the "establishment of policy to guide planning and execution of utility transfers." In the memorandum, the authors stated (in pertinent part):

> **Increases in the transfer percentage during the early part of this period were the result of the housing market collapse in 2008 and a resetting of the taxable value of properties in Holland. This caused significant financial strain on the City's General Fund. The HBPW transfer increase tempered this impact somewhat**. During this time, the HBPW also experienced significant decline in industrial sales of electricity due to the economic recession that followed the housing crisis. The HBPW experienced a rebound in sales volume after 2011, led mostly by the economic recovery. This was coupled by a series of rate adjustments targeted to prepare for the investment in Holland Energy Park. That worked to spark significant growth, on average nearly 8.5% year over year, in the transfer payment between 2012 and 2018. By 2018, the transfer percentage had reached 5.75% of **gross electric retail sales**. [Complaint, ¶ 29 and Exhibit 6 to Complaint (emphasis added)].

The City's Transfer Charge has been imposed in violation of the City's Charter because the City's Transfer Charges have been based on varying percentages of the budgeted **gross revenues** of the Electric Fund and not on 50% of the budgeted **net income** of the Electric Fund, as required by § 12.16 of the Charter. Complaint, ¶ 30. The City's use of gross revenues and not budgeted net income mattered: For FY 2021 through FY 2025, the Transfer Charge was prohibited because the Electric Fund had **no** net income in any of those fiscal years. Complaint, ¶ 32.

III. COUNT I ADEQUATELY ALLEGES THAT THE TRANSFERS VIOLATE THE CITY CHARTER.

The dispositive legal issue presented by Count I is this: **Does § 12.16 of the Charter authorize the City to transfer more than the budgeted net income of the Electric Fund for the general purposes of the City without voter approval, or must the City seek voter approval to transfer more than the budgeted net income?** In her SD Brief, Plaintiff demonstrated in detail that the clear and unambiguous provisions of § 12.16 prohibit the City from transferring any

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amount more than the budgeted "net income" of the Electric Fund without voter approval. Because the City concedes it has not received voter approval for the Transfers (which exceed "net income"), the Transfers in FY 2022 through FY 2025 clearly violate the City's Charter.

In its Motion, the City bizarrely argues that the City's appropriation for the Transfers has NO LIMITS, as long as the appropriation is approved by a unanimous vote of the Board of Public Works and seven members of the City's Council. *See* City's Brief. at p. 1. The City chastises Plaintiff for not addressing the fact that the City Council and the HPBW Board passed resolutions approving the Transfers in the relevant years. *Id.* at p. 2.

But there is a very good reason Plaintiff did not specifically address the City Council resolutions: **they are completely irrelevant to whether the City complied with the Charter in making the Transfers**. Indeed, each resolution touted by the City in support of its motion for summary disposition actually proves its wrongdoing because the City did not have the authority to authorize such transfers. Simply, the resolutions were ineffective to authorize the Transfers as a matter of law because the amount of the Transfers exceeded the budgeted "net income" of the Electric Fund in those years. Again, as the City has conceded "**[o]nly the voters can approve an appropriation if it exceeds net income, as determined under the Charter."** Exhibit 6 to Complaint at fn. 1.

Here, independent of the City's admissions, the clear and unambiguous provisions of § 12.16 preclude any finding that the resolutions legally authorize the Transfers. When properly interpreted, § 12.16 precludes the City from transferring more than the budgeted "net income" of the Electric Fund without voter approval because: (1) the use of "such net income" in § 12.16 necessarily limits the Transfer to "the kind or degree already described or implied" – *i.e.*, the "net income" (*see* Plaintiff's SD Br., *discussion* at pp. 12-15); (2) the Charter's use of different limiting terms in the same provision confirms that "such" net income is intended to foreclose transfers in excess of the net

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income of the Electric Fund without voter approval (*Id. discussion* at pp. 16-17); and (3) the City's interpretation of the Charter would render material provisions of the Charter (such as the voter approval provision) superfluous and unnecessary (*Id.*, *discussion* at p. 17). Of course, to the extent that the Charter is ambiguous as to whether the Transfers were authorized, the City's admission conclusively resolves that ambiguity in Plaintiff's favor. *Id.*, *discussion* at pp. 17-18.[2]

The Court should deny the City's Motion for Summary Disposition as to Count I.

IV. THE COMPLAINT AMPLY STATES A CLAIM FOR UNJUST ENRICHMENT BASED ON THE CITY'S VIOLATION OF THE RBA, MCL § 141.121.

The City issued revenue bonds to finance its new electric generation facility – the Holland Energy Park – and is therefore subject to the RBA and its limitations on rates and charges. Complaint, ¶ 33. The Complaint alleges that the City's Electric Rates have been imposed in violation of the RBA.

A. THE PERTINENT PROVISIONS OF THE RBA.

The RBA authorizes "a locality to issue a limited type of bond for public improvements that would be repaid through revenue generated solely from the public improvement financed by the bond." *Coal Protecting Auto No-Fault v. Michigan Catastrophic Claims Ass'n*, 317 Mich. App. 1, 27-28; 894 N.W.2d 758 (2016). Electric supply systems are among the public improvements authorized under the RBA. *See* MCL § 141.103(b).

§ 21 of the RBA, MCL § 141.121, provides in pertinent part:

---

[2] The City further argues that its interpretation of the Charter should prevail because, under Const. 1963, art 7, § 34, "the provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." City Br. at p. 6. But Michigan courts have repeatedly held that art. 7, § 34 has no application to a statute or charter that is clear and unambiguous. See, e.g., *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 505; 844 NW2d 470 (2014) (a liberal-construction rule was inapplicable because the statutory provision at issue was unambiguous and thus "need[ed] no construction, liberal or otherwise, to determine its meaning."); *Riverview v Sibley Limestone*, 270 Mich App 627, 631; 716 NW2d 615 (2006) (noting that "[l]aws concerning a city must be liberally construed in its favor" under Const -12- 1963, art 7, § 34, but that "the primary purpose of statutory interpretation is to give effect to legislative intent," which is determined by the statutory language if it is unambiguous).

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> (1) Rates for services furnished by a public improvement shall be fixed before the issuance of the bonds. The rates shall be sufficient to provide for all the following: (a) The payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement as may be necessary to preserve the public improvement in good repair and working order. (b) The payment of the interest on and the principal of bonds payable from the public improvements when the bonds become due and payable. (c) The creation of any reserve for the bonds as required in the ordinance. (d) Other expenditures and funds **for the public improvement** as the ordinance may require.
>
> (2) **The rates shall be fixed and revised by the governing body of the borrower so as to produce the amount described in subsection (1).** … [Complaint, ¶ 34 (Emphasis added).][3]

Subparts (a) through (d) of MCL § 141.121(1) require municipalities that are subject to the RBA to use funds garnered by municipal utility rates only to support the utility itself. Subpart (d) is a catch-all, but that provision expressly requires the funds to be expended "for the public improvement." Subdivision (2) requires that the rates be set only "to produce the amount described in subsection (1)." The possibility of "surpluses" is nowhere mentioned in MCL 141.121. Collectively, these provisions of the RBA prohibit the setting of rates which intentionally generate surpluses that can be devoted to non-electric utility purposes. Complaint, ¶ 35. The City's practice of transferring a percentage of its electric utility revenues to the City's General Fund and other funds of the City for the general purposes of the City is thus unlawful under the RBA because it allocates electric utility revenues to other City funds for non-electric utility purposes. Complaint, ¶ 36.

The City argues that its practice is lawful because the "plain language of the RBA does not limit what utility rates may fund" and "simply requires the City to assess rates that are **sufficient** to

---

[3] § 3 of the RBA, MCL 141.103, sets forth the following additional relevant definitions:

> (e) "Rates" means the charges, fees, rentals, and rates that may be fixed and imposed for the services, facilities, and commodities furnished by a public improvement.
>
> (f) "Revenues" means the income derived from the rates charged for the services, facilities, and commodities furnished by a public improvement. Revenues include, to the extent provided in the authorizing ordinance, earnings on investment of funds of the public improvement and other revenues derived from or pledged to operation of the public improvement.
>
> (g) "Net revenues" means the revenues of a public improvement remaining after deducting the reasonable expenses of administration, operation, and maintenance of the public improvement. [MCL § 141.103(e)-(g).]

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fulfill the purposes stated in the Act." City's Brief at p. 12. The City concludes that "collectively" the provisions of the RBA are "intended to secure **enough** funding to meet the requirements in MCL § 141.121 (a)-(d)" City's Brief p. 13. But the City's premise that the "plain language of the RBA does not limit what utility rates may fund" is demonstrably incorrect.

B. THE RBA REQUIRES THAT THE CITY IMPOSE "REASONABLE" RATES.

First, the Court of Appeals has specifically held that municipal utility Rates must still be reasonable even where they are required to conform to the RBA. In *Mapleview Estates v. City of Brown*, 258 Mich. App. 412 (2003), the Court held:

> As defendant obligingly points out, **even if the tap-in fees are not a tax, they must still be reasonable**. *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich. App. 14, 24; 575 N.W.2d 56 (1997) [emphasis added]. The Revenue Bond Act (RBA), MCL 141.101 *et seq.*, authorizes municipalities to "purchase, acquire, construct, improve, enlarge, extend or repair" public improvements such as water and sewer systems, and to "own, operate and maintain" them. MCL 141.104, 141.103(a) and (b). The act also authorizes cities to fix the rate for these services, which includes "the charges, fees, rentals, and rates that may be . . . imposed for the services." MCL 141.103(e), 141.121. "**A connection charge clearly falls within the ambit of a [municipality's] authority to fix the rate for service" under the RBA, and must simply be "reasonable."** *Atlas Valley*, *supra* at 21. [*Mapleview Estates*, 258 Mich. App. at 417 (emphasis added)].

See also Seltzer v. Sterling Twp., 371 Mich. 214, 222; 123 N.W.2d 722 (1963) (charges authorized under the RBA must still be reasonable).

Moreover, the Supreme Court has recognized that, in order to comply with the RBA, "**[t]he rates, of course, must be based upon use** and not special benefit or other similar criteria, unless special assessment proceedings are accepted." *Metro Homes, Inc v Warren*, 19 Mich App 664, 671; 173 NW2d 230 (1969) (emphasis added). The amount each Electric Fund customer should pay for his or her "use" of the Electric System must be limited to the amount necessary to recover the costs of providing electric service to that customer. Yet the City charges each customer for their "use" of the Electric System, **plus** an additional amount – **unrelated to use** – that the City then transfers to its General Fund for the general support of the City. This is a violation of the RBA.

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C. THE PROVISIONS OF THE RBA RELIED UPON BY THE CITY DO NOT AUTHORIZE THE TRANSFERS.

In its Motion, the City contends that the RBA actually authorizes the Transfers because MCL § 141.122 and MCL § 141.126 authorize the City to "dispose of" "surplus" funds generated by the Electric Fund. But the City's reliance on these provisions of the RBA is misplaced for at least three reasons:

1. There Was No "Surplus" To Transfer In The Relevant Fiscal Years.

First, the City's Motion misses something basic: even if the RBA authorized the City to transfer "surplus" revenues, the Complaint alleges that, during the relevant fiscal years, there was **no** "surplus" to transfer.

Under the RBA, revenues become surplus only if they remain after the borrower satisfies all of the obligations set forth in MCL § 141.122. That RBA section provides in most pertinent part:

> Sec. 22. (1) In the authorizing ordinance the governing body of the borrower shall provide that the revenues of the public improvement be accounted for separately from the other funds and accounts of the borrower in the following order of recorded priority: (a) **After provision for the payment for the next succeeding period of all current expenses of administration and operation and the current expenses for that period for maintenance as may be necessary to preserve the public improvement in good repair and working order**. (b) There shall be next set aside a sum sufficient to provide for the payment of the principal of and the interest upon all bonds payable from those revenues, as and when the bonds become due and payable. ****(c) Next there shall be set aside, in the manner and priority provided by the ordinance, the sum or sums necessary for the additional accounts as may be required.
>
> (2) Revenues remaining, **after satisfaction of subsection (1)**, at the end of any operating year shall be considered surplus and shall be disposed of by the governing body as provided in this act.

The Complaint effectively alleges that the Rates the City set in FY 2021 through FY 2025 were insufficient to "satisfy" the obligations set forth in "subsection (1)" of MCL § 141.122. Indeed, because the City had no "net income" in those years, no "surplus" was created that could be "disposed of by the governing body as provided in this act." Thus, the Court should reject the City's arguments based upon the "surplus" provisions of the RBA.

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2. The RBA Requires The City To Set Electric Rates Solely To Cover The Expenses Of The Electric Fund.

Second, the RBA prohibits the City from intentionally setting its Electric Rates to generate revenues in excess of the expenses of the Electric Fund. As the City concedes, the "surplus" provisions the City relies on – MCL § 141.122 and MCL § 141.126 – must be read in conjunction with MCL § 141.121. *See* City's Brief., p. 11 ("when considering the correct interpretation, the statute must be read as a whole") (quoting *Potter v. McLeary*, 484 Mich. 397, 410, 774 N.W.2d 1, 8 (2009).

Under MCL § 141.121, the Electric Rates must be **set** "so as to produce the amount described in subsection (1)." Because all of the expense items in subsection 1 relate to the utility, all of the amounts described in subsection 1 must be used to cover the expenses of the Utility Fund itself. MCL 141.121 is a **prospective provision** – it dictates the manner in which a municipal utility "borrower" must establish its rates in advance of the imposition of the rates. Each of the expenses identified in MCL § 141.121(1) is an expense directly related to the borrower's provision of utility service. *See* MCL § 141.121(1) (requiring that rates cover "administration and operating expenses" of the public improvement, payment of debt service on the revenue bonds, creation of a bond reserve, and other expenditures "for the public improvement"). Unlike MCL § 141.122 and MCL § 141.126, there is no mention in MCL § 141.121 of a "surplus," much less the authorization to **set** rates to generate surpluses. Read as a whole, then, MCL § 141.121 requires the rates to be set solely to fund the expenses of the "public improvement."

In contrast, MCL § 141.122 and MCL § 141.126 are **retrospective provisions**, which govern the disposition of the revenues the Electric Fund actually ends up receiving through rates. MCL § 141.126 simply states that if the City **unintentionally** generates a surplus, that surplus can be used "for the purpose or purposes as the governing body may determine to be for the best interests of the borrower." However, an interpretation of MCL § 141.122 and/or MCL § 141.126 that

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authorizes the City to intentionally set its rates to generate a surplus that it can transfer for the general purposes of the City is foreclosed by the limitations of MCL § 141.121(2).

This necessary interpretation of the RBA is further required by § 3 of the RBA, which defines "rates" as "the charges, fees, rentals, and rates that may be fixed and imposed **for the services, facilities, and commodities furnished by a public improvement**." MCL § 141.103(e) (emphasis added). This means the Electric Rates that are "fixed and imposed" must be "for the services, facilities and commodities furnished by" the Electric Fund. Because the City sets its Electric Rates to partially pay for **both** "the services, facilities and commodities furnished by" the Electric Fund **and** to generate millions of dollars of additional revenues that the City transfers to the City's General Fund, the Rates have been set in violation of the RBA.

While the Michigan courts have not definitively interpreted MCL § 141.121(2) as requiring a borrower to set its rates to recover only the amounts described in MCL § 141.121(1), the Illinois courts, interpreting a nearly-identical Illinois statute, have imposed that limitation. In *Ross v. Geneva*, 43 Ill. App. 3d 976, 357 N.E.2d 829 (1976) (Exhibit A hereto), the Court held that a charge imposed on a municipal electric utility's customers to finance a parking garage was an unlawful exaction. The court described the nature of the contested charge as follows:

> [T]he charge made of each commercial user is, with minor variations in the formula, directly linked to the amount of electricity used by the commercial customer. The narrow question presented by this case is, therefore, whether a municipally owned utility has the authority to charge its commercial electric customers a fee, based on their electrical consumption, to be used solely for city parking facilities. [43 Ill. App. 3d at p. 979.]

In holding that the charge was illegal, the *Ross* court relied upon a state statute, which closely mirrored Michigan's RBA in relevant part. The Court found that, because the statute – like the RBA here – required the municipality to use utility charges only for utility purposes, the city there could not finance the parking garage with utility charges. The Court stated (citing the applicable statute):

> "The *charges fixed for the product supplied or the service rendered* by any municipality *shall be sufficient at least* to bear all costs of *maintenance* and *operation*, to meet *interest charges* on

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> the bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or *sinking fund* to meet all unpaid bonds or certificate at maturity." (Emphasis added.)
>
> **We find no statutory authority whatever therein to charge fees for the creation of an isolated fund unrelated to the cost of the products supplied or the services rendered. The parking fund in this case is just such an unrelated, isolated fund.** The trial court correctly found the ordinances purporting to create it void for want of statutory authority. [43 Ill. App. 3d at pp. 980-981. Emphasis added.]

Like the municipality in *Ross*, the City here is using rate-generated revenues for purposes unrelated to the Electric Fund. Even though the statutory language in *Ross* was even stronger for the municipality there (requiring the charges to "be sufficient **at least**" to cover the utilities expenses (emphasis added)) than the RBA language at issue here (requiring the rates "to be sufficient" to cover the utility's expenses), the *Ross* Court still found that the provision required the municipality to set its rates solely to recover the utility's expenses.

3. The City Charter Prohibits Any Transfers Other Than Transfers Authorized By § 12.16.

Finally, in its Charter, the City has precluded the Electric Fund from transferring any revenues generated by Electric Rates and Charges other than the transfers authorized by § 12.16 of the Charter. In this regard, § 12.12 of the Charter provides in pertinent part as follows:

> Except as otherwise provided in this Charter, all funds raised for, or realized from, the operation of such public service works and utilities of the city shall remain in the accounts to which they have been allocated and no part thereof shall be transferred from or revert to any other account or fund at the close of any fiscal year.

This limitation is dispositive of the City's arguments because the City identifies no Charter provision – other than § 12.16 – that purports to authorize the transfer of utility funds to other City funds or the use of utility funds for non-utility purposes. And, of course, as discussed extensively above, § 12.16 does not authorize the specific Transfers the City made during FY 2021-2025.

Indeed, the City's interpretation of the RBA would authorize **unlimited** municipal utility rates. A cash-strapped municipality could amply supplement its general fund revenues by simply

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jacking-up its utility rates and then transferring the "surplus" to the general fund, to be used for purposes wholly unrelated to providing the utility service. The danger of allowing this practice was recognized long ago by the Ohio Supreme Court in the context of municipal water rates:

> **"The application of funds created by water rentals to the payment of general municipal obligations,** or to expenses of constructing or maintaining sewage disposal plants, **or any purpose other than constructing, maintaining and operating facilities for the supply of water, would result in levying a tax only upon water users to meet the expense of government, …"**
>
> **"If such transfer of funds may be consummated, municipal financial difficulties could be solved by the indefinite increase of water rates followed by such transfer.** If that form of taxation is to be adopted, it should be done directly and openly, and with full consideration of the question of its constitutional validity." [*Franklin v. Harrison*, 171 Ohio St. 329, 331-333 (Ohio 1960) (Exhibit B hereto) (emphasis added).]

At the end of the day, the RBA is concerned with ensuring that municipal utility borrowers establish rates that are sufficient to repay bonds issued for public improvements used by the utility. There is no express or implied authorization for a municipal utility set rates that are intentionally designed to generate amounts far in excess of the cost of providing the utility service. The City's interpretation of the RBA as authorizing unlimited Electric Rates would violate long-established and fundamental principles of rate-making applicable to municipal utilities and to other municipal charges. For all of these reasons, the Court should deny the City's Motion for Summary Disposition as to the RBA claim in Count II of the Complaint.

V. COUNT III OF THE COMPLAINT ADEQUATELY STATES A CLAIM FOR UNJUST ENRICHMENT BASED ON THE CITY'S VIOLATION OF THE COMMON LAW "REASONABLE" RATE REQUIREMENT.

The City advances two arguments in seeking summary disposition of Plaintiff's unjust enrichment claims in Count III under (C)(8). First, the City alleges that Plaintiff fails to state a viable claim for Unjust Enrichment because municipal water rates are presumed reasonable. City's Brief at pp. 15-16. Second, the City claims that Plaintiff's claims "fail to identify any standard or authority for 'reasonableness' rendering the challenged rates unjust." *Id.* at p. 15. *See also Id.* at p. 18

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(characterizing Count III as a "free standing claim" because Plaintiff "cites no 'statute, contractual provision, or ordinance establishing the underlying basis for 'reasonableness' alleged in this claim." *Id.* at p. 18, quoting *Brunet v. City of Rochester Hills*, No. 354110 (Mich. App. 2021).

Both of these arguments fail for the reasons set forth below.

A. The Presumption of Reasonableness Cannot Defeat An Unjust Enrichment Claim At The Pleading Stage.

1. Any Presumption Is Rebuttable, And Therefore Is Not Properly Dispositive At The Pleading Stage.

"Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable." *Trahey v. Inkster*, 311 Mich. App. 582, 594, 876 N.W.2d 582 (2015). "Yet, this presumption is just that—a presumption—and it can be overcome by the plaintiff with a showing of sufficient **evidence** to the contrary." *Shaw v. City of Dearborn*, 329 Mich. App. 640, 655; 944 N.W.2d 153 (2019) (emphasis added). The City cites no case holding that the "presumption" can defeat a plaintiff's claims on the merits **at the pleading stage**. This is not surprising, since the presumption can be rebutted with evidence, but a motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, **not whether the complaint can be factually supported**. *El-Khalil v. Oakwood Healthcare, Inc.*, 504 Mich. 152, 159-160, 934 N.W.2d 665 (2019). Indeed, "[w]hile the lack of an **allegation** can be fatal under MCR 2.116(C)(8), the lack of **evidence** in support of the allegation cannot." *Id.* (emphasis added).

As discussed below, the Complaint's allegations rebut any "presumption of reasonableness."

2. Plaintiff Has Alleged Facts Which, If Proven, Would Rebut Any **Presumption of Reasonableness**.

Michigan courts enforce the common law requirement that municipal utility charges be "reasonable." *Mapleview Estates v. City of Brown City*, 258 Mich. App. 412 (2003). More recently, in *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 969 N.W.2d 570 (2021), the Court clarified the standard a plaintiff must meet in order to demonstrate that a municipal utility's rates and charges

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have been unreasonable. In *Youmans*, the Court of Appeals considered claims which alleged, among other things, that Bloomfield Township's water and sewer rates were unreasonable because they included improper cost components. Although the Court of Appeals reversed the circuit court's judgment in favor of plaintiff, it did so in a way that confirms the validity of Plaintiff's claims here:

> **Whether the Township would receive an unjust "benefit" from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were "excessive," not on whether some aspect of the Township's ratemaking methodology was improper**. [*Youmans*, 336 Mich. App. at 219 (emphasis added).]

To be "reasonable" municipal utility and other charges must be designed solely to recover the costs of providing the associated utility or other service. *See, e.g., Detroit Alliance Against The Rain Tax v. City of Detroit*, 507 Mich. 871, 872-873 (Clement, J. concurring) ("I understand our law as allowing municipalities to charge *no more than* the reasonable cost of the service conferred") (emphasis in original). As the Supreme Court recently observed in assessing the "reasonableness" of certain building permit fees imposed by the City of Troy:

> "**[i]f the fees for a particular service consistently generate revenue exceeding the costs for the service, the reasonableness of the fee for that service would be suspect**." [*Mich. Ass'n of Home Builders v. City of Troy*, 504 Mich. 204, 220; 934 N.W.2d 713, 722 (2019) (quoting *Mich. Ass'n of Home Builders v. City of Troy*, No. 331708, 2017 Mich. App. LEXIS 1521 (2017)).][4]

Importantly, the City cites no case dismissing a municipal utility rate challenge at the pleading stage. Indeed, all of the cases that the City relies on (whether published or unpublished)

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[4] In the *Troy* case, the Supreme Court addressed a state statute which, like the common law principles applicable to municipal electric rates, requires municipal building permit fees to be reasonable. In reversing the Court of Appeals' determination that City of Troy's fees were reasonable, the Supreme Court relied extensively on Judge Jansen's dissent in that case. *See Troy*, 504 Mich. at 215-22. In her dissent (Exhibit C hereto) Judge Jansen specifically stated that Troy's accumulation of an excessive surplus showed that the permit fees were unreasonable:

> **… I believe that a 20-25% surplus is unreasonable on its face. Indeed, defendant used its building department fees to raise $269,483 in surplus funds in 2012, $488,922 in 2013, and $325,512 in 2014, for a total of $1,083,917 deposited directly into defendant's general fund over the course of only three years**. **This "surplus" is not negligible**. Common sense indicates that it is not incidental. **The amount of surplus generated, on its own, indicates that defendant is engaged in a revenue-raising venture**. [*Mich Ass'n of Home Builders v City of Troy*, 2017 Mich. App. LEXIS 1521 (2017) at *26-27 (emphasis added)].

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were decided either on the basis of a (C)(10) motion **filed after extensive discovery** (including, in most cases the submission of expert opinions) or **after a trial on the merits**. Again, this is not surprising, given that a motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil*, *supra*, 504 Mich. at 159-160.[5]

To the extent that *Trahey* requires a Plaintiff to plead that the challenged rates contain "illegal" or "improper" expenses, Plaintiff has amply alleged that the Transfer Charge is an illegal or improper expense because the amounts to fund the Transfers are included in the City Electric Rates. Those amounts are not proper expenses of the Electric Fund but rather are amounts used to finance general governmental obligations unrelated to providing electric service.

B. PLAINTIFF IS NOT REQUIRED TO "MOOR" HER UNREASONABLE RATE CLAIMS TO AN INDEPENDENT LEGAL LIMITATION ON THE RATES.

Municipal utility rates and charges have long been subject to the common law requirement that the rates and charges and that common law requirement exists independent of "statute[s], contractual provision[s]" and "ordinances."

First, none of the published cases cited by the City held that "reasonableness" can **only** be assessed by reference to such authorities. Indeed, the "reasonableness" requirement is grounded in long-established **common law principles**, which apply in the absence of statutes or other regulations. This was recognized by this Court long ago in *Walker Bros. Catering v. Detroit City Gas Co.*, 230 Mich. 564, 203 N.W. 492 (1925), where the Court observed:

> It would seem, therefore, fully established, both on principle and on authority, that in the absence of applicable regulatory legislation, **a public utility has the power to fix its own**

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[5] *See, e.g., City of Novi v. City of Detroit*, 433 Mich. 414, 430, 446 N.W.2d 118 (1989) (trial); *Trahey v. Inkster*, 311 Mich. App. 582, 594, 876 N.W.2d 582 (2015) (trial); *Shaw v. City of Dearborn*, 329 Mich. App. 640, 655; 944 N.W.2d 153 (2019) ((C)(10) motion after discovery); *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 969 N.W.2d 570 (2021) (trial); *Bohn v. City of Taylor*, 2019 WL 360730 (Mich. App. 2019) ((C)(10) motion after discovery); *Brunet v. City of Rochester Hills*, 2021 WL 5750616 (Mich. App. 2021) ((C)(10) motion after discovery).

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> **rates and charges, subject to the common-law duty that the charges must be reasonable**. In the days before general legislative regulation became usual such power was unquestioned. It was the well settled common-law situation; and the common law applied equally to individuals and to corporations and holders of franchises, unless the charter or franchise itself specifically fixed rates. **After general legislative rate regulation became normal, the common law continued where there was complete absence of legislative regulation and where there was legislative regulation which did not cover the entire subject-matter**. [230 Mich. at 572-573 (emphasis added).]

Youmans further makes clear that the common law requirements exist on their own, by requiring a plaintiff only to prove that the challenged rates, "viewed as a whole, were unreasonable inasmuch as they were "excessive." *Youmans*, 336 Mich. App. at 219. One can search *Youmans* – the most recent binding and published authority concerning the common law "reasonable" rate requirement – in vain for even a suggestion that the standard claimed by the City is applicable. The *Youmans* standard manifestly does not require that plaintiff to also "moor" its unreasonable rate claim to some independent "cognizable standard of reasonableness." City Br. at p. 15. The long-standing common-law requirement exists on its own, and Plaintiff's Complaint amply alleges that, by virtue of the Transfer Charges, the City's Electric Rates, "viewed as a whole, have been unreasonable inasmuch as they have been excessive." That is all that *Youmans* requires.

C. In Any Event, The Unreasonable Rate Claims Are Tethered To Independent Legal Limitations On The City's Rates.

In any event, Plaintiff's unreasonable rate claims are not "free standing." Those claims are informed by, among other legal restrictions, the provisions of the City's Charter discussed in § IV, *supra*. In particular, § 12.12 prohibits the City from transferring money from the Utility Fund to any other fund of the City except as authorized by § 12.16, which itself limits transfers to the amount of the Electric Fund's "net income." Those provisions indisputably govern the City's Electric Rates and confirm that the "unreasonable rate claims" are not "free-standing."

Further, as discussed in § IV above, the RBA provides an independent limitation on the City's Electric Rates by requiring the City to set its rates to generate revenues that are designed to

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cover only "the services, facilities, and commodities furnished by a public improvement." *See* MCL § 141.103(e) and MCL § 141.121(2).

Finally, the City arguments ignore another obvious "source of authority" – *i.e.*, professional utility ratemaking standards which appropriately guide any analysis of the "reasonableness" of the City's rates. Courts regularly rely on such standards in applying common law requirements to municipal utility rates.[6] Accordingly, the Court should reject the City's argument that Count III fails to state a viable claim for "unreasonable" Electric Rates and Charges.

CONCLUSION

For all of the foregoing reasons, the Court should deny the City's Motion for Summary Disposition Pursuant to MCR 2.116(C)(8).

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Date: July 18, 2025

[6] *See, e.g., Novi v. Detroit*, 433 Mich. 414, 420 n.6; 446 N.W.2d 118, 121 (1989) (quoting *Plymouth v Detroit*, 423 Mich. 106, 114-116; 377 N.W.2d 689 (1985) and the AWWA's Water Rates, 2d Ed., A Manual of Water Supply Practices (1972)); *Plymouth*, 423 Mich. at 116 ("The two methods most widely used are the Demand-Commodity Method and the Base-Extra Capacity Method, described in Defendant's Exhibit P, Water Rates, 2d Ed., A Manual of Water Supply Practices, American Water Works Association, 1972.").

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2025, I electronically filed the foregoing document with the Clerk of the Court using the court's electronic filing system.

/s/ Jamie Warrow
Jamie Warrow

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EXHIBIT A

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Ross v. Geneva

Appellate Court of Illinois, Second District, Second Division

November 30, 1976, Filed

No. 75-280

Reporter
43 Ill. App. 3d 976 *; 357 N.E.2d 829 **; 1976 Ill. App. LEXIS 3412 ***; 2 Ill. Dec. 609 ****

R. HERBERT ROSS, Individually and as Representative of a Class, Plaintiff-Appellant, Cross-Appellee, v. THE CITY OF GENEVA, Defendant-Appellee, Cross-Appellant

Prior History: [*1]** APPEAL from the Circuit Court of Kane County; the Hon. JAMES BOYLE, Judge, presiding.

Disposition: Affirmed in part, and reversed in part and remanded.

Case Summary

Procedural Posture
Plaintiff commercial electricity user appealed from the judgment of the Circuit Court of Kane County (Illinois), which denied class action status to the suit filed by it against defendant city based on funds collected by the city pursuant to its parking surcharge ordinances. The city appealed the order that found that the ordinances involved were invalid and enjoined their future enforcement because they were without statutory authority.

Overview
The commercial electricity user determined that he was being charged a surcharge based upon his electricity usage from the city's public utility because of a parking surcharge ordinance. He filed suit on behalf of himself and the 1100 other past and present commercial customers similarly situated and asked for a judgment that declared the 10 percent surcharge to be void and sought restitution to the class of all amounts so collected. The trial court invalidated the ordinances involved and enjoined their future enforcement. The trial court denied the class action on the basis that there was insufficient commonality of interest between the named plaintiff and the class he sought to represent and held the class members would be denied due process. Both parties appealed. The court affirmed the order that found the ordinance void because it was without statutory authority. The court reversed and remanded the cause to the trial court because it determined that the requirements for a class action were met and the requisite commonality of questions of law and fact was established.

Outcome
The court affirmed the portion of the trial court order that declared the subject ordinance void for want of statutory authority, and enjoined future collections. The court reversed that portion of the order that dismissed the class action, and remanded the cause to the trial court for further proceedings.

LexisNexis® Headnotes

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Ordinances & Regulations

HN1 **Local Governments, Claims By & Against**

Illinois municipalities are creatures of the legislature and therefore have only delegated powers. Statutes granting power to a municipal corporation are construed strictly against the municipality which claims the right to exercise the power.

Banking Law > Types of Banks & Financial Institutions > National Banks > Affiliates & Subsidiaries

Business & Corporate Law > ... > Corporate Finance > Initial Capitalization & Stock Subscriptions > Classes of Stock

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

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HN2 **National Banks, Affiliates & Subsidiaries**

Prerequisites for a class action in Illinois are the existence of common questions which dominate the controversy and pertain to each class member and an interest in a common result. Relevant factors to be considered in deciding if the required commonality exists are: whether the claims of all members of the class share a common question of law and fact, such as the existence of a common fund from which relief can be given; whether the causes of action of the members of the class arise from the same transaction; whether one party can adequately represent the rights and interests of all other members of the purported class; whether the number of possible class members renders separate litigation impossible or impractical; and whether there exists a purely equitable cause of action. Where there exists a common, dominant and pervasive issue, the propriety of a class action is not defeated by the existence of subsidiary individual issues, and where it appears the common issue is dominant and pervasive, something more than the assertion of hypothetical variations of a minor character should be required to bar the action.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN3 **Defenses, Demurrers & Objections, Affirmative Defenses**

When a business person pursues his only commercially reasonable course of action, although the action in some limited sense involves choice, such action does not rise to the level of waiver or estoppel. Where money is paid under pressure of severe statutory penalties or disastrous effect to business, the payment is involuntary and the money may be recovered. Conduct under duress always involves a choice, but the making of a choice under such circumstances does not estop the person acting under duress from later asserting his rights.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Contracts Law > Remedies > Equitable Relief > General Overview

Estate, Gift & Trust Law > Trusts > Constructive Trusts

HN4 **Right to Jury Trial, Actions in Equity**

Equity requires the return of money rightfully belonging to another. The courts will not sanction the nullification of equitable doctrines by close conceptual reasoning.

Counsel: T. M. Reuland, Charles F. Thompson, Jr., and William C. Murphy, all of Reid, Ochsenschlager, Murphy & Hupp, of Aurora, for appellant.

Bruce R. Johnson, of Wheaton, and Ancel, Glink, Diamond & Murphy, of Chicago, for appellee.

Judges: Mr. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of the court. RECHENMACHER and DIXON, JJ., concur.

Opinion by: MORAN

Opinion

[*977] **[**831]** **[****611]** From 1960 to June 1973, there was in effect in the City of Geneva an ordinance under which the plaintiff and other commercial users of electricity (produced by Geneva in its capacity as a public utility) were charged an additional fee of 10% above the price of the kilowatt hours of electricity used. The money thus collected was designated by ordinance as a special parking fund and was earmarked to finance meter-free parking areas for the downtown business area of the City of Geneva. On **[*978]** June 22, 1973, for the first time since the defendant instituted the above 10% charge, it was specifically segregated on commercial user's bills **[***2]** and noted as a "misc." charge thereon. Upon receiving his June 22 billing, plaintiff Ross made immediate inquiry and objections regarding the parking surcharge, henceforth paid the surcharge portion separately with a check indicating payment was made under protest, and filed this action within the month against the City of Geneva in its capacity as a public utility. By his action plaintiff sought, on behalf of himself and the 1100 other past and present commercial customers similarly situated, a judgment declaring the 10% surcharge to be void and sought restitution to the class of all amounts so collected (approximately $ 353,000) since 1960 pursuant thereto. Notice of the pendancy of this suit, purporting to be a class suit and advising the class members of the possibility they would be bound by the results (although subject to no personal liability on account thereof) was given by individual mailings to the 1100 class members and by repeated publication prior to trial.

The trial court invalidated the ordinances involved and enjoined their future enforcement on the basis that they were without statutory authority. The court did not reach the constitutional issue that the ordinance **[***3]** was invalid as discriminatory. Judgment was entered for the named plaintiff in the amount

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paid by him (about $ 1100). The court, however, denied the class action on the basis that there was insufficient commonality of interest between the named plaintiff and the class he sought to represent and under *Hansberry v. Lee* (1940), 311 U.S. 32, 85 L. Ed. 22, 61 S. Ct. 115, held the class members would be denied due process.

Plaintiff appeals the denial of the class action and asks that reasonable attorneys' fees be awarded his attorneys. Defendant cross-appeals the order voiding its parking surcharge ordinances.

We first consider the issue raised by the cross-appellee -- the validity of the parking surcharge ordinances. Defendant argues that under the Illinois Municipal Code, section 11 -- 117 -- 12 (Ill. Rev. Stat. 1973, ch. 24, par. 11 -- 117 -- 12), and previously under section 49 -- 12 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1959, ch. 24, par. 49 -- 12), the city is authorized to fix charges for the products supplied "sufficient at least" to bear all cost of maintenance and operation; that this statutory language authorizes the municipal utility to operate at **[***4]** a profit; that profits may be used to defray general costs of government; that the establishment and maintenance of parking facilities is a proper corporate purpose; therefore there was statutory authority for the collection of the parking fund surcharge. This entire line of reasoning fails because, on examination of the subject parking fund ordinances, we find that monies derived **[**832]** **[****612]** therefrom do not have the essential characteristics of profit for they **[*979]** accrue whether or not expenses for operating and maintaining the utility have been first met. Instead, under the ordinance, the surcharge herein accrues and is set aside for parking even if the utility operates "in the red." [1] We therefore find the authorities cited for the proposition that a municipal utility may operate at a profit wholly inapposite to the issue at hand. This is not a case of the city government appropriating funds from utility profits for general corporate purposes. It is rather a case of a city utilizing its municipally owned electric utility to exact a fee from a limited class of customers for the isolated unrelated purpose of establishing municipal parking facilities.

[*5]** The utility is used here not merely, as suggested by defendant, as a convenient point of contact for billing purposes between the City and the commercial users who are said to derive most directly the benefits of the parking program. Rather, the charge made of each commercial user is, with minor variations in the formula, directly linked to the amount of electricity used by the commercial customer. The narrow question presented by this case is, therefore, whether a municipally owned utility has the authority to charge its commercial electric customers a fee, based on their electrical consumption, to be used solely for city parking facilities. This court has stated, "It is horn-book law that **HN1** Illinois municipalities are creatures of the legislature and therefore have only delegated powers." (*Norwick v. Village of Winfield* (1967), 81 Ill. App. 2d 197, 199, *appeal denied*, 36 Ill. 2d 631 (1967).) Statutes granting power to a municipal corporation are construed strictly against the municipality which claims the right to exercise the power. (*City of Chicago Heights v. Western Union Telegraph Co.* (1950), 406 Ill. 428, 432-33.) In the *Norwick* case, this court held the municipality **[***6]** acted without statutory authority when it attempted to charge a "sewer property charge" and "treatment plant charge" in addition to the fee for sewer installation. These additional charges were held to be invalidly imposed because they were not made for sewer connections or use, but for future sewer improvements and extensions. The court noted that "the charge in question is not for actual use of the sewer or for even a proposed use. It is rather a charge for construction of a sewer system at some future time to serve someone else. * * * Charges not relating to the actual use * * * are therefore invalid." (*Winfield*, at 201-203.) In *Winfield* the applicable statutory grants of power read:

> "A municipality owning, acquiring, or constructing and providing for the operation of a combined water works and sewerage system may improve and extend that system, and may impose and collect charges or rates for the use of that system * * *." (Section 11 -- 139 -- 2, **[*980]** Illinois Municipal Code, Ill. Rev. Stat. 1965, ch. 24, par. 11 -- 139 -- 2.)
>
> "The * * * municipality * * * may * * * charge the inhabitants thereof a reasonable compensation for the *use and service* of the **[***7]** combined water works and sewerage system and to [*sic*] establish rates for that purpose * * *. These *rates* * * * *shall be sufficient* at all times to (1) *pay the cost of operation and maintenance* of the combined water works and sewerage system, (2) provide an adequate *depreciation fund*, and (3) pay the *principal* of *and interest* upon all revenue bonds issued under this Division." (Section 11 -- 139 -- 8, Illinois Municipal Code, Ill. Rev. Stat. 1965, ch. 24, par. 11-139-8.) (Emphasis added.)

The special sewerage fees charged in the *Winfield* case were held by the trial and appellate courts to be "isolated" funds for building of a future sewerage system, unrelated to the use and service of the existing sewer system, and therefore without statutory authorization.

[833]** **[****613]** The relevant statutes in the case at bar,

[1] The utility has in fact during each year in question operated at a profit of between $ 150,000 and $ 500,000 without regard to the surcharge monies.

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and their predecessor under whose authority the ordinances in question were allegedly passed, provided that a municipality has the power to acquire, construct, own and operate a public utility. (Section 49 -- 1 of the Revised Cities and Villages Act, Ill. Rev. Stat. 1959, ch. 24, par. 49 -- 1; Illinois Municipal Code, section 11 **[***8]** -- 117 -- 1, Ill. Rev. Stat. 1973, ch. 24, par. 11 -- 117 -- 1.) "Public utility" is defined to mean property used in connection with transportation, telephone or telegraph, services in furnishing cold, heat, light, power, water; or conveying oil or gas or acting as a wharfinger. Section 49 -- 2 of the Revised Cities and Villages Act, Ill. Rev. Stat. 1959, ch. 24, par. 49 -- 2; section 11 -- 117 -- 2 of the Illinois Municipal Code, Ill. Rev. Stat. 1973, ch. 24, par. 11 -- 117 -- 2.

The charging for services was formerly governed by section 49 -- 12 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1959, ch. 24, par. 49 -- 12) which has been succeeded by section 11 -- 117 -- 2 of the Illinois Municipal Code (Ill. Rev. Stat. 1973, ch. 24, par. 11 -- 117 -- 12). Both sections contain the following language:

> "The *charges fixed for the product supplied or the service rendered* by any municipality *shall be sufficient at least* to bear all costs of *maintenance* and *operation*, to meet *interest charges* on the bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or *sinking fund* to meet all unpaid bonds or certificates **[***9]** at maturity." (Emphasis added.)

We find no statutory authority whatever therein to charge fees for the creation of an isolated fund unrelated to the cost of the products supplied or the services rendered. The parking fund in this case is just such an unrelated, isolated fund. The trial court correctly found the **[*981]** ordinances purporting to create it void for want of statutory authority.

Plaintiff Ross urges that as all the 1100 commercial customers whom he purports to represent were wrongly charged the illegal 10% surcharge, they should be entitled, as plaintiff was entitled by the trial court, to restitution of a portion of the $ 353,000 fund collected without legal authority from the class. (It was stipulated at trial that the information necessary to determine these individual amounts is within the defendant's possession.)

Defendant asserts, however, that the plaintiff cannot maintain this action as a class suit because the interests of those whom he purports to represent are in conflict with his own. The reasons cited by defendant are basically these: some of the purported class members are past and present city officials who instituted the very ordinance plaintiff **[***10]** seeks to have overturned in this case; some of the purported class members are past and present merchants to whose benefit the parking program redounded, who like it, who paid the charges voluntarily, who want it continued, who do not wish to have a refund of the monies collected, and who do not wish to be represented by Ross in this suit; some of the purported class members are taxpayers to the City of Geneva (unlike Ross who moved from the City), upon whom the eventual burden of paying any judgment in this case would fall. These groups, of course, to some extent overlap. At trial, over the strenuous objections of the plaintiff, defendant introduced the affidavits and testimony of approximately 50 purported class members whose interest in one or more of the above ways was demonstrated to conflict with Ross's interests. Defendant argues and the trial court agreed that, because of these conflicts, Ross's action "lacks the commonality of interest requisite to maintenance of class actions."

HN2 Prerequisites for a class action in Illinois have been stated to be "the existence of common questions which dominate the controversy and pertain to each class member and an interest in a common **[***11]** result." *Adams v. Jewel Companies, Inc.* (1976), 63 Ill. 2d 336, 347, and cases cited therein.

Relevant factors to be considered in deciding if the required commonality exists are:

> "* * * **[**834]** **[****614]** whether the claims of all members of the class share a common question of law and fact, such as the existence of a common fund from which relief can be given [citations]; whether the causes of action of the members of the class arise from the same transaction [citations]; whether one party can adequately represent the rights and interests of all other members of the purported class [citations]; whether the number of possible class members renders separate litigation impossible or impractical [citations]; and whether there exists a purely equitable cause of **[*982]** action [citations]." *Moseid v. McDonough* (1968), 103 Ill. App. 2d 23, 27-28.

Where there exists a common, dominant and pervasive issue, the propriety of a class action is not defeated by the existence of subsidiary individual issues (*Rosen v. Village of Downers Grove* (1960), 19 Ill. 2d 448, 456; see *Perlman v. First National Bank* (1973), 15 Ill. App. 3d 784, 803, *appeal dismissed* **[***12]** *for want of concurrence of four justices*, 60 Ill. 2d 529 (1975)), and "where it appears the common issue is dominant and pervasive, something more than the assertion of hypothetical variations of a minor character should be required to bar the action." *Harrison Sheet Steel Co. v. Lyons* (1959), 15 Ill. 2d 532, 538; see also *Gowday v. Commonwealth Edison Co.* (1976), 37 Ill. App. 3d 140, 151 n. 7.

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In the case at bar, the dominant and pervasive issue pertaining to all class members is clearly the legality of the parking surcharge collected by defendant. Each class member has a legal interest in the restitution of any amounts which defendant, without statutory authority, required him to pay into the fund. Clearly subsidiary is the consideration of the other issues (voluntariness of payment, or other waiver of right to refund which would bar the recovery by individual class members). As was stated in *Rosen*, at page 456, "[T]he defendants' opportunity to establish the circumstances and to assert their legal defenses will not be impaired by litigating any such subsidiary issues in the present action instead of in separate actions."

The asserted conflict of interest between **[***13]** the named plaintiff and the members of the class he purports to represent is an issue which, with reference to the great majority of the members of the class, we find to be highly speculative. Although defendant has produced some 50 persons who, in one fashion or another, have indicated that they do not support this suit, the defection of a relative few does not destroy a class of 1100. Moreover, it would be wholly unwarranted for this court, as suggested by defendant, to presume that the silent balance of some 1050 commercial electric users chose to shoulder the burden of providing the city's merchants with public parking facilities when it is clear, from the testimony of defendant's own expert witness, that alternate sources and methods of funding parking lots were available to the city. We cannot presume that these 1050 members do not wish restitution of unlawful fees collected from them. Contrary presumptions are more likely, in view of the fact that only 50 of the 1100 members of the class "defected," although they were given personal notice of the suit and, in some cases, were contacted directly by defense counsel.

Likewise falls defendant's contention that the named plaintiff **[***14]** is in a conflict of interest situation, rendering him an improper class representative, because he is no longer a Geneva taxpayer, unlike other **[*983]** class members who will assertedly bear the burden of any judgment herein in the form of higher taxes. The basis of defendant's argument is a stipulation in the record to the effect that payment of any judgment herein will not be restricted to the parking fund or the general funds of the electric utility, but may be recovered from the general corporate funds of the City of Geneva. Defendant's theory appears to be that the taxpaying members of the plaintiff class will be required to support a judgment herein in the form of higher taxes, either **[**835]** **[****615]** directly as a result of a judgment payable out of general corporate funds, or indirectly, as a result of payment out of electric utility profits which normally supplement the general fund by $ 150,000 to $ 500,000 per year. [2] It is not asserted that the net benefit to the 1100 class members from restitution of the funds could be outweighed by an increase in taxes. That the class representative benefits proportionately more than other class members does not, *ipso* **[***15]** *facto*, create a conflict of interest. We cannot presume the presence of a conflict in absence of evidentiary support.

Furthermore, taken to its logical ends, defendant's theory could bar virtually all taxpayer class actions against municipal entities in which larger taxpayers were class members. The large taxpayer could always claim conflict to bar the class action of a class representative who pays less taxes in that any judgment with the potential tax consequences would fall more heavily on the former than the latter.

Defendant cites, and the trial court found convincing, *Hansberry v. Lee* (1940), 311 U.S. 32, 85 L. Ed. 22, 61 S. Ct. 115, as authority for holding Ross inadequate to represent the interest of the purported class because of interests in conflict with certain class members. The trial court was persuaded that one seeking to invalidate **[***16]** the special parking fees could not adequately represent the interest of those supporting it. *Hansberry* held that due process of law requires adequate representation of class members, and held due process required that the adverse findings in a prior adjudication -- *Burke v. Kleiman* (1934), 277 Ill. App. 519 -- were not *res judicata* as to plaintiffs whose interests were inadequately represented by parties antagonistic to plaintiffs in that litigation. (It should be noted that the *Burke* adjudication was deemed to be a class action in the subsequent case of *Lee v. Hansberry* (1939), 372 Ill. 369.) The United States Supreme Court, in *Hansberry v. Lee*, found that due process consisting of notice and hearing was lacking in the *Burke* case and, consequently, *res judicata* was not applicable. Also, the very fact asserted to be *res judicata* from the prior case had been wrongfully stipulated to in the earlier proceeding by the supposed class **[*984]** representative. The Supreme Court in *Hansberry* held that due process requires adequate representation of class members, and such had not been provided the plaintiffs whose interests were antagonistic to **[***17]** those of the class representative. The court held the plaintiffs not bound by the adverse finding in the prior litigation, and held that no class existed.

While we do not question the correctness of *Hansberry v. Lee*, we do believe it does not govern the case at bar. Unlike the proceedings out of which *Hansberry* arose, this action was handled as a class action. Unlike *Hansberry*, repeated notices of

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[2] The effect of such a stipulation was not raised as an issue here, and although we question the validity of such stipulation, we need not decide the same.

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the nature and pendency of the suit were published, and individual notice was mailed to all class members informing them of the suit and the possibility of its affecting their rights, and inviting them to "take such steps, if any, as you wish in relation to this lawsuit." Moreover, although Illinois law contains no formal procedure whereby potential members of a plaintiff class may opt out of that class if they deem themselves inadequately represented [3], such right to opt out is inherent in Illinois law. As the asserted conflict of interest between plaintiff and the vast majority of the class is highly speculative, and as individual notice was given indicating the individual members might wish to take steps in relation to the suit, we believe the due process considerations **[***18]** uppermost in *Hansberry* have been satisfied in this case.

Defendant asserts that, even if the class action is otherwise proper, voluntary payment of the parking surcharge held invalid bars Ross's individual recovery and **[**836]** **[****616]** destroys the basis for any class suit. Defendant contends the payer of a fee under a void ordinance waives the right to recovery unless he protests in some manner, or the facts of the transaction itself establish that the payment was involuntary. Defendant cites *Fisher v. City of Ottawa* (1972), 8 Ill. App. 3d 553. The *Fisher* case is inapposite because, there, fees voluntarily paid were late payment penalties which, the court held, were within the power of the plaintiffs to have avoided. The charges in the instant case could not have been avoided by the voluntary action of Ross or other class members. However, assuming *arguendo* that defendant has correctly stated the law, the mere payment, without protest, of the parking **[***19]** surcharge herein does not constitute waiver of a right to recovery. It is clear that **HN3** when a business person pursues his only commercially reasonable course of action, although the action in some limited sense involves choice, such action does not rise to the level of waiver or estoppel. In the case of *Chicago & Eastern Illinois Ry. Co. v. Miller* (1923), 309 Ill. 257, 260, it was stated that "where money is paid under pressure of severe statutory penalties or disastrous effect to business, it is held that the payment is involuntary and that the money may be recovered * * *. Conduct under duress always involves a choice, but this court has held that the making of a choice under **[*985]** such circumstances does not estop the person acting under duress from later asserting his rights." See also *People ex rel. Carpentier v. Treloar Trucking Co.* (1958), 13 Ill. 2d 596.

In the case at hand, defendant was the sole provider of electricity to the class members' commercial enterprises. There was evidence that it was defendant's policy to terminate, and it has terminated, the supply of electricity to users for nonpayment of imposed charges. Furthermore, unlike tax cases where **[***20]** there is a statutory protest mechanism, none exists here. We believe that the payment of the parking surcharge was the commercially reasonable action under the circumstances, and does not, without more, constitute a waiver of the right to recovery nor destroy the class.

It is asserted that the relationship between defendant and plaintiff was based in contract, and that the statute of limitations bars the right of the class to recover from claims arising more than 5 years after the filing of Ross's complaint. This complaint was filed seeking equitable relief -- the imposition of a constructive trust on, and the restitution of, funds collected without statutory authority over a period of 13 years. **HN4** Equity requires the return of money rightfully belonging to another (*Highway Commissioners v. Bloomington* (1912), 253 Ill. 164, 174), and "[t]his court will not sanction the nullification of equitable doctrines by close conceptual reasoning * * *." (*Board of Trustees v. Village of Glen Ellyn* (1949), 337 Ill. App. 183, 198; see also *County of Lake v. X-Po Security Police Service* (1975), 27 Ill. App. 3d 750, 775.) To do equity in this case requires the restitution of all parking **[***21]** surcharge monies collected over the 13 years under the subject ordinances.

The plaintiff vigorously urged the trial court, and now urges us, to exclude evidence obtained as the result of defendant's alleged repeated violations of Disciplinary Rule 7-104 of the ABA Code of Professional Responsibility. Rule 7-104 states that during the course of his representation with a party he knows to be represented by a lawyer in that matter, and he shall not give advice to a person who is not represented by a lawyer other than advice to secure counsel, if the interest of that person has a reasonable possibility of being in conflict with the interest of his client. The evidence urged as improperly obtained includes the affidavits and testimony of the 50 some class members who indicated that they did not support this suit. While we, like plaintiff, are concerned with the practice of contacting members of the opposing class, which presents the opportunity to misrepresent the nature and effect of the class action **[**837]** **[****617]** and to encourage defection [4], we have found no Illinois rule or case law which would allow us to exclude such evidence. We therefore decline to exclude this evidence. **[***22]**

[*986] We affirm that portion of the trial court order declaring the subject ordinance void for want of statutory authority, and enjoining future collections thereunder. We reverse that portion dismissing the class action. This cause is remanded to the trial court for further proceedings consistent with the view expressed herein.

[3] See Rule 23(c) Fed. R. Civ. P.

[4] See 1 J. Moore, Federal Practice, pt. 1, § 1.41.

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Affirmed in part, reversed in part and remanded.

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EXHIBIT B

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Franklin v. Harrison

Supreme Court of Ohio

November 30, 1960, Decided

No. 36495

Reporter
171 Ohio St. 329 *; 170 N.E.2d 739 **; 1960 Ohio LEXIS 550 ***; 14 Ohio Op. 2d 4

CITY OF FRANKLIN, APPELLANT, v. HARRISON, JR., APPELLEE

Prior History: [*1]** APPEAL from the Court of Appeals for Warren County.

Disposition: *Judgment affirmed.*

Case Summary

Procedural Posture
The City of Franklin appealed a judgment of the Court of Appeals for Warren County (Ohio), which affirmed an order sustaining defendant's demurrer to an affidavit charging him with failing to pay a tax in violation of an ordinance.

Overview

The City enacted an ordinance levying a tax upon water and sewer services for the purpose of providing revenues for the general fund of the City. The ordinance provided that failure to pay the tax constituted a misdemeanor. Defendant refused to pay the tax. The City filed an affidavit charging defendant with failing to pay the tax in violation of the ordinance. Defendant filed a demurrer to the affidavit, claiming that the ordinance was illegal. The trial court sustained the demurrer. The appellate court affirmed the trial court's order. On appeal, the court affirmed the appellate court's judgment. The court held that Ohio Const. art. XVIII, § 13 authorized state laws that limited the power of municipalities to levy taxes. The court ruled that Ohio Rev. Code Ann. §§ 743.05, 729.52 prohibited a municipality from levying a tax upon water and sewer services for the purpose of providing money for general municipal purposes. Therefore, the court determined that the ordinance was illegal and void.

Outcome
The court affirmed the appellate court's judgment affirming the trial court's order sustaining defendant's demurrer to the affidavit.

LexisNexis® Headnotes

Governments > Local Governments > Duties & Powers

HN1 Local Governments, Duties & Powers

See Ohio Const. art. XVIII, § 13.

Governments > Public Improvements > Financing

Governments > Public Improvements > Sanitation & Water

HN2 Public Improvements, Financing

Ohio Rev. Code Ann. § 743.04 recognizes that a municipality may assess and collect a water rent from all tenements and premises supplied with water, and may look directly to the owner of property for the water rent, which shall be collected in the same manner as other city taxes.

Governments > Public Improvements > Financing

Governments > Public Improvements > Sanitation & Water

HN3 Public Improvements, Financing

See Ohio Rev. Code Ann. § 743.05.

Governments > Public Improvements > Financing

Governments > Public Improvements > Sanitation &

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Water

HN4 Public Improvements, Financing

Ohio Rev. Code Ann. § 729.49 provides for establishment of rates or charges of rents to be paid for the use of sewerage services and for the collection of such charges in the same manner as other municipal corporation taxes.

Governments > Public Improvements > Financing

Governments > Public Improvements > Sanitation & Water

HN5 Public Improvements, Financing

See Ohio Rev. Code Ann. § 729.52.

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Governments > Public Improvements > General Overview

Governments > Local Governments > Home Rule

HN6 Types of Contracts, Lease Agreements

Ohio Const. art. XVIII, § 4 authorizes any municipality to acquire, construct, own, lease and operate any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants.

Governments > Local Governments > Finance

Governments > Public Improvements > Financing

Governments > Public Improvements > Sanitation & Water

HN7 Local Governments, Finance

The application of funds created by water rentals to the payment of general municipal obligations or any purpose other than constructing, maintaining and operating facilities for the supply of water results in levying a tax only on water users to meet the expenses of government, in violation of the express terms of Ohio Gen. Code § 3959 (current version at Ohio Rev. Code Ann. § 743.05). Surplus revenues derived from the operation of a municipal waterworks may reasonably be regarded as taxes levied upon water users and thereby subject to legislative limitations pursuant to Ohio Const. art. XVIII, § 13.

Governments > Local Governments > Finance

Governments > Public Improvements > Financing

Governments > Public Improvements > Sanitation & Water

HN8 Local Governments, Finance

Ohio Rev. Code Ann. §§ 743.05, 729.52 express a legislative intention that a municipality that is furnishing water and sewer services shall not levy a tax on the use of such services for the purpose of providing money for general municipal purposes. By reason of Ohio Const. art. XVIII, § 13, the General Assembly has authority to so limit municipal taxing power.

Headnotes/Summary

Headnotes

Municipal corporations -- Water and sewer services -- Tax on use of such services -- Not permitted for general revenue purposes -- Municipal taxing power limited by General Assembly.

Syllabus

[*329] 1. Sections 743.05 and 729.52, Revised Code, express a legislative intention that a municipality that is furnishing water and sewer services shall not levy a tax on the use of such services for the purpose of providing money for general municipal purposes.

2. By reason of Section 13 of Article XVIII of the Constitution, the General Assembly has authority **[***3]** to so limit municipal taxing power.

The city of Franklin, herein referred to as the city, enacted an ordinance providing that "for the purpose of providing revenues for the general fund of the city * * * there is hereby levied * * * a tax of 50 per cent computed on the rate charged for water and sewer by the city * * * and used by consumers," that "the water department of the city * * * furnishing or delivering the services on which this tax is levied shall in each and every bill or

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statement rendered therefor * * * set forth an item for said tax * * * on said bill carrying out the amount thereof and including the same in the total of said bill or statement * * * at the time of the payment thereof," and that "whoever being a consumer or payer, refuses to pay the full and exact tax * * * shall be guilty of a misdemeanor, and * * * fined."

When defendant refused to pay a tax levied against him pursuant to the terms of that ordinance for water and sewer services supplied by the city to and used and paid for by him, a warrant was issued for his arrest, pursuant to an affidavit filed in the Municipal Court of Franklin, and defendant was arrested. Thereafter, defendant **[***2]** demurred to that affidavit on the ground that the facts stated therein do not constitute an offense in that the foregoing ordinance contravenes the provisions of the Constitution of the United States and the laws of the state. That **[*330]** demurrer was sustained by the Municipal Court and defendant was discharged.

The judgment of the Municipal Court was affirmed by a 2 to 1 decision of the Court of Appeals.

The cause is now before this court on appeal from the judgment of the Court of Appeals as an appeal involving constitutional questions and also pursuant to allowance of the city's motion to certify the record.

Counsel: *Messrs. Finkelman & Ross*, for appellant.

Mr. George H. Elliott and *Mr. Clinton D. Boyd, Jr.*, for appellee.

Judges: TAFT, J. WEYGANDT, C. J., ZIMMERMAN, HERBERT and PECK, JJ., concur. MATTHIAS and BELL, JJ., dissent.

Opinion by: TAFT

Opinion

[740]** The city recognizes that, to the extent that collection of the so-called tax provided for by the foregoing-mentioned ordinance represents "the collection of sewer rentals" within the meaning of Section 729.52, Revised Code, or of "a water rent" within the meaning of Section 743.04, Revised Code, then that ordinance necessarily conflicts with the statutes of this state, *i. e.*, Section 729.52 or Section 743.05, Revised Code, or both those sections. To avoid any such conflict, the city contends that the so-called tax provided for in the ordinance is an excise tax on the sale of water and of sewer services by the city to consumers and users thereof. If we assume that that contention is sound, the question still remains whether the General Assembly has deprived the city of power to levy such a tax. Section 13 of Article XVIII of the Ohio Constitution authorizes the General Assembly **[***4]** to do that, when it states that **HN1** "laws may be passed to limit the power of municipalities to levy taxes."

Section 743.04, Revised Code, **HN2** recognizes that a municipality "may * * * assess and collect a water rent * * * from all tenements and premises supplied with water," and may "look directly to the owner of property for * * * the water rent * * *, which shall be collected in the same manner as other city taxes."

Section 743.05, Revised Code, reads, so far as pertinent:

HN3 "After payment of the expenses of conducting and managing the waterworks, any surplus * * * may be applied to the repairs, enlargement, or extension of the works or * * * reservoirs, **[*331]** * * * interest of any loan made for their construction, or for the creation of a sinking fund for the liquidation of the debt. * * * a sum not to exceed 10 per cent of the gross revenue of the water-works for the preceding year may be taken from any surplus remaining * * * and * * * used for * * * the sewerage system * * *. Each year * * * five per cent of the gross revenue * * * shall be first retained from said surplus as a reserve for water-works purposes."

Section 729.49, Revised Code, **HN4** provides for establishment of "rates **[***5]** or charges of rents to be paid * * * for the use of" sewerage services and for the collection of **[**741]** "such charges * * * in the same manner as other municipal corporation taxes."

Section 729.52 provides, so far as pertinent:

HN5 "The funds received from * * * sewer rentals under Section 729.49 * * * shall be kept as a separate and distinct fund * * *. * * * such fund * * * shall be used for * * * the cost of the management, maintenance, operation, and repair of the sewerage system and sewage pumping, treatment, and disposal works. Any surplus in such fund may be used for the enlargement or replacement of the system and works, for * * * interest on any debt incurred for the construction thereof, and for the creation of a sinking fund for the payment of such debt, but shall not be used * * * for any other purpose."

In *City of Cincinnati* v. *Roettinger, a Taxpayer*, 105 Ohio St., 145, 137 N. E., 6, this court held that, by reason of statutory provisions substantially similar to those now found in the first sentence of Section 743.05, Revised Code, "surplus revenues derived from water rents" could be applied *only* to payment of the items specified in that statute.

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In **[***6]** that case, it was argued that, if so construed, what is now Section 743.05 would conflict with the home-rule provisions of Article XVIII of the Ohio Constitution and especially Section 4 **HN6** thereof authorizing "any municipality" to "acquire, construct, own, lease and operate * * * any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants."

In disposing of that contention, it is said in the opinion by Marshall, C. J.:

"* * * any effort on the part of any municipality to deliberately **[*332]** impose rates and charges for a water supply, not for the purpose of covering the cost of furnishing and supplying the water, but for the purpose of making up a deficiency in the general expenses of the municipality, and which cannot be met within the limits of taxation otherwise provided, is to that extent an effort to levy taxes, and, to the same extent, an effort to evade the statutory and constitutional limitations upon that subject. * * *

"If the ordinance under consideration in this case [transferring to the city's general fund surplus water revenues not required for the purposes specified by what is now Section 743.05, Revised Code] **[***7]** amounts to an effort to levy taxes for general municipal purposes * * * then * * * by virtue of the provisions of * * * Section 13 of Article XVIII, the Legislature has power to place limitations thereon; and the provisions of Section 3959 [now Section 743.05, Revised Code] are in the nature of such limitation."

That case was followed in *Hartwig Realty Co.* v. *City of Cleveland*, 128 Ohio St., 583, 192 N. E., 880, where it is stated in the opinion by Matthias, J.:

"The application of funds created by water rentals to the payment of general municipal obligations, or to expenses of constructing and maintaining sewage disposal plants, or any purpose other than constructing, maintaining and operating facilities for the supply of water, would result in levying a tax only upon water users to meet the expenses of government, in violation of the express terms of Section 3959, General Code [now Section 743.05, Revised Code, which was subsequently amended to provide as it now does for use of a portion of water rentals for the sewerage system]."

Those cases were followed in *City of Lakewood* v. *Rees*, 132 Ohio St., 399, 8 N. E. (2d), 250, which holds that what is now Section **[***8]** 743.05 prevented a transfer pursuant to other general statutory provisions of surplus water funds to a municipality's general revenue fund. In the opinion by Matthias, J., it is said:

"If such transfer of funds may be consummated, municipal financial difficulties could be solved by the indefinite increase of **[**742]** water rates followed by such transfer. If that form of taxation **[*333]** is to be adopted, it should be done directly and openly, and with full consideration of the question of its constitutional validity."

In *Himebaugh* v. *City of Canton*, 145 Ohio St., 237, 61 N. E. (2d), 483, paragraph one of the syllabus reads:

"Water rates or charges or 'rents' collected by a municipality cannot be classed as taxes so long as their use is limited to the waterworks purposes enumerated in Section 3959, General Code [now Section 743.05, Revised Code]; but if employed as a mere device to lessen the burden of taxation for general governmental purposes, such funds should be considered in the category of taxes."

In *Swank* v. *Village of Shiloh*, 166 Ohio St., 415, 143 N. E. (2d), 586, it is said in the opinion by Bell, J., in referring to the foregoing cases:

"It **[***9]** has been established by a line of cases * * * that **HN7** the application of funds created by water rentals to the payment of general municipal obligations or any purpose other than constructing, maintaining and operating facilities for the supply of water results in levying a tax only on water users to meet the expenses of government, in violation of the express terms of Section 3959, General Code [now Section 743.05, Revised Code]."

In *State, ex rel. McCann*, v. *City of Defiance*, 167 Ohio St., 313, 148 N. E. (2d), 221, it is said in the opinion:

"* * * surplus revenues derived from the operation of a municipal waterworks may reasonably be regarded as taxes levied upon water users * * * and thereby subject to legislative limitations pursuant to * * * Section 13 [of Article XVIII of the Constitution]."

From the foregoing authorities, it is clear that the constitutional validity of Section 743.05, Revised Code, was and the constitutional validity of Section 729.52, Revised Code, could be sustained only upon the theory that **HN8** those statutes together express a legislative intention that a municipality that is furnishing water and sewer services shall not levy a tax on the use of **[***10]** such services for the purpose of providing money for general municipal purposes. By reason of Section 13 of Article XVIII of the Ohio Constitution, the General Assembly has authority to so limit municipal taxing power.

[*334] It follows that the judgment of the Court of Appeals

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must be affirmed.

Judgment affirmed.

Dissent by: BELL

Dissent

BELL, J., dissenting.

The majority opinion herein seems to settle irrevocably a proposition about which there has been no serious doubt since 1922, *i. e.*, that the application of funds created *by water rentals* to the payment of general municipal obligations or for any purpose other than constructing, maintaining and operating facilities *for the supply of water* results in levying a tax only on water users to meet the expenses of government, in violation of the express terms of Section 743.05, Revised Code.

My disagreement with the majority opinion stems from what I consider a *non sequitur*, contained in the next to the last paragraph of the opinion, to the effect that, since a city cannot use *surplus* water rentals for general governmental expenses, it cannot impose an excise tax on the users of a commodity sold by the city.

[*11]** There can be no serious argument, I think, that an excise tax may properly be defined as one laid on licenses to pursue certain occupations, on corporate privileges or on *sales or consumption of commodities.* **[**743]** In my opinion, the tax imposed by the ordinance and described therein as "an excise tax on water and sewer bills" is purely and simply an excise tax upon the consumers of a commodity in a field that has not been preempted by the state.

MATTHIAS, J., concurs in the foregoing dissenting opinion.

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EXHIBIT C

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Mich. Ass'n of Home Builders v. City of Troy

Court of Appeals of Michigan

September 28, 2017, Decided

No. 331708

Reporter
2017 Mich. App. LEXIS 1521 *

MICHIGAN ASSOCIATION OF HOME BUILDERS, ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN, and MICHIGAN PLUMBING AND MECHANICAL CONTRACTOR ASSOCIATION, Plaintiffs-Appellants, v CITY OF TROY, Defendant-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Motion granted by Mich. Ass'n of Home Builders v. City of Troy, 905 N.W.2d 415, 2018 Mich. LEXIS 83 (Mich., Jan. 5, 2018)

Motion granted by Mich. Ass'n of Home Builders v. City of Troy, 502 Mich. 878, 912 N.W.2d 554, 2018 Mich. LEXIS 1147 (June 20, 2018)

Motion granted by Mich. Ass'n of Home Builders v. City of Troy, 917 N.W.2d 625, 2018 Mich. LEXIS 1806 (Mich., Sept. 14, 2018)

Motion granted by Mich. Ass'n of Home Builders v. City of Troy, 920 N.W.2d 833, 2018 Mich. LEXIS 2573 (Mich., Dec. 21, 2018)

Motion granted by Mich. Ass'n of Home Builders v. City of Troy, 924 N.W.2d 235, 2019 Mich. LEXIS 418 (Mich., Feb. 22, 2019)

Motion granted by Mich. Ass'n of Home Builders v. City of Troy, 924 N.W.2d 886, 2019 Mich. LEXIS 602 (Mich., Apr. 5, 2019)

Reversed by, Remanded by Mich. Ass'n of Home Builders v. City of Troy, 2019 Mich. LEXIS 1257 (Mich., July 11, 2019)

Prior History: **[*1]** Oakland Circuit Court. LC No. 2010-115620-CZ.

Mich. Ass'n of Home Builders v. City of Troy, 497 Mich. 281, 871 N.W.2d 1, 2015 Mich. LEXIS 1394 (June 4, 2015)

Judges: Before: O'BRIEN, P.J., and JANSEN and MURRAY, JJ. JANSEN, J. (dissenting).

Opinion

PER CURIAM.

Plaintiffs appeal as of right the trial court's opinion and order denying plaintiffs' motion for partial summary disposition and granting defendant's motion for summary disposition, following remand from the Supreme Court.[1] We affirm.

I. FACTS AND PROCEDURAL HISTORY

This case originated on December 15, 2010, when plaintiffs filed a two-count complaint alleging that defendant's collection of building department revenue that exceeded the amount owed in accordance with its SAFEbuilt contract,[2] and the deposit of the excess monies into defendant's general fund, violated the Single State Construction Code Act (CCA), MCL 125.1501 *et seq.*, specifically MCL 125.1522(1). In addition, plaintiffs contended that defendant's collection of building department fees that exceeded the amount owed under defendant's contract with SAFEbuilt comprised a disguised tax in violation of the Headlee

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[1] *Mich Ass'n of Home Builders v City of Troy*, 497 Mich 281; 871 NW2d 1 (2015).

[2] As explained by the trial court: "Under the contract, Safe Built [sic] agreed to perform most of the functions of Defendant's building department, such as inspections and plan reviews. In exchange, Defendant agreed to pay Safe Built [sic] 75-80% of the revenue Defendant collected for building department services . . . . Defendant deposited the remainder of the revenue into its general fund" to compensate or repay for deficits incurred by the building department in previous years "that were absorbed by the general fund."

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Amendment, Const 1963, art 9, § 31. After the parties filed cross-motions for summary disposition, the trial court granted summary disposition in favor of defendant, concluding that it lacked jurisdiction to hear the dispute where plaintiffs had **[*2]** not exhausted their administrative remedies as required by the CCA. After plaintiffs appealed to this Court and this Court affirmed the trial court's ruling, plaintiffs sought and were granted leave to appeal, where the Supreme Court determined that the trial court erred by ruling that plaintiffs must exhaust the administrative remedy set forth in MCL 125.1509b, and remanded to the trial court. *Mich Ass'n of Home Builders v City of Troy*, 497 Mich 281, 283; 871 NW2d 1 (2015).

This appeal follows the remand of this matter to the trial court and the resumption of summary disposition proceedings in that forum. Following remand, plaintiffs filed a motion for summary disposition pursuant to MCR 2.116(C)(10), and defendant moved for summary disposition pursuant to MCR 2.116(I)(2). As relevant to this appeal, the parties advanced arguments in support of their respective positions regarding whether (1) defendant's Building Department's assessment and collection of fees complied with MCL 125.1522(1) and, (2) the fees assessed violated the Headlee Amendment. The trial court concluded that defendant had fully complied with MCL 125.1522(1), and that the fees at issue did not contravene the Headlee Amendment. Plaintiffs now appeal as of right.

II. MCL 125.1522(1)

In support of their argument that summary disposition was improperly granted, plaintiffs assert that the **[*3]** trial court incorrectly interpreted the language of MCL 125.1522(1). "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Cotton v Banks*, 310 Mich App 104, 111; 872 NW2d 1 (2015). Specifically:

> We review de novo a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of a claim. In deciding the motion, the trial court must view the substantively admissible evidence submitted up to the time of the motion in a light most favorable to the party opposing the motion. Summary disposition may be granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac No 2*, 309 Mich App 611, 617-618; 873 NW2d 783 (2015) (citations and quotation marks omitted).]

Similarly, "[s]ummary disposition may be granted in favor of an opposing party under MCR 2.116(I)(2) if there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law." *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009). Questions of law pertaining to issues of statutory interpretation and "the application of our state Constitution[ ]" are also reviewed de **[*4]** novo. *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014).

In accordance with the general recognized rules of statutory construction:

> When interpreting a statute, our primary goal is to give effect to the intent of the Legislature. If the language of a statute is unambiguous, we presume the Legislature intended the meaning expressed in the statute. A statutory provision is ambiguous only if it conflicts irreconcilably with another provision or it is equally susceptible to more than one meaning. A statute is not ambiguous merely because a term it contains is undefined or has multiple definitions in a dictionary, especially when the term is read in context. When construing a statute, we must assign every word or phrase its plain and ordinary meaning unless the Legislature has provided specific definitions or has used technical terms that have acquired a peculiar and appropriate meaning in the law. [*Blackburn*, 306 Mich App at 516 (citations and quotation marks omitted).]

Plaintiffs assert that the application of the user fee surplus to offset an alleged shortfall for the Building Department is in violation of MCL 125.1522(1), which provides as follows:

> The legislative body of a governmental subdivision shall establish reasonable fees to be charged by the governmental subdivision for **[*5]** acts and services performed by the enforcing agency or construction board of appeals under this act, which fees shall be intended to bear a reasonable relation to the cost, including overhead, to the governmental subdivision of the acts and services, including, without limitation, those services and acts as, in case of an enforcing agency, issuance of building permits, examination of plans and specifications, inspection of construction undertaken pursuant to a building permit, and the issuance of certificates of use and occupancy, and, in case of a board of appeals, hearing appeals in accordance with this act. The enforcing agency shall collect the fees established under this subsection. The legislative body of a governmental subdivision shall only use fees generated under this section for the operation of the enforcing agency or the construction board of appeals, or both, and shall not use the fees for any other purpose.

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According to plaintiffs, this statute requires that the fees charged be "reasonable" and "bear a reasonable relation to the cost" of the building services provided, as well as requires the fees generated to be used for the "operation" of the Building Department and **[*6]** not "for any other purpose." More specifically, plaintiffs argue that the statute requires the fees to be used for current expenses incurred in operating the Building Department and cannot be applied, as is being done by defendant, to compensate for past costs incurred.

As a starting point, we reject plaintiffs' assertion that the plain language of MCL 125.1522(1) precludes defendant's application of surplus user fees to historical shortfalls the Building Department has incurred. We rest this conclusion on the plain language of MCL 125.1522(1), which simply does not contain any wording that would support plaintiffs' interpretation.

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed — no further judicial construction is required or permitted, and the statute must be enforced as written. *In re Petition of Attorney General for Investigative Subpoenas*, 282 Mich App 585, 591; 766 NW2d 675 (2009) (citations and quotation marks omitted). **[*7]**

Notably, the first sentence of MCL 125.1522(1) provides for the establishment of fees "for acts and services performed . . . ." Our reading of the statutory language confirms that use of the term "performed" can be understood to mean future, current, and past services provided. We reach this conclusion where there is no restricting or limiting language preceding the word "performed" indicating a temporal constraint, such as "currently performed," "to be performed," or "previously performed." Moreover, the final sentence of MCL 125.1522(1), indicating "[t]he legislative body . . . shall only use fees generated under this section for the operation of the enforcing agency . . ." likewise fails to suggest a temporal restriction pertaining to the word "operation." Thus, we agree with defendant that "the operation" of defendant's Building Department can denote a current, past, or future action. Although the final sentence of MCL 125.1522(1) does restrict the use of "fees generated" to "the operation of the enforcing agency . . . and . . . not . . . for any other purpose[,]" we are not persuaded that defendant's action in applying surplus fees to past shortfalls is inconsistent with this language. Put another way, if the excess or surplus **[*8]** fees are used to cover expenses or costs incurred with the running or "operation" of the building department, currently or for past shortfalls incurred, defendant's conduct remains in conformance with MCL 125.1522(1).

Here, plaintiffs' restrictive interpretation of MCL 125.1522(1) is not supported by the plain language of the statute, *Paschke v Retool Indus*, 445 Mich 502, 511; 519 NW2d 441 (1994), where it does not evidence a temporal component associated with the use of the surplus fees or the operation of the building department. "When the Legislature enacts laws, it is presumed to know the rules of statutory construction and therefore its use or omission of language is generally presumed to be intentional." *Carson City Hosp v Dep't of Community Health*, 253 Mich App 444, 447-448; 656 NW2d 366 (2002) (citation omitted).

We next address plaintiffs' contention that the accumulation of a surplus impliedly indicates that defendant's fees are not reasonable because they exceed the cost of the service being provided and, therefore, do not meet the requirements of MCL 125.1522(1). This requires us to determine if: (a) the fees are "reasonable" and bear a "reasonable relation to the cost" for the service provided, MCL 125.1522(1), and (b) if reasonable, whether any surplus that occurs is applicable to prior shortfalls. To the extent that plaintiffs' arguments can be interpreted as a suggestion that any **[*9]** monies generated for Building Department services beyond those necessary to fulfill defendant's contractual obligations with SAFEbuilt comprise a surplus and, therefore, are unreasonable, they are without merit.

The language of MCL 125.1522(1) specifically acknowledges that fees encompass not only "reasonable fees . . . charged . . . for acts and services performed by the enforcing agency[,]" but also "include[ ] overhead[.]" John Lamerato, defendant's former assistant city manager for finance and administration, testified that defendant incurs additional expenses for operation of the Building Department that exceed those attributable to SAFEbuilt that are "offset with the revenue" generated. As such, it would be an oversimplification to assert that any and all monies generated by the Building Department in excess of those attributable to the SAFEbuilt contractual agreement with defendant comprise a surplus. Instead, they comprise a cost of doing business for the Building Department and can be attributed, in accordance with MCL 125.1522(1), to "the operation of the enforcing agency[.]" For example, Thomas Darling, CPA, as defendant's interim director of financial and administrative services, averred in his November **[*10]** 2, 2011 affidavit that costs incurred for the activities of the Building Department, aside from those contractually generated with SAFEbuilt, include maintaining a city employee as "the building code official," and that the costs associated with the employment of this individual "are included as a component of

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indirect costs[.]"

With regard to the reasonableness of the fees, we acknowledge that initially, the first sentence of MCL 125.1522(1) appears to support plaintiffs' position. As noted previously, MCL 125.1522(1) provides, in pertinent part:

> The legislative body . . . shall establish *reasonable fees to be charged* by the governmental subdivision *for acts and services performed* by the enforcing agency . . . which *fees shall be intended to bear a reasonable relation to the cost, including overhead, to the governmental subdivision of the acts and services*, including . . . those services and acts [such as the] issuance of building permits, examination of plans and specifications, inspection of construction undertaken pursuant to a building permit, and the issuance of certificates of use and occupancy . . . . [MCL 125.1522(1) (emphasis added).]

The statutory provision obviously permits defendant's Building Department to charge "reasonable **[*11]** fees . . . for acts and services performed[.]" As a preliminary matter, the term "reasonable" is not statutorily defined. See MCL 125.1502a (setting forth definitions pertaining to the CCA). MCL 125.1522(1), however, by its plain terms, does provide additional guidance in our analysis. Specifically, by indicating that the "reasonable fees" are "to bear a reasonable relation to the cost, including overhead, . . . of the acts and services[ ]" to be provided, there exists an implication that the fees should cover the cost of the services received in exchange for the fee being paid. In other words, the statutory language indicates that there must be a determinable relationship between the fee charged for a service and the delivery of that service. Yet contrary to plaintiffs' position, the existence of a surplus does not automatically result in a determination that the fees charged are unreasonable and, therefore, do not satisfy the dictates of MCL 125.1522(1). A surplus may occur within a particular financial year, not because the fees are unreasonable, but simply because the services being provided have not entailed the amount of time, energy, or resources normally, or on average, required for the delivery of the particular service. **[*12]** To determine the reasonableness of the fees would require a breakdown and analysis for each type of fee to determine if the surplus is attributable to all or a majority of the services provided, such that no one service systematically produces a surplus, or whether any surplus is routinely generated by the fees associated with a particular service. If the fees for a particular service consistently generate revenue exceeding the costs for the service, the reasonableness of the fee for that service would be suspect. This, however, has not been demonstrated.

As part of their argument, plaintiffs suggest that defendant has incorporated within its fees structures an amount to compensate for the inadequacy of prior fees resulting in shortfalls. The inclusion of such a figure, according to plaintiffs, would violate MCL 125.1522(1), and would render the fee unreasonable because it would not bear a "reasonable relation" to the cost of the service provided. In other words, it is a violation of MCL 125.1522(1) to require current individuals or entities paying for the services of the Building Department to also pay or provide reimbursement for the inadequacy of payments other users of the Building Department's services previously **[*13]** made. Plaintiffs have not come forward, however, with any evidence to demonstrate that, in deriving the fees to be charged, an amount has been included to compensate for prior shortfalls in defendant's calculation. Instead, testimony elicited from Darling identified the listing of revenues associated with defendant's Building Department in detail.

Under these circumstances, we conclude that plaintiffs have failed to demonstrate the absence of a "reasonable relation" of the fees charged to the services performed, relying primarily on the existence of a surplus to provide proof of their premise.[3]

While accepting the proposition that some amount of a surplus can be generated even if the fees are reasonable, the next question is whether it is permissible, under MCL 125.1522(1), to use that surplus or overage for the payment of past shortfalls incurred. Again, the sole statutory restriction MCL 125.1522(1) imposes is that "[t]he legislative body of a governmental subdivision shall only use fees generated under this section for the operation of the enforcing agency . . . and shall not use the fees for any other purpose." Plaintiffs argue that because defendant's yearly budgets must balance and there is no formal loan document **[*14]** evidencing defendant's borrowing from the general fund to subsidize and maintain the Building Department and necessitating repayment, the placement of any surplus monies into the general fund does not comport with the mandate that such funds only be used to operate the Building Department. Defendant asserts that the accounting procedures for the monies at issue and their application to reduce the cumulative historical shortfalls taken from the general fund required to maintain the operation of the Building Department fully comport with the statute and are permissible. Further, Darling testified that Building Department expenditures are segregated or reported "as a department . . . inside the general fund."

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[3] Plaintiffs have generally asserted that defendant's financial reports overstate expenses and understate revenue for the Building Department. However, our review of the record did not yield evidence to contradict testimony elicited on behalf of defendant regarding its methods of accounting and asserting the accurate representation of the fees and service costs collected and expenditures incurred in the operation of the Building Department.

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In addressing implementation of the CCA, the Department of Treasury[4] has recognized the possibility of the collection of "excess fees," defined as "excess of revenue over expenditures," which are to be "included in the separate fund balance or retained earnings of the separate special revenue fund or enterprise fund." It was further indicated that a general fund could be used to appropriate monies to compensate for a shortfall. Treasury also acknowledged the possibility of the collection **[*15]** of excess fees, requiring only their segregation with the expectation that any such funds will be carried over into the next fiscal year. Read in conjunction with the directives pertaining to a "local unit's accounting system," requiring accumulated totals for (a) revenues generated, (b) costs incurred, and (c) "cumulative excess revenues over or (under) expenditures," Treasury implicitly recognized that surpluses can occur and that they may be used to offset shortfalls in different fiscal years. This is consistent with this Court's ruling in *Trahey v City of Inkster*, 311 Mich App 582, 597-598; 876 NW2d 582 (2015), a case involving the reasonableness of utility rates, where this Court recognized, in the context of a municipality's water and sewer department, that "[t]imely payment of the . . . department's debt was necessary for its continued operation, and therefore constituted part of the actual cost of providing the service." Absent evidence demonstrating "that the method chosen by the city to maintain its operations and repay its debts was unreasonable, and absent evidence of impropriety," this Court refused to "independently scrutinize the municipal ratemaking methods employed by the city." *Id.* As such, plaintiffs' contention that placement of the surplus **[*16]** fees into the general fund and their use to offset prior shortfalls of the Building Department is in violation of MCL 125.1522(1), is without merit.

III. HEADLEE AMENDMENT

Plaintiffs' final argument is that defendant's charging of fees that exceed the current operational costs of its Building Department, and placing the surplus monies in its general fund, violate the Headlee Amendment because it comprises a disguised tax.

The determination of "[w]hether . . . [a] service charge . . . is a 'tax' or a 'user fee' is a question of law that this Court reviews de novo." *Bolt v City of Lansing*, 459 Mich 152, 158; 587 NW2d 264 (1998) (citation omitted).

The Headlee Amendment 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.]

Standards pertaining to judicial review of constitutional provisions are explained as follows:

> The primary goal of the judiciary when construing Michigan's Constitution is to ascertain the purpose and intent **[*17]** of the provision at issue. To do so, courts must apply the original meaning attributed to the words of a constitutional provision by its ratifiers, i.e., the most obvious commonly understood meaning the people would have assigned the words employed at the time of ratification. This is known as the rule of common understanding. Under the rule of common understanding, we must apply the meaning that, at the time of ratification, was the most obvious to the common understanding, the one that reasonable minds and the great mass of the people themselves, would give it. Thus, words should be given their common and most obvious meaning, and consideration of dictionary definitions used at the time of passage for undefined terms may be appropriate. While historical records such as those concerning the debate that occurred at the constitutional convention are relevant, they are not controlling. Furthermore, all provisions must be read in light of the whole document and no provision should be read to nullify another. [*Blackburn*, 306 Mich App at 517 (citations and quotation marks omitted).]

Plaintiffs argue that the surplus fees charged by defendant constitute a mechanism to generate revenue and do not serve a regulatory purpose. **[*18]** They assert that at least a portion of the building fees are compulsory because the fees charged are being used to offset fees that were historically discounted for others, thereby resulting in the current payers paying the fee to exercise a valuable property right.

[4] Plaintiffs and defendant both rely on a 2006 Treasury Department document. According to this document, which responds to questions pertaining to the CCA and its effectuation, a separate fund for building department fees is mandatory "unless your local unit's fee structure is not intended to recover the full cost of the enforcing agency and your local unit has the ability to track the full costs and revenues of this activity without creating a separate fund." While defendant presented evidence that its accounting system is sufficiently sophisticated to "track the full costs and revenues," what has not been definitively determined is whether the "fee structure is [ ] intended to recover the full cost of the enforcing agency." While Treasury indicated a preference for the creation of "a separate fund" with the allocation of "all related overhead costs to this fund[ ]" to achieve a "fund balance [that] will be separate from the General Fund[,]" this method of accounting was not made mandatory.

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The Supreme Court has recognized that "[t]here is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt*, 459 Mich at 160. Further complicating the matter is the failure of the Headlee Amendment to define the terms "tax" or "fee." *Id.* However, "[g]enerally, a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.' A 'tax,' on the other hand, is designed to raise revenue." *Id.* at 161 (citations omitted). The *Bolt* Court identified "three primary criteria to be considered when distinguishing between a fee and a tax." *Id.* Specifically, the criteria to be evaluated are: (a) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose[,]" (b) "user fees must be proportionate to the necessary costs of the service[,]" as well as (c) "voluntariness." *Id.* at 161-162 (citations omitted). Additionally, **[*19]** "[a] proper fee must reflect the bestowal of a corresponding benefit on the person paying the charge, which benefit is not generally shared by other members of society." *Id.* at 164 (citation and quotation marks omitted). Subsequently, this Court in *Graham v Twp of Kochville*, 236 Mich App 141, 151; 599 NW2d 793 (1999), explained that the "criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee." In particular, a "lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 666-667; 697 NW2d 180 (2005) (citations omitted).

Using the Bolt criteria, we conclude that the fees at issue are regulatory in nature. The CCA directs that a state construction code be adopted that shall govern "the construction, use, and occupation of buildings and structures[ ]" throughout the state. MCL 125.1504(1). "[T]he purpose of the construction code act is not to protect the public against harm by establishing construction standards and an inspection regime, but merely to establish the authority of the director of the . . . Department of Labor and Economic Growth, to 'prepare and promulgate' a state construction code **[*20]** consistent with, and protective of, the 'health, safety, and welfare of the occupants and users of buildings and structures.' MCL 125.1504(1) and (3)(c)." *Rakowski v Sarb*, 269 Mich App 619, 628 n 4; 713 NW2d 787 (2006). A recognized result of the enactment of the CCA, however, is the provision of "minimum construction standards for safety purposes." *Gackler Land Co, Inc v Yankee Springs Twp*, 138 Mich App 1, 12-13; 359 NW2d 226 (1984), aff'd 427 Mich 562; 398 N.W.2d 393 (1986). The generation of some revenue is not preclusive if the fee or charge "is in support of the underlying regulatory purpose." *USA Cash #1, Inc v City of Saginaw*, 285 Mich App 262, 280; 776 NW2d 346 (2009) (citations omitted).

The fees charged by defendant are related to or associated with the provision of specific services by the Building Department and "bear[ ] the classic characteristics of a user fee[,]" *Wheeler*, 265 Mich App at 665, because they are applied to offset the costs incurred for the approval of various construction projects in the municipality to assure their compliance with various codes and requirements. The fee is "presume[d]" to be reasonable until demonstrated otherwise, which has not occurred through plaintiffs' proofs. *Id.* at 665-666. Further, the fees are charged only to individuals or entities seeking the particular services provided and are not imposed on all persons in the community. In other words, "only those who receive the mandated service pay for that service[.]" *Id.* at 666. Additionally, a municipality is **[*21]** entitled to generate some additional monies through user fees for such things as capital improvements or capital reserves. *Jackson Co v City of Jackson*, 302 Mich App 90, 110-111; 836 NW2d 903 (2013). Here, as recognized in our discussion of the statutory issue, defendant has established that the additional funds available after payment of the contractor's services go towards a debt incurred by the building department for past services. This holds especially true because these "reserves are funded by true user fees closely calibrated to the actual use of the service or a price paid for a commodity." *Id.* at 111.

This last point is what differentiates this case from Bolt and Jackson Co. In both those casesc the offending party implemented a fee based system to either raise revenue to support a new system (*Bolt*) or to replace declining general fund revenue that used to support the water system (*Jackson Co*). As the *Bolt* Court put it, the fee in that case "constitutes an investment in infrastructure as opposed to a fee designed simply to defray the costs of a regulatory activity." *Bolt*, 459 Mich at 163. Here, however, the same fee has been charged for many years to support the same building department, and defendant did not implement this fee to make up for, or save from spending, tax revenue. **[*22]** Indeed, the only difference now is that the costs have declined, resulting in some additional funds available to reduce building department debt. Additionally, unlike in both Bolt and *Jackson Co*, where *all* the residents were charged a fee regardless of the need, here the only ones paying the fee are those that are utilizing the services of the department. And there is no evidence that any of those additional funds are used for anything other than to pay down the debt incurred by the department in years past. There is no subterfuge in charging a consistent fee for the same service to only those who ask for that service. *Id.* at 166.

There are two ways to evaluate the third criterion of volition. Defendant contends the fees are voluntary because only those individuals seeking to procure certain services are subject to the charges; the fees are not paid by all of defendant's residents. On

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the other hand, plaintiffs assert that the fees are not voluntary, impinging on property ownership rights because they must be paid in order to engage in certain uses or construction on privately owned property. To be deemed voluntary "the payer of the fee must be able to refuse or limit its use of the service or **[*23]** benefit." *USA Cash #1*, 285 Mich App at 280 (citation omitted). As the *Bolt* Court pronounced, the "'mandatory user fee' has all the compulsory attributes of a tax, in that it must be paid by law without regard to the usage of a service, and becomes a tax lien of the property." *Bolt*, 459 Mich at 169 (citation and quotation marks omitted). None of those characteristics are present with this fee paid only by those who want—or need—the services of the building department.

IV. CONCLUSION

The trial court correctly granted summary disposition in favor of defendant and denied plaintiffs' motion for partial summary disposition.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219(A).

/s/ Colleen A. O'Brien

/s/ Christopher M. Murray

Dissent by: Kathleen Jansen

Dissent

PER CURIAM.

JANSEN, J. (*dissenting*)

Plaintiffs allege that "significant monthly surpluses" of fees generated under defendant's contractual arrangement with SAFEbuilt and deposited into defendant's general fund evidence a violation of both MCL 125.1522(1) and the Headlee Amendment, Const 1963, art 9, § 31. The trial court granted a motion for summary disposition pursuant to MCR 2.116(C)(10) after finding that, as a matter of law, (1) defendant's practice of depositing fee surplus funds into the general fund for past shortfalls does not **[*24]** violate MCL 125.1522(1), and (2) defendant's building department charges, including any surplus, constitute fees rather than taxes. The majority adopts the trial court's reasoning and affirms. Because I do not agree that defendant's practice of raising revenue with building department charges comports with MCL 125.1522(1), I respectfully dissent.

In its entirety, MCL 125.1522(1) provides:

> The legislative body of a governmental subdivision *shall establish reasonable fees* to be charged by the governmental subdivision *for acts and services performed* by the enforcing agency or construction board of appeals under this act, *which fees shall be intended to bear a reasonable relation to the cost, including overhead, to the governmental subdivision of the acts and services*, including, without limitation, those services and acts as, in case of an enforcing agency, issuance of building permits, examination of plans and specifications, inspection of construction undertaken pursuant to a building permit, and the issuance of certificates of use and occupancy, and, in case of a board of appeals, hearing appeals in accordance with this act. The enforcing agency shall collect the fees established under this subsection. *The legislative body of a governmental* ***[*25]*** *subdivision shall only use fees generated under this section for the operation of the enforcing agency or the construction board of appeals, or both, and shall not use the fees for any other purpose.* [Emphasis added.]

This Court's role in interpreting a statute is to, as closely as possible, decipher and carry out the expressed legislative intent. *McCormick v Carrier*, 487 Mich 180, 191; 795 NW2d 517 (2010). The clearest indicator of Legislative intent, and the initial focus of any statutory analysis, is the plain language of the statute itself. *Id.* at 191-192. "We interpret the words in the statute in light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (quotation marks, alterations, and citation omitted). "In doing so, courts 'must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.'" *Id.*, quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

I believe that on its face, MCL 125.1522(1) reflects intent to limit building department fees imposed to the cost, within reason but as closely as possible, to the department of providing those particular services. The statute allows the building department to cover the cost of providing the **[*26]** acts and services mandated under the CCA, consistent with the long-established principle that a fee must be related to the cost of the actual goods or services provided. The statute is intended to provide a mechanism through which a city may fully fund its building department, but not to generate additional revenue.

To allow defendant's building department to run deficits by choice and then overcharge future users to make up for those deficits undermines the purpose of the statute, which is to ensure a direct and reasonable relationship between the acts and services performed by the department and the cost of providing those services to each individual served. Although the statute

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allows defendant to apply an incidental surplus to the costs of operating the building department, it does not allow defendant to *create* a surplus in order to recoup what defendant contends was a deficit from prior years.

Although defendant concedes that it has retained SAFEbuilt to provide the acts and services of its building department, it charges fees to cover the cost of compensating SAFEbuilt with an intentional 20-25% surplus. Defendant claims that some of these funds are then used to cover indirect **[*27]** costs of operating the building department, such as covering 40% of the building code official's salary and maintaining the building it leases to SAFEbuilt. However, I believe that a 20-25% surplus is unreasonable on its face. Indeed, defendant used its building department fees to raise $269,483 in surplus funds in 2012, $488,922 in 2013, and $325,512 in 2014, for a total of $1,083,917 deposited directly into defendant's general fund over the course of only three years. This "surplus" is not negligible. Common sense indicates that it is not incidental. The amount of surplus generated, on its own, indicates that defendant is engaged in a revenue-raising venture. Regardless of whether it is raising the revenue to cover alleged prior shortfalls, or any other cost of operating the building department, such an endeavor violates the clear meaning of MCL 125.1522(1).

Also telling is what the record does *not* include. The record is suspiciously devoid of any building department budgets, despite the fact that at least one building department employee testified that detailed building department budgets were scrupulously maintained. The record contains no evidence to support defendant's claim that it actually **[*28]** ran a deficit during any previous budget years, or to explain what expenses the building department incurred during those years to create a more than $6 million shortfall. As proof that it suffered a deficit, defendant relies solely on past Comprehensive Annual Financial Reports (CAFRs) which, in describing defendant's general revenue and expenses, list a total amount for "[c]urrent year building permit revenue" and a total amount of "[r]elated expenses" before reporting the building department's yearly net shortfall. As their name implies, these CAFRs simply *report* a building department deficit, they do not prove that one actually existed. Defendant processes all of its financial transactions through one general fund. Without a specific building department budget, it is not clear whether and how defendant incurred such massive deficits. And although the majority suggests, in a footnote, that there is no evidence to "contradict testimony elicited on behalf of defendant regarding *its methods of accounting* and asserting the accurate representation of the fees and service costs collected and expenditures incurred in the operation of the Building Department," it conspicuously fails to mention that the record **[*29]** contains no such representation of fees and expenditures.

Defendant concedes that it made a management decision to subsidize its building department during the period of alleged deficit with general funds and keep building department fees low during that time period. Perhaps defendant's choice was pragmatic, but it was a choice. It clearly chose *not* to charge fees reasonably related to the cost of performing services during those years, and it now attempts to shuffle funds back into its general account through the back door of operational "surplus." The statute does not allow defendant to charge current payers and permit applicants more than what is reasonable in order to make up for losses it chose to incur by failing to charge previous permit applicants appropriately under the statute. To hold that under MCL 125.1522(1), a city may engage in such creative budgeting would create a poor precedent. Under the majority's interpretation of the statute, a city might permissibly choose to create a shortfall in any given year and unfairly charge unreasonable rates in subsequent years, completely defeating the goal of ensuring that each individual fee-payer pays for the acts and services he or she is provided. **[*30]**

While I believe defendant's practice of depositing excess surplus funds into its general fund to repay alleged prior shortfalls constitutes a clear violation of MCL 125.1522(1), and therefore eliminates the need for this Court to address the constitutional issue presented, I believe that defendant's actions may also have implications under the Headlee Amendment. I disagree with the majority's conclusion that the fees charged by defendant are related to or associated with the provision of specific services provided by the building department. Rather, for the reasons discussed, I believe that defendant's sizeable surplus was the direct result of defendant's attempt to raise revenue by charging excessive fees. Further, I would argue that while the person paying a reasonable building department fee receives a corresponding benefit "not generally shared by other members of society," *Bolt*, 459 Mich at 164, it is the public that receives the benefit of the *excess* funds generated by defendant's revenue-generating practice. These excess funds, which are not reasonably related to a regulatory purpose or the cost of services provided to their payer, are deposited into defendant's general fund and used for the benefit of all residents. **[*31]** Because I am unconvinced that defendant's building department fees are solely regulatory, rather than revenue-generating, I believe questions remain regarding whether defendant's fee surplus constitutes a tax under the Amendment.

I would reverse.

/s/ Kathleen Jansen

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