

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

STEVEN R. GENTRY, individually
and as Trustee of the Steven R.
Gentry Trust U/A/D May 17, 2018, and as
representative of a class of
similarly-situated persons and entities,

Case No. 2021-002813-CZ
Hon. Diane M. Druzinski

Plaintiff,

v.

CHARTER TOWNSHIP OF CLINTON,
a municipal corporation,

Defendant.

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FIRST AMENDED CLASS ACTION COMPLAINT AND JURY DEMAND

Plaintiff Steven R. Gentry (“Plaintiff”), by his attorneys, Kickham Hanley PLLC, individually and as Trustee of the Steven R. Gentry Trust, and on behalf of a class of similarly-situated persons and entities, states the following for his First Amended Class Action Complaint against the Charter Township of Clinton (the “Township”):

INTRODUCTION

1. This is an action challenging a property tax approved by the Township’s voters pursuant to a November 2013 ballot initiative and renewed by a March 2018 ballot initiative (the “Supplemental Police Tax”). At the time the Supplemental Police Tax was initially approved, the

Township's Police Fund was already receiving tax revenues in excess of \$16 million per year in order to fund the activities of its police department.

2. The stated purpose of the Supplemental Police Tax was to finance the purchase of additional police vehicles and cover "operational costs" of the Township's police force. In contravention of this stated purpose, however, the Township has simply hoarded millions of dollars raised by the Supplemental Police Tax and/or used those revenues to make payments to reduce its actuarially-accrued liability for retiree health care expenses – expenses that are not "operational costs." Notably, the Township increased the amount of money in its Police Fund from an already-excessive \$21 million to over \$36 million since the Supplemental Police Tax was first imposed, even after paying the improper nonoperational expenses.

3. The ballot initiative for the Supplemental Police Tax, which passed on November 5, 2013, read as follows:

Shall the limitation on the amount of taxes which may be imposed on all taxable property in the Charter Township of Clinton, Macomb County, Michigan, be increased by One Dollar (\$1.00) per Thousand Dollars (1.00 mill) of the taxable value for a period of Seven (7) years, 2013 to 2019, inclusive, as new additional millage to provide funds for (a) acquiring new police apparatus and (b) other operational costs for the Police Department, including additional police officers? It is estimated that 1.00 mill will raise approximately \$2,544,000 when first levied in 2013.

4. The Supplemental Police Tax was set to expire at the end of 2019. In 2018, however, the Township put before its voters a new proposal to renew and continue the Supplemental Police Tax through 2025. The August 2018 ballot proposal stated as follows:

Shall the limitation on the amount of taxes which may be imposed on taxable property within the Charter Township of Clinton, Macomb County, State of Michigan, be increased by 0.9875 mills (\$.9875) on each \$1,000 of taxable value) for a period of six (6) years, 2020 to 2025, inclusive, as a renewal of the 1.000 mill previously authorized by the electors of the Township in 2013 as reduced by operation of the Headlee Amendment, for the purpose of providing funds for : (1) acquiring new police apparatus; and (2) other operational costs for the Police Department? It is estimated that 0.9875 mills will raise approximately Two Million

Eight Hundred and Eighteen Thousand Three Hundred and Twelve Dollars (\$2,818,312) when first levied in 2020.

5. Under the General Property Tax Act, MCL 211.24f(2)(d), a ballot proposal for a millage must contain “[a] clear statement of the purpose for the millage.”

6. A taxing unit is bound to use the funds collected by the millage for the purpose stated in the millage proposal. *See City of South Haven v. Van Buren County Board of Commr’s*, 478 Mich. 518, 532; 734 N.W.2d 533 (2007) (“If funds that voters approved for the purpose stated on the ballot could be redirected to another purpose without seeking new approval, there would be no reason for including the purpose on the ballot. Indeed, voters could be lulled into voting for a millage for a popular purpose, only to have the funds then used for something they may well have never approved. This is contrary to the General Property Tax Act.”).

7. Because the Township has not used the vast majority of the millage proceeds for the purposes stated on the ballot, the Supplemental Police Tax is unlawful, in whole or in part.

8. Where a millage is unlawful because the proceeds are used for a purpose other than that stated in the ballot proposal, the taxing authority is “not entitled to receive any of the proceeds of the millage.” *Id.* at 533. “Two possible judicial remedies are available in a case where voters approve a ballot proposal that improperly allocates proceeds: to enjoin collection of the improper millage or to refund collected taxes to the taxpayers.” *Id.* at 531.

9. The Court should order the Township to disgorge the proceeds of the Supplemental Police Tax the Township has received in the six years preceding the filing of this action and the proceeds it receives during the pendency of this action, and should enjoin the Township from collecting the Supplemental Police Tax from the present through the expiration of the millage or until a new millage is voter approved after full and honest disclosure.

JURISDICTION AND VENUE

10. The Steven R. Gentry Trust (the “Trust”) is the current owner of improved real property in the Township (the “Property”), which is subject to the Supplemental Police Tax. Plaintiff is the Trustee of the Trust. Prior to December 2020, Plaintiff was the owner of the Property. Prior to December 2020, Plaintiff paid the Supplemental Police Tax on his own behalf, and seeks to act as a class representative for all similarly situated persons.

11. Defendant Charter Township of Clinton (the “Township”) is a municipality located in Macomb County, Michigan.

12. 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.

GENERAL ALLEGATIONS CONCERNING THE SUPPLEMENTAL POLICE TAX

13. The Township maintains and operates a police department that is funded in substantial part by real property taxes collected and deposited into the Township’s Police Fund. Plaintiff owned property in the Township and has paid the real property taxes imposed by the Township.

14. The Township enacts millages from time to time through ballot proposals. The millages raise funds to pay for municipal services, including the police department.

15. The Township has utilized the revenues from the Supplemental Police Tax for purposes unrelated to the purposes to which it told its citizens it would devote those revenues.

16. First, instead of fully devoting the Supplemental Police Tax revenues to “apparatuses” and the “operational costs” of the Police Fund, the Township has merely hoarded millions of dollars of the cash raised by the Supplemental Police Tax. According to the Township’s financial statements, as of March 2013 (shortly before the Supplemental Police Tax was approved by the Township’s voters), the Township’s Police Fund had \$21.4 million in cash and investments. As

of March 2020, the Police Fund's cash and investments had increased to a whopping \$33.3 million. On information and belief (based upon the Township's most recent budget documents), as of March 2021, those cash and investment reserves exceeded \$36 million.

17. The Township claims that its financial statements do not accurately reflect the "available" fund balance of the Police Fund because the balance that exists as of March 31 of each year is gradually spent down over the ensuing 9 months. In other word, the true "available fund balance" is lower than that reflected in its financial statements.

18. Even if one credits the Township's contention that one must consider the "available fund balance," the Township's own documents confirm that between 3/31/2015 and 3/31/2021, the Township still increased the "available fund balance" in the Police Fund by about \$4 million after paying **all** of the expenses of the police department.

19. The Township's budget documents confirm that, as of FYE 3/31/2015, the Township's "Estimated Available Fund Balance" in the Police Fund was **\$15,446,184**, and that, as of FYE 2021, the Township's "Estimated Available Fund Balance" in the Police Fund was **\$19,443,903**. Thus, even under the Township's view of the world, the Township still has not used all of the revenues from the Supplemental Police Tax for "(1) acquiring new police apparatus; and (2) other operational costs for the Police Department" as required by Michigan law.

20. Second, millions of dollars of the revenues of the Supplemental Police Tax were used to cover expenses that were not authorized by the Township's voters in approving the Supplemental Police Tax. After the voters approved the Supplemental Police Tax, the City began making huge additional retiree health care contributions in order to, in the Township's words, "prefund," and thereby reduce its accrued liability to provide Other Post-Employment Benefits

("OPEB").¹ For the reasons discussed below, these additional contributions reduced a long-term liability of the Township and therefore those amounts do not constitute "operational costs" for the Police Department as the term "operational costs" is understood by generally accepted governmental accounting principles and as that term would have reasonably been understood by the Township's voters.

21. The Township Board administers the Clinton Township Post-Retirement Health Benefits Plan (the "Plan"), a single-employer defined benefit OPEB plan that is used to provide OPEB for all permanent full-time general and public safety employees of the Township. The Plan provides health care benefits for retirees and their dependents.

22. On information and belief, prior to 2016, the Township traditionally funded its OPEB obligations essentially on a "pay as you go basis" – i.e., paying on an annual basis only those OPEB expenses it was required to pay to currently retired employees in each current year. As a result, the Township's total accrued actuarial "net" liability for present and future vested OPEB benefits continued to increase. Commencing in the fiscal year beginning April 1, 2016, the Township began making additional contributions (the "Additional OPEB Contributions") in order to, in the Township's words, "prefund" its OPEB obligations. These were not expenditures to cover current period OPEB payments on behalf of retirees (i.e., OPEB payments due in the current fiscal year for current retirees) but rather were contributions made to reduce the Township's unfunded actuarial liability that had accumulated over time. According to the Township's budget documents, these additional contributions were equal, in FYE 3/31/2018, to the amount of the

¹ "OPEB" is defined in paragraph 8. of GASB Statement No. 75, *Accounting and Financial Reporting for Postemployment Benefits Other Than Pensions* as all postemployment benefits other than retirement income (such as death benefits, life insurance, disability, and long-term care) that are provided separately from a pension plan, as well as postemployment healthcare benefits (including medical, dental, vision, hearing, and other health-related benefits regardless of the manner in which they are provided. OPEB does not include termination benefits or termination payments for sick leave.

Township's annual actuarially determined contribution ("ADC") and were equal in FYE 3/31/2019, 2020, and 2021 to 30% of the actuarial required contributions for those fiscal years.

23. The financial reporting for OPEB obligations, including the effects of the Additional OPEB Contributions, is dictated in large part by Government Accounting Standards Board ("GASB") Statements Nos. 74 and 75 (the "GASB Standards"), which the Township implemented in 2018. Pursuant to the GASB Standards, the Township is required to report as a liability the present value of the benefits that current and former employees have earned and, therefore, that the Township has the present obligation to pay in the future. This amount, the "Total OPEB Liability," represents the Township's financial obligation to provide OPEB for the work already performed by its covered employees. When the Total OPEB Liability exceeds the Plan's "Net Position" available for paying benefits (*i.e.*, the money set aside by the Plan to pay OPEB benefits when they become due in the future), there is a "Net OPEB Liability."² The Township reports its Total and Net OPEB Liabilities in its financial statements. As of March 31, 2020, the Township's Total OPEB Liability was \$117.4 million, the Plan's Net Position was \$56 million and the Net OPEB Liability was \$61.4 million.

24. When the Township made the Additional OPEB Contributions, it was not paying an "operational cost" but rather it was making a payment to reduce the amount of a long-term liability that it had already incurred— the Net OPEB Liability. While the Township itself has stated that the purpose of the Additional OPEB Contributions was to "prefund" its OPEB obligations, the use of the word "prefund" would imply that the additional funding provided would represent an optional payment made in advance of when it is due, yet, because the Total OPEB liabilities exceed the net position available to satisfy them in the future, the additional payments would be better be

² In other words, the Net OPEB Liability represents the measure of the total costs of future OPEB payments already earned by Plan participants, stated in current dollars, that is not covered by assets currently held in the Township's Plan.

characterized as “catch-up” payments since the Township had underfunded the liability by using a “pay as you go” approach in the past. It is an unremarkable statement of prevailing and elementary accounting principles that payments applied to reduce the principal amount of a long-term liability do not constitute the payment of an operating expense. Indeed, by analogy, if a commercial enterprise decided to use excess cash to prepay a note payable to a lender, this would not be considered the payment of an operational cost, but rather would be considered a settlement of a liability of the enterprise.

25. The Township’s recent financial statements confirm that the Additional OPEB Contributions have resulted in a significant reduction in the Net OPEB Liability from the Net OPEB Liability that would exist in the absence of such contributions. *Compare* FY 2018 Financial Statements at p. 62 (reporting a \$67.5 million Net OPEB Liability) *with* FY 2020 Financial Statements at p. 59 (reporting a \$61.4 million Net OPEB Liability).

26. The City’s budget documents confirm that the Additional OPEB Contributions that were made possible by the Supplemental Police Tax are as follows:

FYE 3/31/16 -- \$1,605,500
FYE 3/31/17 -- \$1,633,000
FYE 3/31/18 -- \$2,032,400
FYE 3/31/19 -- \$2,137,200
FYE 3/31/20 -- \$1,777,100
FYE 3/31/21 -- \$1,820,500 (budgeted)

Total -- **\$11,005,700**

27. Had the Township not made these additional contributions, the cash balance of the Police Fund would be more than **\$47 million** as of 3/31/21. The Township’s voters might have had a different view of the millage if the ballot proposal had said that the revenues from the Supplemental Police Tax would be used for “(1) acquiring new police apparatus; (2) other

operational costs for the Police Department and (3) prefunding future health care expenses for retired police officers.

CLASS ALLEGATIONS

28. 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 who/which have paid real property taxes to the Township during the relevant class period and/or who/which pay real property taxes to the Township during the pendency of this case.

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

30. 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.

31. The Township has acted wrongfully in the same basic manner as to the entire class.

32. 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 Township has adhered to the General Property Tax Act by using the proceeds of the Supplemental Police Tax for the purposes stated in the Supplemental Police Tax ballot proposal;
- b. Whether the Additional OPEB Contributions constitute "operational costs" of the Police Fund;
- c. Whether the Township should be required to disgorge the funds it collected through imposition of the Supplemental Police Tax; and
- d. Whether the Township should be enjoined from collecting the Supplemental Police Tax from the present through the expiration of the millage in 2025.

33. 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.

34. 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

ASSUMPSIT (MONEY HAD AND RECEIVED) – SUPPLEMENTAL POLICE TAX

35. Plaintiff incorporates each of the preceding paragraphs as if fully set forth herein.

36. Under the General Property Tax Act, MCL 211.24f(2)(d), a ballot proposal for a millage must contain “[a] clear statement of the purpose for the millage.”

37. A taxing unit is bound to use the funds collected by the millage for the purpose stated in the millage proposal. *See City of South Haven v. Van Buren County Board of Commr’s*, 478 Mich. 518, 532; 734 N.W.2d 533 (2007) (“If funds that voters approved for the purpose stated on the ballot could be redirected to another purpose without seeking new approval, there would be no reason for including the purpose on the ballot. Indeed, voters could be lulled into voting for a millage for a popular purpose, only to have the funds then used for something they may well have never approved. This is contrary to the General Property Tax Act.”).

38. The ballot proposal for the 2013 Supplemental Police Tax provided that the Township would use the funds collected by the millage for “(a) acquiring new police apparatus and (b) other operational costs for the Police Department, including additional police officers”. The ballot proposal for the 2018 renewal of the Supplemental Police Tax provided that the Township would use the funds collected by the millage for “(1) acquiring new police apparatus; and (2) other operational costs for the Police Department.”

39. The Township has not used the Supplemental Police Tax proceeds for the publicly announced purpose but has instead used the funds to inflate the balance in the Township’s Police Fund and/or to finance future retirement benefits.

40. As a direct and proximate result of the Township’s improper conduct, the Township has collected millions of dollars to which it is not entitled.

41. A claim to recover amounts paid to a governmental unit in excess of the amount allowed under law is properly filed as an equitable action in assumpsit for money had and received.

42. By virtue of the Township’s inclusion of the Supplemental Police Tax in its tax rates, the Township has collected amounts in excess of the amounts it was legally entitled to collect. Therefore, Plaintiff is entitled to maintain an equitable action of assumpsit to recover back the amount of the illegal exaction. *See, e.g., Bond v. Public Schools of Ann Arbor*, 383 Mich. 693, 704, 178 N.W.2d 484 (1970).

43. By virtue of the Supplemental Police Tax, the Township has received funds to which it was not entitled, and it would be unfair for the Township to retain the Supplemental Police Tax proceeds under the circumstances.

44. “[T]wo possible judicial remedies are available in a case where voters approve a ballot proposal that improperly allocates proceeds: to enjoin collection of the improper millage or to refund collected taxes to the taxpayers. These remedies would be unexceptional exercises of the

power of the judiciary to give injunctive relief to prevent illegal acts.” *City of South Haven v. Van Buren County Board of Commr’s*, 478 Mich. 518, 532; 734 N.W.2d 533 (2007).

45. The Township should be required to disgorge and refund to the Class the amounts it collected, but to which it is not entitled.

COUNT II

UNJUST ENRICHMENT– SUPPLEMENTAL POLICE TAX

46. Plaintiff incorporates each of the preceding paragraphs as if fully set forth herein.

47. Under the General Property Tax Act, MCL 211.24f(2)(d), a ballot proposal for a millage must contain “[a] clear statement of the purpose for the millage.”

48. A taxing unit is bound to use the funds collected by the millage for the purpose stated in the millage proposal. *See City of South Haven v. Van Buren County Board of Commr’s*, 478 Mich. 518, 532; 734 N.W.2d 533 (2007) (“If funds that voters approved for the purpose stated on the ballot could be redirected to another purpose without seeking new approval, there would be no reason for including the purpose on the ballot. Indeed, voters could be lulled into voting for a millage for a popular purpose, only to have the funds then used for something they may well have never approved. This is contrary to the General Property Tax Act.”).

49. The ballot proposal for the Supplemental Police Tax provided that the Township would use the funds collected by the millage for “(a) acquiring new police apparatus and (b) other operational costs for the Police Department, including additional police officers”.

50. The Township has not used the Supplemental Police Tax proceeds for the stated purpose but has instead used the funds to inflate the balance in the Township’s Police Fund and/or to finance future retirement benefits.

51. As a direct and proximate result of the Township’s improper conduct, the Township has collected millions of dollars to which it is not entitled. By paying the Supplemental Police Taxes,

Plaintiff and the Class have conferred a benefit upon on the City.

52. The Township has been unjustly enriched because it received Supplemental Police Taxes to which it was not entitled, and it would be unfair for the City to retain the Supplemental Police Taxes under the circumstances.

53. “[T]wo possible judicial remedies are available in a case where voters approve a ballot proposal that improperly allocates proceeds: to enjoin collection of the improper millage or to refund collected taxes to the taxpayers. These remedies would be unexceptional exercises of the power of the judiciary to give injunctive relief to prevent illegal acts.” *City of South Haven v. Van Buren County Board of Commr’s*, 478 Mich. 518, 532; 734 N.W.2d 533 (2007).

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

COUNT III

INJUNCTIVE RELIEF

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

56. The ballot proposals giving rise to the Supplemental Police Tax provide that the Township shall continue to collect the millage through 2025.

57. The Supplemental Police Tax is unlawful under the General Property Tax Act because the Township has failed to use the proceeds of the taxes for the purposes stated on the ballot proposal that enacted the millage.

58. “[T]wo possible judicial remedies are available in a case where voters approve a ballot proposal that improperly allocates proceeds: to enjoin collection of the improper millage or to refund collected taxes to the taxpayers. These remedies would be unexceptional exercises of the power of the judiciary to give injunctive relief to prevent illegal acts.” *City of South Haven v. Van Buren County Board of Commr’s*, 478 Mich. 518, 532; 734 N.W.2d 533 (2007).

59. Because the Supplemental Police Tax is unlawful, the Court should enter an order enjoining the Township from collecting the Supplemental Police Tax between the present and 2025.

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 designated Class Counsel;

B. Define the Class to include all persons or entities who/which have paid or incurred the Supplemental Police Tax at any time in the six years preceding the filing of this action or who/which pay or incur the Supplemental Police Tax during the pendency of this action;

D. Enter judgment in favor of Plaintiff and the Class and against the Township, and order and direct the Township to disgorge and refund all proceeds of the Supplemental Police Tax 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 the Supplemental Police Tax 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. Enter a declaratory judgment invalidating any tax liens arising from the Supplemental Police Tax;

G. Find and declare that the Supplemental Police Tax violates the General Property Tax Act and is therefore unlawful, and permanently enjoin the Township from imposing or collecting the Supplemental Police Tax;

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

I. Grant any other appropriate relief.

JURY DEMAND

Plaintiff hereby demands a jury trial on all issues so triable.

KICKHAM HANLEY PLLC

/s/ Gregory D. Hanley

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Jamie Warrow (P61521)
Edward F. Kickham Jr. (P70332)
32121 Woodward Avenue, Suite 300
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(248) 544-1500
Counsel for Plaintiff and the Class

Date: September 17, 2021

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2021, I served the foregoing document on all counsel of record using the court's electronic filing system.

/s/ Kim Plets

Kim Plets