STATE OF MICHIGAN

IN THE SUPREME COURT

JAMILA YOUMANS,
individually and as representative of a class of similarly-situated persons and entities,

Plaintiff/Appellee/Cross-Appellant/
Applicant for Leave to Appeal

v.

CHARTER TOWNSHIP OF BLOOMFIELD,
a municipal corporation,

Defendant/Appellant/Cross-Appellee/
Respondent to Application for Leave to Appeal.

MSC Case No. _____
COA Case No. 348614
Circuit Court Case No. 2016-152613-CZ
Hon. Daniel P. O'Brien

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PLAINTIFF/APPELLEE/CROSS-APPELLANT'S

APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING THE ORDER APPEALED

Plaintiff/Appellant seeks leave to appeal the unpublished Opinion of the Court of Appeals dated January 7, 2021 (Exhibit A hereto). The appeal to the Court of Appeals in this matter was initially taken from a Judgment of the Oakland County Circuit Court dated April 22, 2019 (Exhibit B hereto).

The Application for Leave to Appeal to this Court is timely pursuant to MCR 7.305 because it has been filed within 42 days after the Court of Appeals' January 7, 2021 Opinion.

STATEMENT OF QUESTIONS PRESENTED

1. Defendant Bloomfield Township (the "Township") implored the Court of Appeals to publish its opinion in this case because the "legal issues analyzed therein" are "of significant public interest." Therefore, the Township contends that this case meets the criteria for this Court's review under MCR 7.302. Should this Court agree with the Township and grant Plaintiff's Application for Leave to Appeal?

2. This Court has authorized lower courts to invalidate municipal utility rates where those rates are arbitrary, capricious and/or unreasonable, but this Court also has held that such rates are entitled to a "presumption" of reasonableness. That presumption has been justified primarily on the grounds that utility ratemaking by a municipality is a legislative act and the courts are "ill-equipped" to navigate the complexities of utility ratemaking. Is the continued application of the presumption warranted where (a) municipal utilities are completely unregulated, (b) they provide essential services and enjoy monopolies on the services they provide within their jurisdiction, (c) their inhabitants must purchase their water and sewer services from their respective municipalities, and (d) regulated utilities bear the burden of establishing the reasonableness of their rates?

3. Bloomfield Township implements its water and sewer rates through resolutions, and not by enacting ordinances. Assuming the presumption of reasonableness attaches to municipal rates imposed by a legislative act, is the passing of a resolution -- which is immune from the referendum and initiative processes applicable to an ordinance -- a legislative act?

4. If a municipality's utility rates are NOT entitled to a presumption of reasonableness, what must a plaintiff prove to establish that the rates are arbitrary, capricious and/or unreasonable?

5. The lower courts have treated the "presumption" of reasonableness as an almost insurmountable barrier to imposing liability and have further applied varying standards for rebutting the presumption. Assuming a presumption of reasonableness is warranted, what quantum of evidence suffices to rebut the presumption?

6. In *Trahey v. City of Inkster*, 311 Mich. App. 582, 594; 876 N.W.2d 582 (2015) the Court of Appeals, in a published decision, held that a plaintiff meets its burden to show a rate is unreasonable by providing "clear evidence of illegal or improper expenses included in a municipal utility's rates." In this case, the Court of Appeals held that it is not enough for a plaintiff to show that the Rates contain improper cost components and a plaintiff must also prove that the Rates "as a whole" were "excessive." In doing so, the Court applied the doctrine of "vertical" stare decisis – effectively holding that *Trahey* was inconsistent with this Court's prior pronouncements. Is the published *Trahey* decision inconsistent with this Court's prior precedents, particularly its holding in *Novi v Detroit*, 433 Mich 414, 428-429; 446 NW2d 118 (1989)?

7. The Court of Appeals judged the overall reasonableness of the Township's Rates by comparing the cash it took in as revenues with the cash it allegedly expended. Is this simplistic "cash-in" vs. "cash-out" analysis appropriate where, as here, a plaintiff proves that

a municipality's expenditures are inflated because they include costs that the municipality itself was obligated to pay?

8. At the time of trial, Township Ordinance § 38-225 (the "Service to Township Ordinance") provided:

   'The township shall pay for all water **used by it** in accordance with the foregoing schedule of rates. The Township shall pay a flat charge for water used or available through fire hydrants of $10.00 per year, per hydrant, connected to the system. Charges for hydrants shall be paid annually. [AE 29,[1] Def. Appx. Vol. 2, pp. 120-28 (emphasis added)].'

   However, the Township does **not** pay the costs required by Ordinance § 38-225, but instead those costs are paid by the Township's water and sewer customers. The Circuit Court ruled that the Township had violated the Service to Township Ordinance and found, based upon the undisputed evidence, that the Township had overcharged its water and sewer customers by $3.8 million during the Class Period. The Court of Appeals ignored the Township's violation and did not even address, much less disagree with the Circuit Court, concerning the Service to Township Ordinance. Did the Court of Appeals err in failing to even address a significant component of the Circuit Court's Judgment in this case?

9. Does the presumption of reasonableness apply when a court is called upon to decide whether a municipal utility charge constitutes a "tax" in violation of the Headlee Amendment to the Michigan Constitution?

10. Did the Circuit Court err when it found that the Township was liable for overcharges it imposed on Plaintiff and the Class to finance future obligations to pay Other Post Employment Benefits to retired Township employees (the "OPEB Charges"), but declined to order the Township to refund the unlawfully-collected OPEB Charges?

11. The Court of Appeals held that the OPEB Charges are not "taxes" even though they force current ratepayers to fund future liabilities. Did the Court of Appeals err?

12. Did the Circuit Court err when it found after trial that the Township had not included an unlawful component in its Rates to pay the cost of stormwater drainage (the "County Drain Charges") and was not liable for including the County Drain Charges in its Rates?

13. Did the Circuit Court err when it found after trial that although the Township had included a component in its Rates to pay the cost of the excess water system capacity needed to provide public fire protection service (the "Public Fire Protection Charges"), the Township had done so lawfully?

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[1] References herein to "AE" refer to Agreed Exhibits at trial, all of which were admitted into evidence by stipulation of the parties. References to "Pl. Appx" and "Def. Appx" are references to the appendixes of exhibits submitted by the parties to the Court of Appeals. All of these materials are properly part of the record on appeal in this Court.

14. Did the Circuit Court err when it found after trial that the Township had included an unlawful component in its Rates to pay for the rental of space in the Township's Department of Public Works building that is used by the Water and Sewer Division (the "Rent Charges"), but that Plaintiff was not entitled to a refund of the unlawful rent charges?

15. If the Township had not forced its water and sewer customers (a) to pay for the Township's own water use, (b) to pay the OPEB Charges, (c) to pay the County Drain Charges and (d) to pay the Public Fire Protection Charges during the Class Period and had instead paid those amounts out of the Township's own funds, the cash reserves of the Water and Sewer Fund would have increased by more than $8 million between 2010 and 2017. Assuming the challenged rate components were improper, were the Township's Rates "viewed as a whole" excessive?

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

I. INTRODUCTION

This Application arises from the Court of Appeals' holding that the Defendant/Appellant Charter Township of Bloomfield (the "Township") did not, as a matter of law, overcharge its water and sewer customers for service by including unlawful cost components in its water and sewer rates (the "Rates"), where those cost components filled revenue holes that existed due to the Township's unlawful practices. The unlawful practices included, for example, the Township's failure to pay for the water and sewer service to its own facilities and to pay for all water "used" by the Township that did not reach a metered customer, in accordance with its own ordinances.

Pending this Court's further delineation of the standards applicable to municipal utility rates and charges, this case is controlled by *Trahey v. City of Inkster*, 311 Mich. App. 582, 594; 876 N.W.2d 582 (2015), where the Court of Appeals held as follows:

> Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable. *Id.* at 428. This presumption exists because "[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." *Id.* at 430. **However, the presumption of reasonableness may be overcome by a proper showing of evidence**. *Jackson Co v City of Jackson*, 302 Mich App 90, 109; 836 NW2d 903 (2013). The burden of proof is on the plaintiff to show that any given rate or ratemaking practice is unreasonable. *City of Novi*, 433 Mich at 432-433.[2] [*Trahey*, 311 Mich. App. at 594 (emphasis added)].

The *Trahey* court also recognized that a plaintiff rebuts the presumption of reasonableness by providing "**clear evidence of illegal or improper expenses included in a municipal utility's**

[2] As discussed below, the Court of Appeals erred when it found that *Trahey* and *Novi* were in conflict. *Trahey* in fact applied *Novi*'s prohibition against any unreasonable "ratemaking practice" and construed that language to encompass the inclusion of improper components in a municipality's rates.

rates." *Id.* at 595 (emphasis added).[3] *Trahey* further acknowledged that "[t]he determination of 'reasonableness' is generally considered to be **a question of fact**." 311 Mich. App. at 594 (emphasis added). *See also City of Plymouth v. City of Detroit*, 423 Mich. 106, 133, 377 N.W.2d 689 (1985) (recognizing that courts may invalidate municipal utility rates where the party challenging the rate demonstrates that the rate determination was "arbitrary, capricious or unreasonable").

As Plaintiff will explain in detail below, the Court of Appeals, in reversing the Circuit Court, held that the Township's Rates are reasonable because its overall water and sewer revenue is approximately equal to its overall water and sewer related expenses – an argument Plaintiff will describe herein as "cash in, cash out." The Township improperly inflated the "cash out" by paying certain expenses through water and sewer rates that should have been paid from other sources. As a result, the overall "cash-out" was inflated by millions of dollars. **If the Township had not unlawfully forced its water and sewer customers to (a) pay fo the Township's own water use, (b) pay the OPEB Charges, (c) pay the County Drain Charges, and (d) pay the Public Fire Protection Charges, and had instead paid those amounts out of the Township's General Fund, the Water and Sewer Fund's cash reserves would have increased by more than $8 million between 2010 and 2017.** How can Rates that take $8 million from the burden of general government (i.e., taxpayers) and shift it to a proprietary fund (i.e., water and sewer customers) be reasonable?

This is a fundamental problem with the presumption that municipal water and sewer rates are reasonable; a municipality need only manipulate its own financial numbers to create the thinnest veneer of reasonableness, and the presumption turns that veneer into an impenetrable shield that will protect even the most wildly disproportionate and/or unreasonable rates.

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[3] The judicial deference to municipal utility rates and charges is not absolute, or the Michigan Supreme Court would never have found the City of Lansing liable in *Bolt v. City of Lansing*, 459 Mich. 152, 158-59; 587 N.W.2d 264 (1998).

II. THE UNLAWFUL COST COMPONENTS

The cost components at issue here, which constitute "illegal or improper expenses" in the Township's Rates, and which **also** constitute an unreasonable "ratemaking practice", are as follows:

The Township's Failure to Pay for Its Own Water Use.[4] The Township's Ordinance § 38-225 (the "Service to Township Ordinance") provides: "The township shall pay for all water used by it in accordance with the foregoing schedule of rates." The Township admits it does not pay for water that is lost before it reaches a meter (for example, through leaks in the city mains). Plaintiff successfully argued that lost water was "used" by the Township, so the cost of such water must be borne by the General Fund, not the water and sewer customers.

The Non-Rate Revenue.[5] The Township receives revenue from sources outside of the water and sewer rates, such as late fees and tap fees ("Non-Rate Revenue"). The Township sets its water and sewer rates by dividing its cost of buying water and sewer services by the number of units of water and sewage disposal services it buys, then charging each user for his or her pro rata share of the total cost. Plaintiff proved that the Township had failed to account for Non-Rate Revenue in setting its revenue requirements, which drove up the purported total cost of buying water and sewer services and thus drove up the cost of each unit of water and sewer service. By failing to account for Non-Rate Revenue, the Township double-charged by collecting the Non-Rate Revenue outside of its Rate structure and then including the costs associated with the Non-Rate Revenue as part of the Rates.

The Sewer-Only Revenue.[6] Similar to its treatment of the Non-Rate Revenue, the Township does not account for substantial revenue it receives from flat rates it charges to customers who have sewage disposal service but not water service ("Sewer-Only Revenue"). The Township

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4 Discussed in detail in Plaintiff's Brief on Appeal, pp. 5-11.
5 Discussed in detail in Plaintiff's Brief on Appeal, pp. 11-20.
6 Discussed in detail in Plaintiff's Brief on Appeal, pp. 20-28.

ignores this revenue and thus begins with an excessive revenue requirement when it sets its sewer Rates. As with Non-Rate Revenues, the Township's failure to account for Sewer-Only Revenue results in a double-recovery of the costs associated with Sewer-Only customers – once from the Sewer-Only customers themselves and once from the other Ratepayers.

The OPEB Charges.[7] Other Post-Employment Benefits, or "OPEB", are benefits, primarily health insurance, that the Township is obligated to provide to current and future retirees. Trial Trans. 2/9/18, Cross Appx. 2, pp. 210-11. The parties agree that the Township can lawfully include a component in its Rates to pay for **current** OPEB costs (i.e., the cost of providing OPEB **this year** to **currently retired** Water and Sewer Division employees). However, Plaintiff demonstrated that the Township also includes the cost of **future** OPEB in its Rates, thereby collecting money to pay the cost of providing OPEB **in future years** to current employees of the Water and Sewer Division who have not yet retired, as well as currently-retired Water and Sewer Division employees. The funds collected through the OPEB Charge have nothing to do with the current operation of the Township's water and sewer system, and those funds will be utilized, if at all, at some undefined time in the future.[8]

The County Drain Charges.[9] Oakland County (the "County") maintains and repairs the Township's storm drains, and it charges the Township approximately $200,000 per year to do so (the "County Drain Charges"). All of the Township's storm drains are the responsibility of Oakland County, and the payments to Oakland County cover the entire cost of operating and maintaining storm sewers in the Township. The Township historically financed those costs through its General

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7 Discussed in detail in Plaintiff's Brief on Cross-Appeal, pp. 1-5.

8 *See* Trial Trans. 2/9/18, Cross Appx. 2, pp. 219 (Township Finance Director Theis: "Q. Okay. But the third component of cost that's in the rate could be funding health insurance that is being paid to the employee in 10 years, or 15 years, correct? A. Not paid to the employee, but yeah. Paying premiums for the coverage that they're gonna have. Q. Well, paid on their behalf for their benefit? A. Yes.").

9 Discussed in detail in Plaintiff's Brief on Cross-Appeal, pp. 5-8.

Fund and allocated about $40,000 to pay Oakland County. In 2015, the Township incorporated those costs into the Sewer Rates, and they are now be paid by the Township's sewer customers through the County Drain Charges to the tune of about $200,000 per year. Incredibly, the Township asserted at trial that the only function of the county storm drain system is to keep stormwater out of the Township's sanitary sewer system. That assertion did not hold up to examination.

The Public Fire Protection Charges.[10] It is undisputed that the Township's water supply system has two distinct purposes: (1) to supply treated water for the personal use of a municipality's inhabitants (the "Water Supply Function") and (2) to provide capacity and flow for fire protection through public hydrants (the "Fire Protection Function."). Plaintiff's expert, Kerry Heid, testified that the Township's water system has a dual function, namely to provide treated water for consumption by its inhabitants and also to provide capacity and infrastructure to fight fires. Accordingly, per both Heid and the Township's expert, Bart Foster, if a municipal water system did not have to provide or did not provide firefighting capacity, it could be sized smaller with less capacity than otherwise it needs to fight fires. It is undisputed that the Township's Water and Sewer Fund does not charge the Township's General Fund a line item dollar amount for the costs associated with the fire protection function of the system. It is also undisputed that the cost of the public fire protection system is covered in the first instance by water rates, which are largely based upon how much water a person draws from the tap. Heid further testified that the Maine Curve methodology in the M-1 Manual may be used to determine the percentage of total water revenues that should be allocated as fire protection costs based on the population served and the peak hour water demands.[11]

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[10] Discussed in detail in Plaintiff's Brief on Cross-Appeal, pp. 8-15.

[11] Foster agreed that the Maine Curve methodology Heid used was appropriate. *See* Trial Trans. 2/26/18, pp. 83-84 ("Q You would agree with me that the Maine curve methodology may be

The Rent Charges.[12] The Township includes in its Rates an annual expense for "rent" in the amount of $350,000 to pay for the Water and Sewer Division's use of space in the Township's Department of Public Works building (the "Rent Charge"). The Township's DPW Director, Tom Trice, determined how much rent the Water and Sewer Fund should pay for its space in the DPW building, which consists of 5,000 square feet of office space and 25,000 square feet of shared garage space, based on an existing agreement whereby the Township paid for the use of storage space in the 48th District Court building. Plaintiff's expert James Olson described for the Circuit Court what was wrong with Trice's explanation. Olson testified that under cost allocation principles, a typical "rent" for the DPW Facility (which is a charge to cover the capital cost of the "rented" premises and the premises-related utility, maintenance and repair expenses) is not properly allocated to the Water and Sewer Fund. The capital cost of the DPW Facility (approximately $16 million) was financed with bonds issued by the Township. *See* AE 30, Cross Appx. 16. Those bonds were approved by the Township's voters and the principal and interest are being repaid through a dedicated millage also approved by the Township's voters. Therefore, the capital costs of the DPW Facility are already being paid by the Township's residents through their property taxes. Moreover, in FY 2010-11, two years after construction of the new DPW building, the Township charged the Water and Sewer Fund "Building and Equipment Rent" of just $41,000. *See* AE 10, Cross Appx. 17, p. 26 (p. 4 of W&S Budget). That year, the Water and Sewer Fund paid $41,000 to rent both its space in the DPW building and whatever equipment it was using. The Township then charged the Water and

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used to determine the percentage of total water revenues that should be allocated as fire protection costs based on the population served and the peak hour water demands? A. I would -- the only disagreement with that statement is I wouldn't say should, I would say could. Q. Could, okay. And you test -- you would agree that Mr. [Heid], while you disagree about what's legally required, you would agree that Mr. [Heid] has utilized the appropriate approach for determining the overall cost associated with public fire protection for a municipal utility? A. My review -- well, my review of Mr. [Heid's] calculations are that he used an approach amongst many that could be utilized to determine the extra capacity cost of public fire protection should an entity be interested in doing so.").

[12] Discussed in detail in Plaintiff's Brief on Cross-Appeal, pp. 15-21.

Sewer Fund **nothing** for three years, and in FY 2014-15 began imposing a new charge, for building rent alone, that was more than 8 times the amount of the previous "Building and Equipment Rent" charge.

III. WHY THE COST COMPONENTS MAKE THE RATES UNREASONABLE

Each of the cost components entered the rates through the Township's *overstatement* of its net revenue requirement or its *understatement* of the number of units of water and sewer service its customers used. In other words, the Township's Water and Sewer Fund failed to account for revenue it actually received, or failed to collect revenue to which it was entitled, leading to a higher per-unit cost for water and/or sanitary sewage disposal services. The relationship between the Township's revenue requirement and the Rates is as follows:

$$\frac{Net\ Revenue\ Requirement}{Number\ of\ Units\ Used} = Price\ Per\ Unit$$

As Plaintiff's expert explained: "And to put it in very simple terms, the net revenue requirement would be the numerator. And then, let's say that you're designing rates that are just simply based upon number of customers. The number of customers would be the denominator." Trial Trans. 2/22/18, Appx. 1, p. 31.[13] Here, the process is more complicated because the Township charges based on usage, but the principle is the same. The Township should divide the actual cost of providing water and sewer service by the number of units of service it provides, and thereby set a price per unit that will result in the recovery of the Township's costs without becoming a profit center.

Thus, as the net revenue requirement (i.e., the revenue requirement after accounting for sources of revenue other than the Rates) increases, all else being equal, the price per unit increases and the Rates increase. But like any equation, garbage in becomes garbage out. If the Township

[13] Citations to "Appx." refer to Plaintiff/Appellee's Appendix on Appeal. Citations to "Def. Appx." refer to Defendant/Appellant's Appendix.

uses the wrong net revenue requirement (which it did by failing to account for Non-Rate Revenue and Sewer-Only Revenue and by failing to charge itself for water "used"' by the Township), then it ends up with the wrong price per unit – the wrong Rates. Plaintiff proved at trial that the Township failed to account for revenue items that should have reduced its net revenue requirement. This increased the price per unit of water and sanitary sewage disposal services, resulting in inflated Rates for Plaintiff Jamila Youmans and the certified Class.

Even the Township's failure to pay for its own water use leads to an incorrect input into the equation above. By failing to account for its own water use, the Township *decreased* the number of units of water used, thereby *increasing* the price of each unit. Township Ordinance § 38-225 (the "Service to Township Ordinance"), which at the time of trial provided:

> The township shall pay for all water **used by it** in accordance with the foregoing schedule of rates. The Township shall pay a flat charge for water used or available through fire hydrants of $10.00 per year, per hydrant, connected to the system. Charges for hydrants shall be paid annually. [AE 29, Def. Appx. Vol. 2, pp. 120-28 (emphasis added)].

However, the Township does **not** pay the costs required by Ordinance § 38-225, but instead those costs are paid by the Township's water and sewer customers. As with increasing the net revenue requirement (the numerator), decreasing the number of units sold (the denominator) leads to higher Rates.

IV. THE CIRCUIT COURT'S RULINGS FOLLOWING THE BENCH TRIAL

A. The Township's Failure to Account for Its Own Water Use

The Court divided the Township's water use into three "buckets": (1) tap water actually used by the Township at its facilities and elsewhere; (2) "truly lost water" such as water that leaks from pipes; and (3) construction water used for the operation and maintenance of the water supply system itself. The Court found that Plaintiff is **not** entitled to a refund for Bucket #1, tap water actually used by the Township, because the Township pays for that water with in-kind services to the Water

and Sewer Fund. Opinion, Def. Appx. Vol. 4, p. 44. The Township previously estimated the value of this type of water as $35,000 per year.

However, the Court found that Plaintiff **was** entitled to a refund for Buckets #2 and #3. Regarding the "truly lost water" bucket, the Court said: "It is most apt to keep the buckets separated, and insofar as this isolated bucket is concerned, the Court is persuaded by Plaintiff's logic over the Defendant's default position. The cost for this truly lost water bucket per ordinance, per the Court, was destined to be borne on the shoulders of the general fund taxpayers." Opinion, p. 46. "It shall be the duty of the parties to translate this pronouncement into numbers and damages.[14] The parties are charged to crunch the numbers." *Id.*, p. 47.

Regarding the construction water bucket, the Court said:

> Now onto the third bucket, construction water; again, water purchased by the Township which reaches its intended destination, such destination being a use, rather than a geographic location. Similar in consequence and similar, but not identical, in reasoning, the Court finds in Plaintiff's favor here.
>
> Plaintiff argues that from the reading of Township ordinances 225 and 226, the cost of this bucket called construction water too is destined to be borne on the shoulders of the general fund taxpayers. The Court -- this Court agrees.
>
> * * *
>
> This section of the Court's opinion regarding the construction water bucket stops at this pronouncement. It shall be the duty of the parties to translate this pronouncement into numbers and damages. The parties are charged to crunch the numbers. [*Id.*, pp. 48, 49-50.]

The Court reiterated its rulings as follows:

> To recap, truly lost water bucket and construction water buckets, the Court finds, because of obfuscation, intentional or not, misinterpretation of Township ordinance or not, has been paid for by the water and sewer customers over the time frame Plaintiff prosecutes, and they should not have been charged to them, but to the general fund. That, or if the Defendant contends it did pay through in-kind

[14] Throughout this case, Plaintiff has always sought an equitable refund or disgorgement of unlawful overcharges, not "damages" per se, as in an action at law. That the Circuit Court actually awarded a refund, and not damages, is apparent from the CAJ's repeated provisions that "the Township shall pay a refund to Plaintiff and the Class in the amount of . . ." *See* CAJ, Def. Appx. Vol. 1, pp. 1-45.

> services, is rejected by the Court, if only because the proof of that is obfuscated and unnecessarily so.
>
> Thus, the Court concludes the Defendant has not in any form reimbursed water and sewer, nor paid for these buckets itself.
>
> Though also obfuscated, in this Court's opinion, the Court is more persuaded that municipal tap water, the first bucket, has been paid for by the Defendant effectively through horse-trading or in-kind services; hence, no damages to the Plaintiff for this bucket. [*Id.*, p. 50.]

The refund numbers Plaintiff presented at trial did not distinguish between the three "buckets" of water. However, the "truly lost water" bucket made up the vast majority of Plaintiff's claimed refund. In order to fulfill the Circuit Court's instruction to "crunch the numbers", Plaintiff needed only to determine the cost of the water the Township actually uses in its facilities and subtract that amount from the total refund numbers Plaintiff presented at trial. The Township estimated that the value of the water used by the Township's facilities is approximately $35,000 per year. The Circuit Court entered judgment in accordance with Plaintiff's demonstrative exhibit on the Township's own water use, Appx. 4.

B. Non-Rate Revenue

In its Opinion from the bench, the Circuit Court initially appeared to find in favor of the Plaintiff:

> Non-rate revenue and sewer only. Judgment, liability to Plaintiff on both sections. Damages; first, the Court leaves as resolved between the parties that some period of time over which this case pertains non-rate revenue was to Plaintiff's satisfaction explicitly deducted from the numerator or from the rates. Whatever damages, if any, the Court trusts will exclude this portion.
>
> * * *
>
> The Court accepts Plaintiff's math as correct. [Opinion, Def. Appx. Vol. 4, pp. 151, 154.]

The Circuit Court went on to criticize the Township's lack of transparency at length:

> Defendant may either be inept at the task of equating cost with income, or as Defendant contends here, the surplus is itself meeting an expense, which from that perspective is resulting in proportion between rates and costs. But if this is Defendant's possession -- position that it needs extra beyond today's expense, then

> why the confusion? The Court is loath to say smoke and mirrors because the Court is not claiming anything sinister here, but why the -- why the abstrusity about how non-rate revenue is accounted for in the equation which yields the rates? Then when will Defendant be caught up to tomorrow's expenses, so that it no longer has future expenses to catch up to? When can it be expected a flat line in the water and sewer fund? Surely no one -- no way sensible and et -- eternal increase in the water and sewer fund balance.
>
> If the Defendant believes that the millions of dollars in -- in the water and sewer fund is necessary to fund future expenses, then when will these expenses start coming due? They have either not come due in the past eight years or so, or they have, but their consequence has not prevented the water and sewer fund from increasing year in and year out. [*Id.*, pp. 81-82.]

The Circuit Court then explained that because of the Township's "abstruse, recondite practice", the Circuit Court **would not adjudicate the issues of Non-Rate Revenue or Sewer-Only Revenue at that time:**

> Next, in case it has not been made abundantly clear in this Court's opinion in these sections for non-rate revenue and sewer only, this is the Court's opinion of what the Defendant, and this time likewise its expert, has to say about the positive balance in the water and sewer fund quote, it is needed, much needed reserves. **And this is the Court's opinion: Your abstruse, recondite practice prevents any such adjudication.** You may not bait and switch, Defendant. You did not call it reserves at the beginning in projecting; you may not call it that at the end. You profess to the world in your budgets, you called it projected postage, slag, uniform, tools, et cetera, you called 80 percent sewer customers are water customers, you professed that to the world. You do not possess a magic wand at the end of the year and change what is -- what is surplus money for postage, slag, uniform, tools, et cetera, into much needed reserves. You possess no such magic wand to change 80 percent into 70 percent, regardless of your child protecting parent motif to reflect much needed reserves.
>
> It is Defendant which creates this – these mysteries; **Defendant has impeded the Court, and more importantly, its customer and taxpayers from passing upon the question of whether the Defendant's rates are proportionate to its costs.** This impediment, abstrusity, may be of late past practice, estops invocation of the presumptive reasonableness, the thoughtless thoughtfulness presumption of the rates. Short of blind deference to the Defendant, redundancy intended, Defendant's impediment, regardless of -- of intent, hamstrings the Court, and the Defendant's water and sewer customers, taxpayers, public at large, **prevents our ears from even being able to hear a claim of disproportion.** In a word, if the presumption were to prevail here, the presumption is and evermore shall be in -- unrebuttable. This is not what the law intended. [*Id.*, pp. 151-153 (emphasis added).]

See also Id., p. 74 ("This is the Court speaking: Where, Defendant, can your bosses, your principals, your masters, your non-arm's length customers, your intimates, heck, yourself, your reflection in a mirror, where can they see this [non-rate revenue] computation? You don't suggest, Defendant, that you know more than your superiors, or at least see more, or at least have more available for you to see than your superiors, do your -- do you?"); p. 78 ("It is true, this Court concludes as a matter of fact, this figure, which is projected non-rate revenue, is not located in the equation which the Defend -- Defendant annually refers to in its rate memos as the equation which yields the water and sewer rates. The quote, it is simply, dot, dot, dot, quote, verbiage.").

It is clear that the Circuit Court's findings of (a) "liability to plaintiff" and (b) an inability to adjudicate the question of liability because of the Township's lack of transparency did not amount to a finding in favor of the Township on Non-Rate Revenue and Sewer-Only Revenue. The Circuit Court intended to defer its rulings on Non-Rate Revenue and Sewer-Only Revenue to give the Township a chance to "make good", which expression the Circuit Court used on two occasions in its Opinion. First, at Def. Appx. Vol. 4, pp. 108-09:

> Either one is forced to defer to the municipality, or the municipality is obliged to show the underbelly, show its work. No doubt the law requires the latter, and if the Defendant cannot show its work because of the sticky notes, notepads, and napkins are gone, well, get over it; show a little due humility and make good somehow. It is not a slam dunk that the Defendant omitted from its municipal brain non-rate revenue from the equation which yielded the rates, and it is surely no slam dunk that the Defendant -- to the Defendant that it did.

And again, at Def. Appx. Vol. 4, pp. 153-54:

> The Court has plenty of ideas on the issue of damages and the issue of remedy. The Court has a clear view of some real injury -- I'm looking at Plaintiff's counsel -- but sitting in chancery, it is most apt the Court affords Defendant a last opportunity on its own to make good here. It is imminently reasonable that the Defendant show its work. It is entirely unreasonable to presume reasonable, unless it is demonstrated unreasonable, that which in the sole control of the Defendant by not showing its work, is impossible to demonstrate.
>
> Defendant is invited not to try now for the first time to show its work, but to chime in on the question why, given that the Defendant did not, in this Court's

> opinion, show its work, and in this Court's opinion and regardless of the Defendant's motive, published a known untruth, 80 percent is 70 percent, why the Court should not in equity or otherwise assign the answer as no, Defendant did not deduct non-rate revenue which occasioned the disproportion Plaintiff contends, and no, 80 percent equals 80 percent, not 70 percent, and the higher sewer receipts occasioned the disproportion Plaintiff contends? This would quantify the dollars in these sections as Plaintiff contends. The Court accepts Plaintiff's math as correct.

The parties submitted competing proposed judgments. At the hearing on the parties' motions for entry of judgment, the Circuit Court reiterated that it could not award a refund for Non-Rate Revenue or Sewer-Only Revenue "because the Defendant impeded the Court from directly finding one way or another". Hearing Trans. 9/5/18, Appx. 31, p. 17. The Circuit Court then asked, "What is the legal vehicle – and this is the question today, but it was the question back in July , which is why your matter was put over, or put back in the parties' laps – what is the legal vehicle for this non-direct finding a/k/a circumstantial evidence?" *Id.* The Circuit Court then walked through the proposed judgment line by line and addressed each of the parties' disagreements about the form of the judgment. *Id.*, pp. 26-43. Plaintiff's counsel then brought up the Circuit Court's question about a "legal vehicle" for finding in Plaintiff's favor, and the Circuit Court acknowledged that the Non-Rate Revenue and Sewer-Only Revenue issues remained open:

> MR. HANLEY: I -- I don't -- I mean obviously, we would have a disagreement with what you've done with respect to the non-revenues and the -- and the -- the non-rate revenues and the sewer-only revenues, and I guess what I'd ask is if -- the pointed question you asked me didn't seem to satisfy you in that regard, but what you've said is what you've said; if there's a legal authority that I can present to the Court that says under these circumstances, because we've been prevented by not anything of our own fault from being able to establish this, that we nonetheless, as a legal matter, have a right to -- I'd -- I'd be --
>
> THE COURT: So that's on the backburner for you to deal with as you --
>
> MR. HANLEY: Right. But I think that --
>
> THE COURT: -- see fit; is that right? [*Id.*, pp. 44-45.]

On September 17, 2018, the Circuit Court entered a Judgment in the form described at the hearing on September 5. *See* Judgment 9/17/18, Appx. 32. That Judgment provided, as to Non-

Rate Revenue and Sewer-Only Revenue, that "Defendant's rate method has impeded Plaintiff from proving its claim that Defendant's rates are disproportionate to costs. Due to that impediment, the Court is prevented from deciding the question." *Id.*, pp. 3-4, Sec. II(1) and III(1). The Judgment thus acknowledged that those two issues remained undecided.

Plaintiff thereafter filed a motion for reconsideration of the Judgment. After briefing, the Circuit Court entered an Order on November 29, 2018 (Appx. 33) clarifying that it had not adjudicated liability in favor of Plaintiff or the Township as to Non-Rate Revenue or Sewer-Only Revenue, and reiterated its questions to the parties, in particular the following inquiry to Plaintiff: "Is there a legal or equitable doctrine which would yield a judicial adjudication in favor of one party because the other party obscured proofs needed for that judicial adjudication?" *Id.*, p. 3.

In February 2019, the Township filed a motion for entry of final judgment and Plaintiff filed a motion for relief from the September 17, 2018 Judgment to the extent that it had not provided for relief as to the Non-Rate Revenue or Sewer-Only Revenue. The Circuit Court heard both motions together on March 18, 2019. *See* Hearing Trans. 3/18/19, Def. Appx. Vol. 3, pp. 127-68. The Circuit Court recalled that in its Opinion from the bench in July 2018, "[t]his Court ordered the Defendant to be transparent, this Court would call it fluorescent; do not merely make the truth visible, advertise the truth, publicly display the truth." *Id.*, p. 159. The Circuit Court therefore held:

> The wrong, in this Court's opinion, as it has not been -- as if it has not been made ab -- abundantly clear, is that the Defendant did do wrong, and that wrong was wont of clarity. The Court could not be more clear in its finding that the Defendant was unclear. Plaintiff has persuaded the Court with its cases and reasoning that whether the Defendant is wrong beyond its abstruse recondite rates, such wrong of unclarity itself in equity in this Court's opinion fulfills the element Plaintiff needed to prove that the Defendant's rates were disproportionate to costs in the amount of non-rate revenue and sewer-only receipts as previously calculated and adopted now here by the Court -- previously adopted by the Court and ratified by the Court now. [*Id.*, pp. 165-66.]

The Court then entered the Amended Judgment, which was missing a page, and the Corrected Amended Judgment, which supplied the missing page. The CAJ provided for liability and a refund

in favor of Plaintiff on Non-Rate Revenue and Sewer-Only Revenue in the amounts Plaintiff presented at trial. As discussed below, the CAJ did not provide relief from the Court's September 17, 2018 Judgment, but rather supplemented that Judgment. *See* Hearing Trans. 3/18/19, Def. Appx. Vol. 3, p. 156 (describing Plaintiff's motion as one "inaptly titled motion for relief from judgment, it's more a supplement to a judgment, rather than relief from it"); p. 167 ("The Court is persuaded by the Plaintiff's arguments and supplements and amends its judgment, awarding damages in the amount prayed for.").

C. Sewer-Only Revenue

In addressing Sewer-Only Revenue in its July 12, 2018 Opinion from the bench, the Circuit Court made the same "liability to plaintiff" pronouncement and again opined at length about the Township's lack of transparency before declining to rule:

> In fairness to the Defendant, it is not so much which factor in the denominator is altered to yield the truth, what matters is what is the quotient after the computation. This dissection of the denominator is performed by the Court merely to demonstrate the convoluted mess, which even if performed with fidelity to the water and sewer customers, is abstruse, recondite, it is not transparent.
>
> One thing is clear, by the plausible arguments both sides present in support of their contention that sewer only revenues are and are not baked into the water and sewer customers' sewer rates, the Defendant's method is unclear. It is hardly verifiable. If there were not an easier, less convoluted, traceable equation to deduct such projected revenues from projected costs, Plaintiff may well be stuck with a trust me, I am your government proclamation. Plaintiff may well fail to overcome the presumptive reasonableness, the thoughtless thoughtfulness.
>
> But there sure is a simpler, a transparent way to do this. The Defendant itself identifies the number of sewer only customers as quote, dot, dot, dot, relatively small, dot, dot, dot. [Opinion, Def. Appx. Vol. 4, pp. 58-59.]

The Court further explained:

> These water and sewer customers' sewer sewage contribution is a little less than their water quantity purchased. This means that the water and sewer customers' pie slice of the entire sewer sewage pie is not 80 percent, but something less than say 70 percent. This is Domine: We're trying to keep the rates low; we write 80 percent, even though in truth it's 70 percent. This is the Court: With all due respect, who are you, the child, the subordinate, or the parent, the principal? Don't conceal from your parents on the notion you're trying to protect them. If you are going to deal in

> assumptions, then deal in assumptions. Don't deal in assumptions if you are going to mix it up with perceived reality. [*Id.*, p. 63.]

See also Id., p. 65 ("Approximating a percentage of producers of a benign or intentionally inflated approximated quantity of sewer sewage as a means to offset an actually and easily calculable source of revenue is unreasonable."); p. 66 ("The Court opines and adjudges, however, you either are not achieving proportionality because of your methodology, or your methodology is abstruse, and no one can tell whether or not your rates are proportional to costs, save wholesale deference, blind faith to the Defendant. This is not the law.")

As described above under Non-Rate Revenues, the Circuit Court ultimately awarded Plaintiff a refund based on the Sewer-Only Revenues at the same time and for the same reasons it awarded a refund based on the Non-Rate Revenues.

D. OPEB

The Circuit Court found no cause of action under the Headlee Amendment as to any of Plaintiff's claims, based on the Circuit Court's determination that none of the overcharges (including the OPEB Charges) were revenue-raising:

> This financing of OPEB is not, as Plaintiff contends, a future obligation, a -- a tax, a violation of Bolt, in this Court's opinion. Neither, in this Court's opinion, is charging for next year's Band-Aid a tax, or revenue-raising. The Court agrees with the Defendant that the liability to the Defendant is incurred not when the ret -- when the retiree's whittling knife slips, but when the retiree was trudging through the sewage wrenching on pipes as a water and sewer employee. There is no practical distinction, given this adjudicated date, when the liability was incurred between a Band-Aid needed today for a retired water and sewer employee and paid for by today's water and customer, and a Band-Aid needed tomorrow for a retired water and sewer employee and paid for by today's water and sewer customer, unless of course there is disproportion between rates and costs. And this proportion would manifest itself in a marked distinction between OPEB charges to one temporal class of water and sewer customers vis-à-vis another temporal class of water and sewer customers. [Trans. 7/12/18, Cross Appx. 7, pp. 24-25.]

The Circuit Court found liability in Plaintiff's favor on her equitable claims related to the OPEB Charges (which alleged that the Charges were unreasonable) but declined to award any refund:

> OPEB, judgment, liability in Plaintiff's favor; damages, no dollars. Remedy, henceforth, explicit accounting for all OPEB dollars. Any dollar in unrestricted cash or cash equivalent accounts which the Defendant would characterize as an OPEB dollar, must be transferred into trust, or that dollar shall lose any identity as OPEB, and shall instead be what it necessarily is, a surplus. Defendant may propose, upon return to court, a specified time that dollar may reside in unrestricted cash account before its true nature as a surplus dollar emerges. It would be sensible, but the Court abstains in deference to division of powers, to perform a year-end reconciliation. [*Id.*, p. 148.][15]

See also Id., p. 31 ("Judgment of liability to Plaintiff. No damages, however.").[16]

E. County Drain Charges

The Circuit Court rendered a judgment of no cause of action under Count I (Violation of the Headlee Amendment) as to the County Drain Charges. *See* Trans. 7/12/18, Cross Appx. 7, p. 148 ("Storm water drain, judgment, no cause of action."). The Circuit Court reasoned as follows:

> Number one, does the charge serve a regulatory purpose, rather than a revenue-raising purpose, and this is the Court speaking: It is clear, undisputed, or at least this Court finds from this record the dollars charged historically and presently are pass-through charges, no revenue raising intent or result has been proven by any standard of proof.
>
> Number two, the charge -- is the charge proportionate to the necessary cost of the service -- and this is this Court speaking: Given the Court's finding in number one that the charge is but a pass-through, the answer here is yes. [*Id.*, p. 12.]

The Circuit Court later seemed to contradict is own reasoning, but stuck to its decision that the County Drain Charges were not taxes:

> Simply, these charges are not revenue-raising charges, even though it is amply clear the storm water drain and its service charges confer public benefits. There is a reason why the charge would seem not to belong to the sewer customers. It confers a public benefit. It is involuntary. There is a reason why the charge would seem not to belong to the taxpayers. It is not generated to raise revenue. Sure, it is involuntary; sure, it confers a public benefit, and presently, given the artificial rather than the actual sewage flow component to the equation which yields the sewer rate, there appears

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[15] *But see Id.*, pp. 30-31 ("Funding for currently retired employees to catch up for prior neglect is entirely sound, reasonable, and proportionate. Funding for future retiree benefits is a practice of a coequal branch of government exempt from judicial review. As a mere bystandard, it ma -- as a mere bystander, it makes complete sense in itself, and there is no sensible alternative anyway.").

[16] The Circuit Court embodied this ruling, and all of its post-trial rulings from the bench on liability and refund amounts, in the Corrected Amended Judgment, Cross Appx. 1.

> no individualized benefit to the sewer customers, the class holding the bag, so to speak. [*Id.*, pp. 15-16.]

F. Public Fire Protection Charges

The Circuit Court found no cause of action under Headlee (Count I) as to the Public Fire Protection Charges. *See* Trans. 7/12/18, pp. 36-37 ("Is the charge motivated by revenue-raising? Here, no revenue-raising agenda. Under the Bolt analysis, as a whole, no Headlee violation, no Bolt violation, no cause of action on this facet of the fire protection claim."). The Circuit Court also ruled that Plaintiff was not entitled to recover the cost of the excess capacity built into the Township's water supply system for public fire protection purposes. *Id.*, p. 41 ("The Court denies money to Plaintiff for infrastructure."). As to Plaintiff's claims for unreasonable water and sewer rates (Count II), violation of MCL 141.118 (Count III), and violation of MCL 123.141 (Count IV), the Circuit Court found no cause of action as to infrastructure costs but ordered the Township to account or the water it actually uses in fire hoses:

> Public fire protection, judgment, no cause of action in part, liability in Plaintiff's favor in part. Damages, MCL 123.141(3), Plaintiff prevails in a dollar amount equal to the cost of water in fire hoses over the relevant time frame paid by the general fund. The parties are to calculate, approximate, or stipulate to this figure and report back. The Court has mused over the intersection of the parties here; the parties may address this if they choose, or ignore it. Remedy, henceforth, explicit accounting of water in fire hoses to be paid for by the general fund, with explicit attention paid to the intersect -- strike that -- strike that.
>
> If the Defendant chooses in-kind service exchanges, an explicit accounting of same, with explicit valuations. Or, of course, instead actual payment of dollars rather than horse-trading. It would be sensible, but this Court abstains in deference to the division of powers to perform a year-end reconciliation, or year-end reconciliations. [*Id.*, p. 149.]

G. The Rent Charges

After trial, the Circuit Court found in favor of Plaintiff as to liability for the Rent Charges under Count II (Assumpsit – Unreasonable Water and Sewer Rates) and Count IV (Assumpsit – Violation of MCL 123.141). However, the Circuit Court found that Plaintiff was not entitled to any refund, deferring to the Township's determination of what constituted a fair trade of in-kind

services. *See* Trans. 7/12/18, Cross Appx. 7, p. 32 ("And whether or not it is fair horse-trading is clearly the prerogative of the municipality; clearly, the prerogative of the electorate at the ballot box and the non-electorate inhabitants in their decision to remain or emigrate from the Township. This ratemaking method, this horse-trading, rests soundly within the juridical presumption of reasonable ratemaking."). Township ordered to explicitly document all instances where in-kind provision of services is used to reimburse the Township's Water and Sewer Fund for services provided by the Township's General Fund, including provision of in-kind services as reimbursement for Rent Charges.

The Circuit Court found that in-kind payment for services between Township departments was permissible, and that the Township was liable to Plaintiff, but awarded no refund on this claim. The Circuit Court did grant Plaintiff prospective relief by ordering that the Township adopt greater transparency in the future with respect to in-kind payments between its general fund and Water and Sewer Fund: "Though no damages awarded, the Court adjudges that if Defendant chooses to trade services, it shall be explicit for all eyes to see. Thus, there is a remedy to the water and sewer customers, but no damages." *Id.*, pp. 33-34.

The Circuit Court reiterated its decision on the Rent Charges as follows:

> Rent section. Liability in Plaintiff's favor; damages, no dollars. Remedy, henceforth explicit accounting of any quote, in-kind service exchanges, with explicit valuations, or, of course, instead, actual payment of dollars rather than horse-trading. It would be sensible, but the Court abstains in deference to division of powers, to perform a year-end reconciliation. [*Id.*, pp. 148-49.]

V. THE COURT OF APPEALS' RULINGS

A. The Presumption of Reasonableness

The Court of Appeals held that "the trial court erred by failing to apply the presumption that the disputed rates were reasonable and abused its discretion by granting plaintiff permanent injunctive relief despite her failure to demonstrate that doing so was necessary to prevent irreparable

harm." COA Opinion, Exhibit A hereto, p. 26. The court remarked that "[i]n contemporary municipal utility ratemaking cases, a similar focus on principles of 'unjust enrichment' is encapsulated within the rebuttable presumption that a municipality's utility rates are reasonable." *Id.*, p. 27 (citing *City of Novi v. City of Detroit*, 433 Mich. 414, 425-33; 446 N.W.2d 118 (1989). With respect to Plaintiff's refund claims, the court concluded as follows:

> In any event, the heart of the parties' dispute regards the manner in which the rule of law set forth in *Trahey* should be applied. Specifically, citing in support *Trahey*, 311 Mich App at 595 ("[a]bsent 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") (emphasis added), plaintiff argues that in a ratepayer challenge like the one at bar (i.e., one pursued under MCL 123.141(3)), if a plaintiff *does* present clear evidence of either illegal or improper expenses included in a municipal utility's rates, the presumption of reasonableness is no longer a relevant consideration—that is, the plaintiff need not also demonstrate that the rates, viewed as a comprehensive whole, are unreasonable. Put differently, plaintiff argues that *Trahey* stands for the proposition 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.
>
> In stark contrast, the Township argues that, under *Trahey*, even if a *specific* expense that is included in formulating a challenged municipal utility rate is shown to be either illegal or improper, the plaintiff nevertheless bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed as a *whole*. In other words, the Township argues that absent a showing that the disputed rates actually overcharged plaintiff and the plaintiff class for the related water and sewer services, plaintiff's challenge to those rates—and her request for monetary "damages" in particular—is fatally flawed. We agree with the Township.
>
> In our view, the flaw in plaintiff's argument rests less on a textual dissection of *Trahey* than it does on the fundamental nature of plaintiff's equitable "assumpsit" claims. "[E]quity regards and treats as done what in good conscience ought to be done." *Allard v Allard (On Remand),* 318 Mich App 583, 597; 899 NW2d 420 (2017) (quotation marks and citation omitted). Had plaintiff sought a declaratory judgment that certain costs included in the disputed water and sewer rates were improper or illegal, perhaps she would be correct that the presumption of reasonableness would be irrelevant. Instead, however, by asserting her claims for assumpsit, plaintiff sought "restitution"—in the form of a refund to herself and the plaintiff class—of whatever amount was necessary to "correct for the unfairness flowing from" the Township's "benefit received," i.e., its "unjust retention of a benefit owed to another." *See Wright*, 504 Mich at 417-418, 422-423. 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. *See id.* at 419 ("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 correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded *excessive and unjust* benefits to his or her rightful position.") (emphasis added).

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. Moreover, even assuming, arguendo, that plaintiff is correct concerning this Court's holding in *Trahey*, she fails to recognize that, to the extent that *Trahey* might be read as inconsistent with our Supreme Court's decisions concerning the essential nature of unjust enrichment and restitution in *Wright*, or with *Novi*'s holding regarding the continued viability of the presumption of reasonableness, *Trahey* must be ignored under the doctrine of vertical stare decisis. *See In re AGD*, 327 Mich at 339 (noting that, under the doctrine of vertical stare decisis, only our Supreme Court has authority to overrule one of its prior decisions, and until that Court does so, its former decisions remain binding on all lower courts); *Allen v Charlevoix Abstract & Engineering Co*, 326 Mich App 658, 665; 929 NW2d 804 (2019) (noting that this Court is "required to ignore" its former published decisions "in favor of any conflicting Supreme Court precedent").

The application of such principles in this case is straightforward. On several occasions, the trial court explicitly found that plaintiff had failed to rebut the presumption of reasonableness or demonstrate that the disputed rates were excessive in comparison to the associated costs of providing the related water and sewer services. On this record, we perceive no basis to disturb those factual findings. On the contrary, without a comprehensive rate study—or some similar evidence demonstrating that the disputed rates excessively compensated the Township for the related utility services—one can at best speculate about whether the disputed rates were proportional to the underlying costs. And several of the testifying experts at trial specifically indicated that, based on a review of the Township's audited financial statements, its cash inflows and outflows over the disputed period were proportional. Therefore, we are not definitely and firmly convinced that the trial court made a mistake when it found that plaintiff had failed to demonstrate disproportionality in the rates. [*Id.*, pp. 30-31.]

As to Plaintiff's request for injunctive relief, the court held:

We also conclude that the trial court abused its discretion by granting plaintiff a permanent injunction requiring the Township to document its ratemaking efforts in a specified fashion. "Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, *and there exists a real and imminent danger of irreparable injury*." *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992) (quotation marks and citation omitted; emphasis added). *See also Royal Oak Sch Dist v State Tenure Comm*, 367 Mich 689, 693; 117 NW2d 181 (1962) ("Equity should not be used to obtain injunctive relief where there is no proof that complainant would suffer irreparable injury."). Moreover, the party seeking injunctive relief has the burden of demonstrating that the requested injunction is

> appropriate and necessary. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 3; 753 NW2d 595 (2008); *Dutch Cookie Machine Co v Vande Vrede*, 289 Mich 272, 280; 286 NW 612 (1939). [*Id.*, p. 31.]

B. The Revenue Bond Act

The Court of Appeals rejected Plaintiff's claim under the Revenue Bond Act's free service provision, MCL 141.118(1), on the grounds that the Circuit Court "expressly found that the Township did, in fact, pay for the disputed PFP [Public Fire Protection] expenses by way of in-kind remuneration provided to the water and sewer fund." *Id.*, p. 32. The court also credited the testimony of the Township's expert and rejected the testimony of Plaintiff's expert because it was based on an "antiquated" methodology. *Id.*, p. 33.

C. MCL 123.141(3)

The Court of Appeals rejected Plaintiff's claim under the Service Outside Territorial Limits Act, MCL 123.141(3), based on its finding that Plaintiff had failed to rebut the presumption of reasonableness, which the court found to be a prerequisite for maintaining such a claim.

D. The Headlee Amendment

The Court of Appeals held that Plaintiff failed to satisfy two of the three Headlee factors. Regarding whether the charges served a regulatory purpose, the court held:

> Similarly, in this case, it is undisputed that the contested rates are assessed to fund the operational and capital expenses of the Township's water and sewer system, which serves the primary function of providing water and sewer services to the Township's ratepayers. Moreover, to the extent that those rates result in surpluses during some fiscal years, Domine indicated that the Township's 20-year capital improvement program was, at least in part, necessitated by the entry of an "abatement order" against the Township, which arose out of litigation with the DEQ and regarded the level of water "infiltration" in the Township's sewer system. Categorically, such obligations arising out of administrative-agency regulations serve a regulatory purpose. On the strength of the entire record, we hold that the Township's act of raising a prudent level of both revenue and capital and operational reserves through the disputed rates—including revenue to fund its OPEB obligations, the costs of providing fire protection services to the community, expenses related to the county storm-drain system, and necessary capital improvements—primarily serves valid regulatory purposes.

> Nor are we persuaded by plaintiff's contention that, because some who are not ratepayers may benefit from the water and sewer system, the disputed rates must be an improper tax. By way of example, although county storm-sewer systems certainly benefit the general public when viewed on a macro scale—e.g., by preventing roadways from flooding, limiting soil erosion and the pollution of waterways, and decreasing demand on regional wastewater-treatment facilities—the vast majority of governmental enterprises benefit the general public, rather than just one regional subset of the public, when viewed on such a scale. As in *Shaw*, plaintiff's proposed application of the first *Bolt* factor would effectively hamstring municipal utilities, preventing them from raising the funds necessary to comply with mandatory state and federal regulations if doing so will yield any sort of incidental benefit for society at large. In any event, viewing the disputed rates as a whole, we are persuaded that they primarily serve valid regulatory purposes under the first *Bolt* factor, which favors the determination that they are user fees rather than taxes. [*Id.*, p. 36.]

Regarding whether the charges were proportionate to the necessary cost of the service, the court held that Plaintiff had failed to carry her burden of proof because "on several occasions, the trial court expressly found that plaintiff had failed to demonstrate that the disputed utility rates were disproportionate to the underlying utility costs, and as already explained, we see no basis for disturbing that factual finding." *Id.*, p. 37. The Court of Appeals thus relied on the same "cash in versus cash out" analysis it applied in connection with the presumption of reasonableness, and concluded that because Plaintiff had not shown that the Township claimed to have collected revenue in an amount roughly equal to what it claimed to have spent, the Township's rates were proportionate.

The court agreed with Plaintiff that the charges were not voluntary, but this factor alone was not enough for Plaintiff to prevail on her Headlee claim:

> On this record, we conclude that use of the Township's water and sewer services cannot be viewed as "voluntary" for purposes of the *Bolt* inquiry. If a charge is "effectively compulsory," it is not voluntary. *Bolt*, 459 Mich at 167. With the exception of those sewer-only customers who have elected not to have a meter installed to track their actual well-water usage, it is technically true that the Township's water and sewer customers can avoid paying the variable portion of the disputed rates by refusing to use any water. But the fixed portions of those rates constitute flat-rate charges like those in *Bolt*, 459 Mich at 157 n 6, and such flat rates can only be avoided by not being a utility customer in the first instance. To the extent that the Township contends that the fixed rates are nevertheless voluntary because ratepayers can avoid paying them by moving elsewhere, that argument is

> unavailing. *See id.* at 168 ("The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property."). In light of *Bolt*, 459 Mich at 167-168, we conclude that at least the fixed portion of the disputed rates here—the most sizable portion—is effectively compulsory. Thus, the third *Bolt* factor weighs in favor of plaintiff's position. [*Id.*, p. 38.]

ARGUMENT

I. AS CONCEDED BY THE TOWNSHIP, THIS CASE PRESENTS ISSUES OF STATEWIDE PUBLIC IMPORTANCE AND THEREFORE JUSTIFIES THE CRITERIA FOR THIS COURT'S REVIEW.

This case presents a unique opportunity for this Court to address improper methods of municipal finance that are designed to evade limitations on municipal taxing power and impose unreasonable charges on users of municipal utility services. As the Township itself concedes, this case "involves a significant case of public interest." *See* Request for Publication, Exhibit C hereto.

In reversing the Circuit Court's judgment rendered after an extensive bench trial, the Court of Appeals panel in this case abdicated its responsibility to enforce limitations on the Township's wrongful financing practices and, in doing so, denied relief to a certified class of over 25,000 water and sewer customers in the Township.

The Court of Appeals panel in this case was unduly deferential to the rate-making practices of the Township and sanctioned ratemaking practices which would enable Michigan municipalities to impose virtually-unlimited rates with impunity. This appeal asks this Court to more precisely define the discretion municipalities possess in this area, and to enforce the power of the judiciary to invalidate Rates that (a) include expenses which constitute hidden taxes and (b) are arbitrary, capricious and/or unreasonable.

In particular, the Court should grant leave to decide three important issues:

(1) should the presumption of reasonableness that historically has been applied to municipal utility rates and charges continue to be applied by the Michigan Courts?

(2) if the presumption of reasonableness still applies in general, does the presumption apply specifically when determining whether a fee or charge constitutes an unlawful tax in violation of the Headlee Amendment and other limitations on municipal taxing power; and

(3) Assuming a presumption of reasonableness applies, what quantum of proof is necessary for a plaintiff to rebut the presumption and ultimately prove that a municipal utility's rates are "unreasonable"?

The outcome of this case will directly affect the rights of over 40,000 Michigan citizens and may indirectly affect the rights of virtually every other Michigan citizen. It is worthy of this Court's review. Indeed, this case meets virtually every criteria warranting review by this Court, including: (1) the issue has significant public interest and is against a subdivision of the State, MCR 7.302(B)(2); (2) the issues presented involve "legal principles of major significance to the state's jurisprudence," MCR 7.302(B)(3), and (3) the Court of Appeals decision "is clearly erroneous and will cause material injustice" to thousands of property owners in the Township. MCR 7.302(B)(5).

The Township clearly agrees that this case meets at least the "significant public interest" requirement of MCR 7.302(B)(2). Indeed, After the Court of Appeals issued its January 7, 2021 unpublished Opinion, the City asked the Court of Appeals panel, as authorized by MCR 7.215(D), to publish the Opinion. *See* Exhibit C hereto.[17] The City's publication request attacked Plaintiff's counsel and intimated that suits like these represent an existential threat to the ability of municipalities to effectively provide water and sewer services to their inhabitants. In its publication request, the Township argued:

[17] As of the date of the filing of this Application, the Court of Appeals has not yet ruled on the publication request.

> "The Township respectfully asserts that this case **involves a significant case of public interest,**" and "this is especially true in this case where counsel for Plaintiffs have made a 'cottage industry' out of threatening to and suing municipalities on issues essentially identical to the instant case." *Id.* at p. 1.
>
> "… these public utilities are 'regulated and used for the public benefit,' and thereby **this lawsuit meaningfully implicated the public interest**." *Id.*
>
> "… the public continues to have an increasing interest in the utility rates and ratemaking process." *Id.* at p. 2.
>
> "**Due to this action's significance to the public interest,** both the Michigan Municipal League ("MML") and the Michigan Township Association ("MTA"), representing municipalities and townships statewide, submitted an amicus brief supporting the Township's position." *Id.*
>
> "In short, since the governmental entities throughout the state represent the public, the Court's written Opinion in this case involves not only legal issues of significant interest to the Township, **but legal issues of significant public interest**." *Id.* (emphasis added).

For these reasons, and the reasons described more particularly below, the Court should grant Plaintiffs' Application for Leave to Appeal.

II. THE COURT SHOULD GRANT LEAVE TO DECIDE WHETHER THE "PRESUMPTION" OF REASONABLENESS SHOULD CONTINUE TO APPLY TO MUNICIPAL UTILITY RATES AND CHARGES

This case turned largely on the lower courts' application of the "presumption" of reasonableness that historically has been applied to municipal utility rates and charges. *See, e.g.*, *Novi v Detroit*, 433 Mich. 414, 428-429; 446 N.W.2d 118 (1989). In its Opinion, the Court of Appeals suggested that the Circuit Court had refused to apply the presumption of reasonableness because the Township had not provided sufficient detail about its ratemaking process:

> The court described that presumption as a "substitute for reason" and an exercise in "thoughtless thoughtfulness," at least as applied here; suggested that Novi and Trahey are outdated, having relied on caselaw from "1942 and 1943"; and indicated that application of the presumption of reasonableness in this case would "bastardize the presumption" and "absolutely, necessarily, unequivocally transform it into an unrebuttable presumption[.]" In support, the trial court reasoned that "[i]t is clear from a reading of the law that a presumption exists once the details are on the table for all to see. First comes the details, then comes the presumption."

Plaintiff disagrees with the Court of Appeals' characterization of the Circuit Court's treatment of the presumption. In Plaintiff's view, the Court deemed the presumption rebutted because the Township had obfuscated the evidence relevant to the application of the presumption. But whether the Circuit Court failed to apply the presumption or deemed the presumption rebutted, the presumption itself is unwarranted. For the reasons discussed below, Plaintiff respectfully submits that the lower courts have misapplied the presumption, and requests that the Court grant the application for leave in order to consider whether that presumption should even continue to apply.

A. The Unique Status Enjoyed By Municipal Utilities Justifies Heightened, Not Diminished, Judicial Scrutiny

In plaintiff's view, the lower courts have used the presumption of reasonableness as a justification for abandoning any meaningful review of municipal utility rates. But judicially-imposed limitations on these municipal powers are vital for the following reasons: In Michigan, municipal water and sewer utilities, which essentially operate as businesses, enjoy three distinct advantages virtually unheard-of in the private sector: (1) they enjoy absolute monopolies over the market for their services, (2) their customers must purchase those services and (3) their prices are completely unregulated by any governmental agency. These governmental units provide essential services to their inhabitants with no competition. Customers have no realistic alternative. Residents whose homes and businesses are serviced by the Township's water and sewer lines are required to hook up to those facilities. As a result, people who want to use their showers, sinks and toilets must pay the Township for that "privilege." As Justice Markman observed (in his dissent to the COA's original decision in *Bolt* that was later adopted in substantial part by the majority in *Bolt*):

> **City ordinances mandate that all property owners connect to the sanitary sewer** and it does not seem unreasonable to assume that Ordinance 925 will eventually be amended to impose the same requirement with respect to the newly separated storm sewer system. **The use of such indispensable services cannot be considered a matter of choice when there is a municipal monopoly and**

> **mandate over them**. The property owner wishing not to use the service, or to use another service, has no alternatives. **The charge is effectively compulsory**. [221 Mich. App. at 97 (emphasis added)]

Indeed, even the Court of Appeals ultimately held that the Township's Water and Sewer Charges were not voluntarily incurred or paid.

The Township is allowed its monopoly, but various state laws governing water and sewer rates place clear and reasonable limits on the Township's right to charge for the services. The trade-off is that a municipal utility is required to set Rates at a level that recovers no more than its actual "cost of service." Simply, the Township is not Apple Inc., tasked with maximizing the profits for its shareholders in the face of price competition from well-financed rivals like Dell, HP and Toshiba. Instead, the Township is required to impose Rates that are designed to pay for the current expenses properly associated with its water and sewer function, and no more. Unfortunately, the Township has disregarded this fundamental principle of municipal rate-making, to the detriment of tens of thousands of its citizens.

In stark contrast to the environment enjoyed by municipal utilities like those operated by the Township, regulated utilities, like DTE Energy and Consumers Power, have to answer to the Michigan Public Service Commission ("PSC"). The PSC is there to vigorously ensure, on an ongoing basis, that the regulated utilities recover their "cost of service," and not a penny more. By law, DTE and Consumers have to continually convince the PSC that their rates are fair and reasonable. In *Bolt*, the Court recognized that rate-making principles applicable to regulated utilities could be applied by analogy to municipal utilities. *See Bolt*, 459 Mich. at 164.

On this point, the Court of Appeals recently observed the following:

> "In very general terms, the [Public Service Commission] compares an electric utility's revenues to its costs, "reconciles" the two, and permits the electric utility to adjust its rates accordingly. *See Attorney General v Pub Service Comm*, 237 Mich App 27, 30; 602 NW2d 207 (1999). **If the utility collected more revenue than its costs, it must refund or credit the excess to its customers**. MCL 460.6j(14) and (16). If it collected less revenue than its costs, it may recover the difference from its

> customers." MCL 460.6j(15) and (16)" [*In re Application of DTE Energy Company For Reconciliation of 2015*, Case No. 339557 (December 6, 2018) (emphasis added)]

It also bears noting that municipal water and sewer utilities in Michigan are completely unregulated. *See* Mich. Comp. Laws § 460.6; *Novi v. Detroit*, 433 Mich. 414, 429, 446 N.W.2d 118 (1989). Therefore, only the Michigan courts, aided by private litigants, are empowered to place limits on their ability to recognize monopoly profits. Without suits like these, municipal utilities can charge whatever they like and that is why the Township is so hell-bent on defeating this case and preserving its monopoly. And that is why we are here.

In Plaintiffs' view, the Headlee Amendment and other statutory and common law limitations on governmental taxing power and municipal utility ratemaking are vital because the government is endlessly creative in its attempts to separate citizens from their money. As Justice Marshall of the U.S. Supreme Court pointed out 200 years ago, "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431; 4 L. Ed. 579 (1819). This case seeks to enforce those limitations, but the presumption of reasonableness, which has been given nearly dispositive weight by the lower courts, effectively forecloses review by the only branch of government with the power to prevent the abuse of the monopoly power possessed and wielded by municipal utilities.

Also, it is significant that, in operating a water and sewer utility, a municipality is acting in a proprietary, and not a governmental, capacity. As the Court of Appeals recently held in *Boler v. Governor*, 324 Mich. App. 614, 923 N.W.2d 287 (2018), a case arising out of the Flint water crisis:

> With respect to waterworks in particular, the Home Rule City Act, MCL 117.1 et seq. authorizes a municipality to provide for the installation and connection of sewers and waterworks in its charter. MCL 117.4b. **The operation and maintenance of waterworks is generally found to be a proprietary or private function of a municipality as opposed to a governmental function**. Exceptions, as always, do exist, but they are easily identifiable. "Although a city may in the construction, operation and maintenance of a water works system be acting, under certain factual circumstances, in a governmental capacity, as a general proposition the weight of authority is to the effect that in engaging in such an enterprise the city acts in a proprietary or private capacity." *Taber v. City of Benton Harbor*, 280 Mich. 522, 525, 274 N.W. 324 (1937). The cases cited in *Taber* were out-of-state cases and only

one, *Miller Grocery Co v. Des Moines*, 195 Iowa 1310, 192 N.W 306 (1923), set forth a factual situation in which maintenance of a waterworks was deemed a governmental function.

In *Miller*, the court held that a municipality, acting in a governmental capacity, had the right to maintain and operate waterworks for the purpose of fire protection and also had the right, in its proprietary capacity, to operate waterworks to distribute water to citizens and receive money for the same. *Id.* at 307. The majority of cases cited in *Taber* reiterated that a municipality supplying water to its citizens did so in a proprietary function. *Taber*, 280 Mich. At 525. *See Woodward v. Livermore Falls Water Dist.*, 116 Me. 86, 100 A. 317 (1917) (holding that a municipal corporation engaged in the business of supplying water to its inhabitants was engaged in an undertaking of a private nature because it entered into an enterprise that involved the ordinary incidents of a business wherein it sold what people desired to buy and that might become a source of profit); Canavan v. City of Mechanicville, 229 NY 473, 476, 128 N.E 882 (1920) ("While the business of maintaining a municipal water system and supplying water to private consumers at fixed compensation is public in its nature and impressed with a public interest, it is not an exercise of governmental or police power. A municipal corporation in aggregating and supplying water for the extinguishment of fires discharges a governmental function. In operating a water works system, distributing water for a price to its inhabitants, it acts in its private or proprietary capacity, in which it is governed by the same rules that apply to a private corporation so acting.").

What is gleaned from these cases is that **if a municipality is supplying a utility—or specifically, waterworks—to its citizens and the citizens are paying for the waterworks, the municipality is operating the waterworks as a business, and it is doing so as a businessman or corporation**, not as a concern of the state government or as the arm of the state. It is, after all, serving only a limited number of people within its boundaries, not the state as a whole. If, on the other hand, the municipality is supplying water for the purpose of protecting its citizens from fire or natural disaster or anything else that has the potential to have statewide impact and it is not profiting from the provision of that water, it could be deemed to be serving a government function and serving the public in general. Then the municipality could be deemed to be acting as an arm of the state in maintaining and operating waterworks.

Taking all of this into account, we conclude that the city of Flint was not acting as an arm of the state when operating its waterworks. Historically, a municipality's provision of drinking water to its citizens—which is precisely the issue here—was not considered a government function because the municipality was acting in its role as a proprietor, and not in a governmental capacity. And, with the enactment of the Home Rule City Act and the adoption of the 1963 Constitution, municipalities were provided with even more power and control over activities such as providing utilities or services to their populations. The city has provided no persuasive argument or binding authority to indicate that the city was acting as an arm of the state when operating its waterworks. The Court of Claims therefore did

> not have exclusive jurisdiction over plaintiffs' claims against defendants. [324 Mich. App. at 624-25 (emphasis added)].

As the courts have recognized, municipalities like the Township operate their water and sewer utilities as businesses. Yet, they legally are only allowed to recover the "actual costs of service" as opposed to making a profit. Plaintiff submits that the proprietary nature of the activity here further justifies abandonment of the presumption which hampers judicial review of municipal utility rates and charges. Actions taken by a municipality in furtherance of its governmental functions are far more worthy of judicial deference than those taken in furtherance of its business activities in providing water and sewer service to its inhabitants.

B. The Historical Justifications For The Presumption Are Not Compelling

The principal reasons the Courts have historically applied a "presumption" of reasonableness were summarized by this Court in *Novi v Detroit*, 433 Mich 414, 428-429; 446 NW2d 118 (1989):

> [R]ate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates. * * * Michigan courts, as well as those in other jurisdictions, have recognized the longstanding principle of presumptive reasonableness of municipal utility rates. These courts have stressed a policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates. …
>
> 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.

For the reasons discussed below, however, these historical rationales for the presumption do not justify the continued application of the presumption.

1. Justification 1: Ratemaking Is A Legislative Function

The presumption of reasonableness has its basis in part in the Courts' view that ratemaking is a legislative act. Therefore, ratemaking that is not legislative in nature should not be entitled to a presumption of validity. Bloomfield Township establishes rates through resolutions, not

ordinances. That means the "legislative function" justification for the presumption of reasonableness should not apply.

The Michigan courts have long recognized that where a municipality acts pursuant to a resolution and not an ordinance, the municipality's acts are not legislative in nature: In *Saginaw Intermediate Sch. Dist. v. Coleman Cmty Schools*, 2007 Mich. App. LEXIS 2593 (2007), the Court summarized these long-standing principles as follows:

> "Furthermore, under the circumstances, the resolution itself was a legally binding commitment. "Boards of education, like other corporate boards, execute their powers at meetings lawfully called and held unless otherwise authorized by statute." *McLaughlin v Bd of Ed of Fordson School Dist of City of Dearborn*, 255 Mich. 667, 670; 239 NW 374 (1931). The August 16, 2000, resolution states that it was adopted at a regular meeting of the Coleman Board of Education. Such a meeting may be considered a quasi-legislative proceeding, *Kefgen v Davidson*, 241 Mich. App. 611, 619; 617 N.W.2d 351 (2000), and an act of legislation by one legislature cannot bind future legislatures. *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich. 702, 713; 664 N.W.2d 193 (2003). However, a resolution is not actually in the nature of legislation. "A resolution is the form in which a legislative body expresses a determination or directs a particular action. It is of a special or temporary character, whereas an ordinance prescribes a permanent rule for the conduct of government." *Duggan v Clare Co Bd of Comm'rs*, 203 Mich. App. 573, 576; 513 N.W.2d 192 (1994). "The nature of the act, not its effect, determines whether an action by the legislative body of a county may be accomplished by resolution rather than by ordinance." *Id.* In *Duggan*, a contract for the sale of land was special or temporary in nature, and it was therefore appropriate for the county to enter into it by a resolution. In other words, "a resolution is not a law or an ordinance but merely the form in which a legislative body expresses a determination or directs a particular action." *Kalamazoo Muni Utilities Ass'n v City of Kalamazoo*, 345 Mich. 318, 328; 76 N.W.2d 1 (1956)." [emphasis added]

And even if the ratemaking is a legislative function, there is no reason to defer to the ratemaking determinations of municipal utilities, which in virtually all cases lack the institutional expertise of a regulatory agency, like the PSC. A rate order from the PSC is entitled to significant judicial deference because the PSC has the recognized expertise in evaluating utility rates and charges. As this Court observed in *Ameritech Mich. v. Public Service Commission*, 460 Mich. 396, 427, 596 N.W.2d 164 (1999):

> To declare an order of the commission unlawful there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion in the exercise of its judgment. [*Giaras v Public Service Comm*, 301 Mich. 262, 269; 3 N.W.2d 268 (1942).] The hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or "zone" of reasonableness within which the PSC may operate. *Michigan Bell Telephone Co v Public Service Comm*, 332 Mich. 7, 26-27; 50 N.W.2d 826 (1952).

The deference accorded to PSC rate determination is warranted, because the PSC is a regulatory agency populated with learned professionals tasked with making sure regulated utilities do not overcharge their customers. Yet, when the presumption is applied to municipal utility rates that are unregulated by the PSC, a rate determination by a municipality is accorded essentially the same judicial deference as a rate order issued by the PSC. That deference is unwarranted where, as here, there is no reason to believe that the municipality has any particular expertise in ratemaking. Indeed, the Township's rate methodology here was so amateurish and nontransparent that the Circuit Court found it virtually impenetrable and indecipherable.

2. Justification 2: Courts Are "Ill-Equipped" To Deal With Municipal Rate Challenges

The other historical reason the presumption has been applied is that courts allegedly 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." So what? Courts are "ill-equipped" to decide a variety of complex factual issues without the assistance of expert witnesses. For example, there can be no reasonable debate that the average trial judge is "ill-equipped" to decide a personal injury birth trauma case. Yet, that does not result in deference toward the actions of the defendant physician, nor does it justify a presumption that physician acted reasonably in any particular case or otherwise limit the trial court's ability to adjudicate the case. As in this case, expert witnesses learned in the relevant speciality provide opinion testimony that guides the trial court in understanding complex facts.

In sum, there are compelling reasons for this Court to reassess the wisdom of "presuming" municipal utility rates are "reasonable." Accordingly, Plaintiff requests that the Court grant leave to enable that reassessment.

C. Should The Presumption Trump The Headlee Amendment?

Assuming the presumption of reasonableness has continuing vitality in general, the Court should grant the application to decide if the presumption applies to municipal charges that constitute unlawful taxes in violation of the Headlee Amendment and other limitations of municipal taxing authority.

There are compelling reasons for the Court to refuse to apply the presumption in "tax" cases. First of all, as discussed below, the test for determining whether a charge is a tax is simply different that than the test for determining whether a charge is unreasonable. As the Court of Appeals has observed: even if a municipality's Water and Sewer Charges are not taxes, they must still be "reasonable." *Mapleview Estates v. City of Brown City*, 258 Mich. App. 412 (2003).

In *Bolt,* the Court, in enforcing the Headlee Amendment, identified "three primary criteria to be considered when distinguishing between a 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) payment of the fee is voluntary. 459 Mich. at pp. 161-62.

It is clear that municipal utility charges can constitute taxes to the extent that they exceed a municipality's actual cost of providing the utility service. In *Bolt*, the Michigan Supreme Court specifically rejected the assertion that charges for sanitary sewers are "always user fees." 459 Mich. at 162. Instead, the Court held that sewerage can properly be viewed "as a utility service for which usage-based charges are permissible, and not as a disguised tax," **only** where "**the charge for … sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component**." *Id* at p. 164-64

(emphasis added). The Court recognized that "where revenue generated by a regulatory 'fee' exceeds the cost of regulation, the 'fee' is actually a tax in disguise." *Id.* at 164, n. 14 (quoting *Gorney v. Madison Heights*, 211 Mich. App. 265, 268, 535 N.W.2d 263 (1995)).

Notably, there is not a whisper in the *Bolt* opinion that would suggest that the Court was applying a presumption of reasonableness to the City of Lansing's Stormwater Charges. This is probably because, while the issue of reasonableness is typically one of fact, *Bolt* specifically held that whether a charge constitutes a "tax" is an **issue of law** for the Court. *Bolt*, 459 Mich. at 158. Presumptions, however, are applicable to **issues of fact.** *See Mich. Aero Club v. Shelley*, 283 Mich. 401, 410; 278 N.W. 121 (1938) ("Presumptions are frequently misapplied. They are merely prima facie precepts. . . . They are inferences from the existence or nonexistence of facts. . . . They disappear if, and when, evidence is introduced from which facts may be found . . . and cannot be weighed against evidence") (citations omitted). Therefore, it is absurd to talk about applying a presumption in resolving an issue of law. *See* MRE 301 ("**a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption** . . .") (emphasis added); *Isabella Cty. Dep't of Soc. Servs. v. Thompson*, 210 Mich. App. 612, 615; 534 N.W.2d 132 (1995) (a presumption is a procedural device that regulates the **burden of proceeding with the evidence**. . . . The presumption is dissipated, however, once substantial evidence has been submitted by its opponent.") (emphasis added).

Moreover, according the "presumption of reasonableness" to charges challenged under Headlee would undermine the broad, remedial purposes of that constitutional amendment. As the *Bolt* Court observed:

> The Headlee Amendment "grew out of the spirit of 'tax revolt' and was designed to place specific limitations on state and local revenues. The ultimate purpose was to place public spending under direct control." *Waterford School Dist v State Bd of Ed,* 98 Mich. App. 658, 663; 296 N.W.2d 328 (1980). More recently, this Court has stated,

> The Headlee Amendment was "part of a nationwide 'taxpayers revolt' . . . to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level." *Airlines Parking, Inc v Wayne Co*, 452 Mich. 527, 532; 550 N.W.2d 490 (1996). [*Bolt*, 459 Mich. at 160-161]

Clearly, the purpose of the Headlee Amendment was not to give municipalities the "benefit of the doubt" that is accorded by a presumption of reasonableness. Instead, the Amendment was intended to keep their feet to the fire, so to speak, as it relates to creative methods of municipal finance. This is yet another reason why the presumption of reasonableness has no place in Headlee jurisprudence.

III. THE COURT SHOULD GRANT LEAVE TO DICTATE THE QUANTUM OF PROOF NECESSARY TO DEMONSTRATE THAT A MUNICALITY'S UTILITY RATES ARE UNREASONABLE[18]

A. Question 1: How Does A Plaintiff Rebut The Presumption?

The Court of Appeals gave almost dispositive weight to the presumption that the Township's rates are reasonable under *Trahey v. City of Inkster*, 311 Mich. App. 582, 594; 876 N.W.2d 582 (2015). But, assuming the presumption has continued vitality, how should that presumption properly be applied?

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[18] Throughout this Application, Plaintiff's reference to the requirement that rates be reasonable means that the rates cannot be "arbitrary, capricious or unreasonable." *See, e.g., City of Plymouth v City of Detroit*, 423 Mich 106, 133; 377 NW2d 689, 701 (1985), citing *City of Detroit v City of Highland Park*, 326 Mich 78, 92; 39 NW2d 325, 330 (1949). This Court has stated that "arbitrary" and "capricious" have generally accepted meanings and wrote that Arbitrary is: [W]ithout adequate determining principle * * * [f]ixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, * * * decisive but unreasoned. Capricious is: [A]pt to change suddenly; freakish; whimsical; humorsome. [*Goolsby v City of Detroit*, 419 Mich 651, 678; 358 NW2d 856, 870 (1984) Page 7 (internal quotations omitted), citing *United States v Carmack,* 329 US 230, 246 n 14; 67 S Ct 252, 260; 91 L Ed 209 (1946).] Additionally, Black's Law Dictionary defines arbitrary as "[d]epending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedure" and "capricious" as "contrary to the evidence or established rules of law." ARBITRARY, Black's Law Dictionary (10th ed. 2014); CAPRICIOUS, Black's Law Dictionary (10th ed. 2014).

We do know this: a presumption has no weight as evidence; all Plaintiff must do is introduce evidence to rebut the presumption and it evaporates, leaving the Court with the ordinary task of weighing the evidence. The definition of a "presumption," is something the court must "suppose to be true without proof". *Sandstrom v. Montana*, 442 U.S. 510, 517; 99 S. Ct. 2450, 2455 (1979). Presumptions are rebuttable with evidence. *See Mich. Aero Club v. Shelley*, 283 Mich. 401, 410; 278 N.W. 121 (1938) ("Presumptions are frequently misapplied. They are merely prima facie precepts. . . . They are inferences from the existence or nonexistence of facts. . . . They disappear if, and when, evidence is introduced from which facts may be found . . . and cannot be weighed against evidence") (citations omitted); *Gillett v. Michigan United Traction Co.*, 205 Mich. 410, 414; 171 N.W. 536 (1919) ("It is now quite generally held by the courts that a rebuttable or prima facie presumption has no weight as evidence. It serves to establish a prima facie case, but if challenged by rebutting evidence, **the presumption cannot be weighed against the evidence.** Supporting evidence must be introduced, and it then becomes **a question of weighing the actual evidence introduced, without giving any evidential force to the presumption itself**.") (emphasis added).

The Court should grant the application and not only reaffirm these general principles, but also apply them specifically to cases challenging municipal water and sewer rates and charges. Absent clear guidance from this Court, the lower courts are apt to continue to misconstrue the "presumption" and immunize those rates and charges from meaningful challenges.

In addressing the presumption, Plaintiff submits that the Court consider the following procedure adopted by the Virginia Supreme Court and described in *Town of Leesburg v. Giordano*, 280 Va. 597, 701 S.E.2d 783 (Va. 2010):

> Where presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness. If evidence of reasonableness is sufficient to make the question fairly debatable, the [legislative action] 'must be sustained'. If not, the evidence of unreasonableness defeats the presumption of reasonableness and the [legislative action] cannot be

sustained. [280 Va. At 605-606 (quoting *Board of Supervisors v. Robertson*, 266 Va. 525, 533, 587 S.E.2d 570 (2003)]

Under this standard, a plaintiff challenging the Rates must come forward with evidence that the contested Rates are unreasonable. If plaintiff does so, the municipality must provide "some evidence of reasonableness" sufficient to make the issue "fairly debatable."[19] If it does not, plaintiff meets its burden.

As applied here, the Circuit Court clearly held that plaintiff had come forward with evidence that the Township's Rates were unreasonable because they failed to take into account the Non-Rate Revenue, the Sewer-Only Revenues, and the Township's own water use. The Circuit Court also necessarily found that the Township, due to its inept record-keeping and documentation practices, had failed to provide "some evidence of reasonableness." Accordingly, under the standard advocated by Plaintiff here, Plaintiff clearly met her burden to rebut the presumption.

B. Question 2: What Evidence Suffices To Allow A Court To Find That The Rates And Charges Are Unreasonable?

1. The Conflicting Standards Employed By Various Panels Of The Court of Appeals

The Court of Appeals has issued conflicting opinions as to what a plaintiff must ultimately prove to invalidate municipal utility charges as unreasonable. In *Trahey v. City of Inkster*, 311 Mich. App. 582, 595; 876 N.W.2d 582 (2015), the only published Court of Appeals opinion on the subject, the Court held that the determination of 'reasonableness' is generally considered by courts to be a question of fact." In *Trahey*, the Court of Appeals affirmed the following principles:

1. Plaintiff meets its burden of proof by showing that "any given rate **or** ratemaking practice is unreasonable." *Id*; and
2. Plaintiff meets its burden of proof by providing "**clear evidence of illegal or improper expenses included in a municipal utility's rates**." *Id.* at p. 595.

[19] The *Town of Leesburg* Court stated that "an issue is fairly debatable 'when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions.'" 280 Va. at 606.

In *Trahey*, the plaintiff claimed that the city was financing certain general fund obligations through water rates. The Court of Appeals entire analysis was devoted to determining whether there was sufficient evidence of that practice. The Court did not conduct any analysis of the reasonableness of the "overall" rates, instead focusing on whether plaintiffs had proven that the rates were generating revenues that were being transferred to the city's general fund. *See Trahey,* 311 Mich. App. at p 595 ("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.")

Again, *Trahey* allows a plaintiff to meet its burden in one of two ways: (1) provide evidence that the "given rate" is unreasonable or (2) provide evidence that a given "ratemaking practice" is unreasonable. Given these alternatives, clearly one can meet its burden without demonstrating that the overall "given rate" is unreasonable, provided Plaintiff shows that the ratemaking practice is unreasonable. And *Trahey* confirms that a plaintiff shows that a ratemaking practice is unreasonable if it presents "clear evidence" that the rates contain "improper or illegal expenses." Plaintiff amply provided facts which, at the very least, create a genuine issue of material fact as to whether the Township's rates contain "improper or illegal expenses."

In contrast to *Trahey*'s binding authority, other panels of the Court of Appeals, including two unpublished decisions that are the subject of applications for leave which remain pending in this court, have required a plaintiff to establish that the "overall" rates are unreasonable. In one of the cases, *Deerhurst v. City of Westland,* COA Case No. 339143, plaintiff challenged multimillion dollar transfers the city annually made from its Water and Sewer Fund to its General Fund, purportedly for services provided by the General Fund departments to the water and sewer utility. The Court of Appeals held that, viewing the evidence in a light most favorable to plaintiffs, a "question of fact" existed regarding the propriety of the particular allocations of administrative costs identified by

Plaintiffs, noting that "the City effectively conceded that there were errors in its cost allocation when it presented proposed testimony regarding a revised cost allocation study." Westland COA Opinion, Exhibit D hereto, p. 5. The Court of Appeals, however, disagreed that the questions regarding specific administrative costs ***by themselves*** precluded summary disposition and determined that Plaintiffs' failed to present evidence that the City's ***overall*** allocation of administrative costs to the water and sewer department was unreasonable and thus, Plaintiffs failed to meet burden required to establish the unreasonableness of the City's Rates. *Id.*, p. 5 (emphasis added).

The Court of Appeals took specific issue with the evidence Plaintiff presented regarding the reasonableness of the City Rates, criticizing the fact that Plaintiffs' expert did not do a full cost allocation plan in analyzing administrative expenses allocated to the water & sewer department or analyze the reasonableness of the City's overall Rates in light of the department's revenue requirements by conducting a rate study. *Id.*, p. 5. The Court of Appeals observed that "Plaintiffs have not "explained" how incorrect or improper administrative cost allocations in and of themselves renders the City's water and sewer rates unreasonable." *Id.*, p. 5 (emphasis added). Further noting that Plaintiffs claims may not proceed solely on the basis of certain selected individual expense components that they have chosen to address **without a broader evaluation of whether such allegedly improperly estimated expenses in the City's original budget (1) resulted in an unreasonable variance from the actual overall costs and (2) affected the reasonableness of the Rates.** *Id.* (emphasis added). Ultimately determining that without a "more universal analysis, **plaintiffs failed to provide an evidentiary basis from which to conclude that the amount of the department's administrative costs renders the City's water and sewer rates unreasonable."** *Id.* (emphasis added). The Court of Appeals also criticized Plaintiff for citing "no authority to support what would be a form of active court oversight that would amount to an exacting level of judicial auditing of only those individual expenses… that a plaintiff chooses to

challenge without respect to the "overall cost allocation is reasonably accurate." COA Opinion, pp. 5-6.

Similarly, in *Bohn v. City of Taylor*, COA Case No. 339306, the Court sanctioned the "reasonableness" of the City of Taylor's water and sewer rates with the startling observation that "[t]he City is not required by law or ordinance to adhere to any ratemaking approach. Nor must the City abide by any particular ratemaking manual or guideline." Taylor COA Opinion, Exhibit E hereto, p. 3 [emphasis added].[20] What, then, are the limits? Are there any limits? May a municipality simply devise its own ratemaking methodology in a vacuum and expect that the courts will accept it as proper?

Though the Court of Appeals acknowledged that the City should not be allowed to accomplish a "double recovery" by counting a single expense (depreciation) twice in determining its revenue requirements, and further acknowledging that City included debt service payments as a budgeted expense in its sewer rates analysis, the Court of Appeals nevertheless concluded that Plaintiff had not provided evidence showing that the debt service payments were related to the depreciated items or that the City otherwise received a double recovery for depreciation expense. *Id.*, p. 4. Accordingly, the Court of Appeals found that Plaintiff failed to present "specific evidence" that would give rise to a factual dispute regarding the depreciation expense nor "clear evidence" that the "inclusion of depreciation costs in the City's sewer rates was improper or that this practice renders those rates unreasonable." *Id.*, p. 4

[20] These statements alone should cause this Court concern. Municipalities are not free to charge willy-nilly for water and sewer service—they are absolutely required to adhere to reasonable rate-making standards, laws and guidelines. In fact, in *Bolt*, this Court held that sewer charges are properly considered user fees and not taxes only where the charges reflect the "actual cost of service, metered with relative precision in accordance with available technology, **including some capital investment component**." *Bolt* at p. 164-64.

Similarly, the Court of Appeals dismissed Plaintiff's challenge to the City's excessive reserves held in its Sewer Reserve Fund by rejecting Plaintiff's argument that the City must have a specific plan for capital improvements and that without such a plan, the fund's existence is evidence that the rates are excessive. *Id.*, p. 4. The Court of Appeals stated it "did not see how the lack of a capital improvement plan rendered the accumulation of a reserve fund improper" and further opined that Plaintiff did not provide any authority (legal or otherwise) to support this contention, and held that Plaintiff failed to proffer any evidence regarding much money should actually be in the City's sewer fund nor had shown that the amount of the City's sewer reserve fund is unreasonable per se. *Id.* In sum, the Court of Appeals held that "in the absence of a complete study of the rate structure and all of its components, it is speculative to suggest that the City's sewer rates are unreasonable." *Id.*, p. 5.

Relying upon its reasoning that the Plaintiff had failed to "overcome the presumption that the City's rates are reasonable," the Court of Appeals in *Taylor* also determined that there was "no basis from which to conclude that those rates are not proportionate to the cost of service" and held that the rates "constitute a valid user fee because users pay their proportionate share of the expenses associated with the operation and maintenance of the sewer systems." *Id.*, p. 6. The Court of appeals specifically rejected Plaintiff's claim that the rates are disguised taxes, reasoning that the City incorporates costs in its sewer rates in order to fund future capital improvements. *Id.* The Court of Appeals ultimately held that Plaintiff had not demonstrated a genuine issue of material fact in support of his claims alleging violations of the Headlee Amendment and MCL 141.91 and affirmed the trial court opinion granting summary disposition to the City pursuant to MCR 2.116(C)(10). *Id.*

In this case, the Court of Appeals – in stark contrast to *Trahey* -- rejected Plaintiff's argument that municipal water and sewer rates can be unreasonable merely by demonstrating that the rate-making methodology was improper irrespective of whether the rates generated excessive amounts of cash. The Court accepted the Township's argument that the use of an improper rate-making

methodology was not alone sufficient to demonstrate that the resulting rates were unreasonable, and that a plaintiff must show that the rates "viewed as a whole" generated revenues that were "excessive:"

> In any event, the heart of the parties' dispute regards the manner in which the rule of law set forth in *Trahey* should be applied. Specifically, citing in support *Trahey*, 311 Mich App at 595 ("[a]bsent 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") (emphasis added), plaintiff argues that in a ratepayer challenge like the one at bar (i.e., one pursued under MCL 123.141(3)), if a plaintiff does present clear evidence of either illegal or improper expenses included in a municipal utility's rates, the presumption of reasonableness is no longer a relevant consideration—that is, the plaintiff need not also demonstrate that the rates, viewed as a comprehensive whole, are unreasonable. Put differently, plaintiff argues that Trahey stands for the proposition 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. **In stark contrast, the Township argues that, under *Trahey*, even if a specific expense that is included in formulating a challenged municipal utility rate is shown to be either illegal or improper, the plaintiff nevertheless bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed as a whole. In other words, the Township argues that absent a showing that the disputed rates actually overcharged plaintiff and the plaintiff class for the related water and sewer services, plaintiff's challenge to those rates—and her request for monetary "damages" in particular—is fatally flawed. We agree with the Township**.
>
> In our view, the flaw in plaintiff's argument rests less on a textual dissection of Trahey than it does on the fundamental nature of plaintiff's equitable "assumpsit" claims. "[E]quity regards and treats as done what in good conscience ought to be done." *Allard v Allard (On Remand)*, 318 Mich App 583, 597; 899 NW2d 420 (2017) (quotation marks and citation omitted). Had plaintiff sought a declaratory judgment that certain costs included in the disputed water and sewer rates were improper or illegal, perhaps she would be correct that the presumption of reasonableness would be irrelevant. Instead, however, by asserting her claims for assumpsit, plaintiff sought "restitution"—in the form of a refund to herself and the plaintiff class—of whatever amount was necessary to "correct for the unfairness flowing from" the Township's "benefit received," i.e., its "unjust retention of a benefit owed to another." See *Wright*, 504 Mich at 417-418, 422-423. **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**. *See id.* at 419 ("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 correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party

who yielded excessive and unjust benefits to his or her rightful position.") [Exhibit A hereto at pp. 29-30 (emphasis added).]

The heart of the Court of Appeals' analysis of the reasonableness issue is the notion that Plaintiff needed to cross two distinct hurdles in order to prevail at trial: (1) rebutting the presumption of reasonableness by showing clear evidence of unlawful **components** in the Rates and (2) proving by clear and convincing evidence that the Township's **overall** rates were disproportionate to its costs and were thus unreasonable.

2. The Court Should Reject The "Overall" Reasonableness Requirement Imposed By The Court of Appeals Panel In This Case.

There are good reasons to reject the requirement that the "overall" Rates or the Rates "viewed as a whole" be excessive. First, this Court has specifically held that a plaintiff can satisfy its burden by showing that "any given rate or ratemaking practice is unreasonable." *City of Novi*, 433 Mich at 432-433. *Trahey* properly relied upon this precedent. For this same reason, vertical stare decisis does not save the Township here, because *Trahey* does not conflict with *Novi*. Including an improper component in rates **is** an unreasonable "ratemaking practice".

Second, improper or unreasonable rate components clearly can result in unreasonable charges to utility customers even if the plaintiff cannot show that the "overall" rates are unreasonable. During her cross-examination of the Township's expert Bart Foster, Plaintiff illustrated her argument about Non-Rate Revenue with an extreme example – what if the Township put $1 million in the Rates to build a vacation home for the use of the Township's Board members? *See* Trial Trans. 2/26/18, Appx. 25, pp. 58-61. If the vacation home expense increased the revenue requirement from $26 million to $27 million, a 3.8% increase, that increase might not be enough to make the overall Rates disproportionate to cost. But Mr. Foster agreed that it would nevertheless be inappropriate to put $1 million in the Rates for the non-water and sewer related purpose of building a vacation home for the Board. *Id.* The inclusion of the $1 million cost of a vacation home, in and

of itself, would be improper. *Id.* The various cost components at issue here are not as obviously improper as an expense for a vacation home. But ultimately they are no different. They are improper expenses, and under *Trahey* – a case which bound the Circuit Court and which binds this Court under rules of stare decisis – their inclusion in the Rates makes the Rates unreasonable, regardless of whether the Township's overall water and sewer revenues matched its overall water and sewer expenses.

Third, a simplistic "cash-in/cash-out" approach such as that employed by the Court of Appeals here would immunize municipal utility charges from scrutiny even if the municipality's rates were loaded with improper expenses, like the Township's Rates here. This approach assumes that all costs included in the Rates are appropriate and is particularly inappropriate here where Plaintiff demonstrated a whole host of improper costs that were included in the Rates.

For example, at trial both parties **agreed** that it would be unlawful for the Township not to account for Non-Rate Revenue. *See* Trial Trans. 2/23/18, Appx. 24, p. 65 (Township expert Heffernan: "Q. And you would agree with me that if you're determining how much to recover through a rate, a commodity rate or a fixed charge or something, you would deduct the non-rate revenues from the total expenses to determine the rate? A Yes."); Trial Trans. 2/9/18, Appx. 26, p. 196 (Finance Director Theis: "Q. . . . you say you're taking non-rate revenue into account. That's because you concede that you need to, to properly determine the rates, right? A. You should consider it. . . . It's a form of revenue."). As described above, Plaintiff's expert Kerry Heid demonstrated, using the Township's own records, that the Township had not in fact accounted for Non-Rate Revenue.

Moreover, the "cash-in vs. cash-out" argument completely breaks down when one considers that the Township improperly inflated the "cash out" by paying certain expenses (the cost of water that was not ultimately consumed by the Township's water customers) through water and sewer

rates that should have been paid from other sources. As the Circuit Court found, the Township improperly included over $3.6 million of costs associated with lost water in its Rates when its own Ordinance required the Township itself to pay those costs. As a result, the overall "cash-out" was inflated by over $3.6 million.

Remarkably, the Court of Appeals ignored the Circuit Court's rulings concerning the Service to Township Ordinance. Therefore, the Court effectively let stand the Circuit Court's ruling that the Township violated the Service to Township Ordinance by charging its water and sewer customers for water "used" by the Township that was not "consumed" by its customers, as measured by installed meters.

The Circuit Court's ruling in this regard was absolutely correct. "Ordinances are treated as statutes for the purposes of interpretation and review." *Great Lakes Soc. v. Georgetown Charter Twp.*, 281 Mich. App. 396, 407, 761 N.W.2d 371, 380 (2008). "Since the rules governing statutory interpretation apply with equal force to a municipal ordinance, the goal of construction and interpretation of an ordinance is to discern and give effect to the intent of the legislative body. *Bonner v. City of Brighton*, 495 Mich. 209, 222, 848 N.W.2d 380, 388 (2014). An ordinance must be construed as a whole. *Winchester v. WA Foote Mem'l Hosp., Inc.*, 153 Mich. App. 4898, 501, 396 N.W.2d 456, 462 (1986). "[T]he most reliable evidence of [legislative] intent is the language of the ordinance itself and, therefore, the words used in an ordinance must be given their plain and ordinary meanings. *Bonner,* 495 Mich. At 222. *Jones v Wilcox*, 190 Mich. App. 564, 566; 476 N.W.2d 473 (1991) (interpretation of a city ordinance is a question of law for the court).

The Michigan courts have long held that municipalities must comply with their own ordinances. In *Township of White Lake v. Amos*, 371 Mich. 693, 699; 124 N.W.2d 803 (1963), the Court held that "[a]n ordinance of a municipality when once legally adopted becomes binding upon all the citizens thereof, officers as well as private citizens." *See also Sylvania Silica Company v. Township*

of Berlin, 186 Mich. App. 73, 463 N.W.2d 129 (1990) (enforcing ordinance against municipality and stating "[s]ince defendant [municipality] now had an ordinance allowing blasting, it had a **clear mandatory duty** to issue plaintiff a blasting permit") (emphasis added).

In *Taber v. City of Benton Harbor*, 280 Mich. 522, 274 N.W. 324 (1937), the court held that that a municipality was required to comply with its own zoning ordinance. There, the plaintiff sought to enjoin the defendant from erecting a water tower in violation of the zoning ordinance. The court ruled that the defendant was bound by its own zoning ordinance and entered the requested injunction. In reaching this result, the court observed:

> Under the circumstances in this case, no sound reason is perceived why the city should not be bound by the ordinance in question so long as such ordinance is in force and defendant is not excepted from its provisions as would be an individual or private corporation in attempting to engage upon the same project under the same conditions. **It is undoubtedly true that under the provisions of the charter the city owes a duty to its inhabitants to maintain an adequate water system, but in so providing it cannot proceed in disregard of the plain legislative enactments of the duly elected representatives of its citizens**. [280 Mich. at 526 (emphasis added)].

Similarly, in providing municipal water service here, the Township cannot "proceed in disregard of the plain legislative enactments of the duly elected representatives of its citizens." But that is exactly what the Township did by **admittedly** violating the Service to Township Ordinance. The Township may think its own Service to Township Ordinance is "absurd" (Def. Br., p. 27), but the Township itself wrote and adopted the ordinance. It cannot simply declare the ordinance to be "absurd" and decide not to follow it.[21]

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[21] One reason the Township thinks the Service to Township Ordinance is "absurd" is that the ordinance requires taxpayers, and not water and sewer customers, to bear some of the cost of the Township's water and sewer system. *See* Def. Br., p. 28. Far from being "absurd," choosing how to apportion the burden of government is always a part of municipal finance. For example, many people who have no school-age children pay taxes to support schools. Municipalities choose to fund schools with taxes rather than collecting "school user fees" from each student's household, and that decision is considered perfectly appropriate. Choosing to fund the water and sewer system in part with tax money is no different. And as a practical matter, access to municipal water and sewer

The Circuit Court applied the standards for interpreting and enforcing a municipal ordinance to the following evidence. The Township indisputably had, at the time of trial, a Service to Township ordinance that provided "[t]he township shall pay for all water **used by it** in accordance with the foregoing schedule of rates." Ord. § 38-225 (emphasis added). The very next ordinance on the books provided that "all water service shall be charged on the basis of water **consumed** as determined by a meter installed on the premises of the user by the department." Ord. § 38-226 (emphasis added). There must be a difference between water "used" and water "consumed", or the Township's choice to use different words in the two ordinances becomes a nullity. Mr. Domine testified that "lost water" is not "consumed" by any end user. Trial Trans. 2/8/18, pp. 88-90 ("Q. When a water main breaks, that's water loss, correct? A. Yeah, the water that comes out of it. Correct. Q. And that water is in no way consumed by an end user, correct? A. Just the ground. Yes."). It was reasonable for the Circuit Court to construe the Service to Township ordinance to mean that lost water is "used" by the Township and that the ordinance requires the Township to pay for that water. The Township amended the Service to Township Ordinance after trial, which obviously was not admissible evidence at trial, but which nonetheless tends to prove that the Service to Township Ordinance had the meaning Plaintiff proposes.

It is true that "**in cases of ambiguity** in a municipal zoning ordinance, where a construction has been applied over an extended period by the officer or agency charged with its administration, that construction should be accorded **great weight** in determining the meaning of the ordinance." *Macenas v. Michiana*, 433 Mich. 380, 398; 446 N.W.2d 102 (1989) (emphasis added). But there is no ambiguity here. The meaning of the Service to Township Ordinance is clear and unambiguous, particularly in the context of the very next ordinance section on the books. The Township must pay for all water **used**, and metered users must pay for all water **consumed.** The ordinances use two

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services increases the value of property, so it is logical that taxpayers would contribute to the system in proportion to the value of their property even if they use relatively little water.

words to convey two different meanings. If the Township disliked its own ordinances, it always had the power to change them, as it did after trial. Moreover, even if the ordinance had been ambiguous, then under *Macenas* the Township's own interpretation of its ordinance was to be "weighed", not to be considered dispositive.

CONCLUSION

The so-called "presumption" that a municipality's water and sewer rates are reasonable has grown and hardened beyond all logical reason. The "presumption" has engulfed the factual inquiry on the merits as to the reasonableness of the rates at issue, and the bar for rebutting the presumption has crept so high that no resident can question municipal water and sewer rates. The contrast with municipal electrical utility rates could not be more striking. This Court should grant Plaintiff's application for leave to appeal in order to consider whether any presumption of reasonableness should apply to municipal water and sewer rates, and if so, how that presumption may be rebutted.

KICKHAM HANLEY PLLC.

By: */s/ Gregory D. Hanley*
Gregory D. Hanley (P51204)
Attorneys for Plaintiff

Dated: February 18, 2021

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2021 I electronically served the foregoing document on all counsel of record using the Court's electronic filing system.

/s/ Kim Plets
Kim Plets

EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

JAMILA YOUMANS, and all others similarly situated,

Plaintiff-Appellee/Cross-Appellant,

v

CHARTER TOWNSHIP OF BLOOMFIELD,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
January 7, 2021

No. 348614
Oakland Circuit Court
LC No. 2016-152613-CZ

Before: STEPHENS, P.J., and MURRAY, C.J. and SERVITTO, JJ.

PER CURIAM.

In this certified class action, plaintiff Jamila Youmans, who is the sole class representative, challenged certain municipal utility rates and ratemaking practices of defendant, Charter Township of Bloomfield ("the Township"). Defendant appeals as of right the trial court's amended judgment, entered after a bench trial, that awarded plaintiff and the plaintiff class permanent injunctive relief and more than $9 million in restitution. Plaintiff has filed a cross-appeal, challenging the trial court's refusal to award damages for certain components of the Township's water and sewer rates.[1] We affirm the trial court's ruling concerning plaintiff's claims based upon a violation of § 31 of the Headlee Amendment, Const 1963, art 9, § 31, reverse its judgment awarding monetary and equitable relief to plaintiff and the plaintiff class, and remand for entry of a judgment of no cause of action in favor of the Township.

I. FACTUAL AND PROCEDURAL BACKGROUND

[1] By leave of this Court, the Michigan Municipal League and the Michigan Townships Association have submitted an amicus brief that supports the Township's position. *Youmans v Charter Twp of Bloomfield*, unpublished order of the Court of Appeals, entered January 29, 2020 (Docket No. 348614).

This case arises out of plaintiff's challenge to various aspects of the Township's water and sewer rates and its related ratemaking methodology during the "class period," which commenced on April 21, 2010, for purposes of plaintiff's assumpsit claims (i.e., six years before plaintiff initiated this action) and on April 21, 2015, for purposes of plaintiff's Headlee claims (i.e., one year before plaintiff initiated this action). In October 2016, the trial court entered an order "certifying this case as a class action" and appointing plaintiff as the sole class representative. Plaintiff's amended complaint included six counts, the first of which asserted several claims for violation of § 31 of the Headlee Amendment, and the remainder of which asserted claims for "**ASSUMPSIT/MONEY HAD AND RECEIVED**" with regard to both certain specific components of the Township's water and sewer rates and the "arbitrary, capricious, and unreasonable" nature of those rates and the underlying ratemaking processes. After the trial court denied the parties' competing motions for summary disposition, the matter proceeded to a 10-day bench trial.

A. THE UTILITY SYSTEMS AND BASIC RATEMAKING METHODOLOGY

Wayne Domine, the director of the Township's "engineering and environmental services" department from 1991 until his retirement in May 2017, testified that the Township consists of approximately 18,000 parcels of realty, approximately 3,000 of which are not serviced by the Township's water utility. The water system provides treated, potable water to its municipal customers, but it is also used for firefighting capability, providing water to the Township's fire hydrants.

According to Domine, much of the Township's water system was privately constructed by real estate developers beginning in the 1920's. The infrastructure was originally a piecemeal collection of "several subdivision well water supply systems throughout the township." However,

> [i]n 1963, the township had decided that the existing well systems would not be adequate to provide the water quality and quantity required to maintain the projected future demands of the community. The connection to the City of Detroit system was found to be most dependable for the health and welfare of the township residents. Several miles of transmission mains were constructed. . . . Since then over 200 miles of lateral water mains have been extended into areas either by means of special assessments or developer funded projects.

Since 2004, the Township has been subject to an abatement order, which arose out of litigation with the Michigan Department of Environmental Quality (DEQ), to "dry out" the sewer system, i.e., prevent water infiltration into the system. After performing a long-term needs study, the Township approved a 20-year capital improvement program, which is funded by the inclusion of a "water debt charge" in the disputed utility rates.

Domine agreed that the Township's sewer system is a separated system, with "one set of pipes for sanitary sewage," and a separate storm-sewer system, which is "intended to collect storm water runoff or . . . water from the land" and discharges such water directly into a waterway. The

Township does not own its storm-sewer system, other than the storm drains that are on the property of the township. Rather, the storm-sewer system is owned and maintained, in concert, by several county and state entities. Oakland County bills the Township for the "sewer flow" that exits in the Township, as estimated by approximately 30 meters located in various areas, based on the Township's proportional contribution to the entire system. Conversely, the Township does not measure "sewer flow" in order to determine the rate that it charges its municipal sewage customers; it bases the overarching sewer rate on water usage, which is the common practice throughout Oakland County.

Domine was involved in the Township's annual budgeting (on a limited basis) and water and sewer ratemaking from before the class periods in this case commenced until his May 2017 retirement.[2] He also coauthored the "annual rate memorandum," which included an outline of recommended water and sewer rates and was presented to the Township "board" for approval each year. The "first" consideration in ratemaking was "to gather up all the expenses, and then determine a revenue that would cover those expenses." Put simply, the rates were intended to allow the Township to "[b]reak even," but the process is complex, generally taking place "over several months." By nature, the rates are predictive—intended to cover expenses that will be incurred after the rates are set—and thus they merely *estimate* the revenue that will be required. Accordingly, to provide a "margin of error," the rates were generally set to generate "a revenue stream slightly above" the projected expenses, but in some years during Domine's tenure, the "water and sewer fund" was operating at a deficit. Even so, and in at least one year, a midyear adjustment to the rates was required to prevent an excessive deficit. The ratemaking process employed by the Township did not focus on individual line items; it employed a holistic approach, focusing on generating sufficient overall annual revenue to cover the overall annual costs.

Jason Theis testified that he served as either the Township's finance director or deputy finance director at all times pertinent to this case, during which time he was also involved in the annual budgeting process for the Township's water and sewer fund. Theis is a certified "public finance officer," which is akin to being a certified public accountant, but with an exclusive focus on governmental, rather than private, finance and accounting. He indicated that, in setting the disputed utility rates, it was desirable to budget both revenues and expenses "conservatively," in hopes of ensuring sufficient revenue to cover expenses. As a result, with regard to individual line items in the budget, the actual amounts received or expended often varied considerably from the projections used in setting the rates. Over the ratemaking period of six months, the disputed rates would go "through many different iterations."

According to Domine and Theis, the water rate included a "variable rate" for consumption, which was intended to recover the Township's operating expenses, depreciation improvements, and the cost of the water purchased from the Southeastern Oakland County Water Authority, and

[2] Thomas Trice, the director of the Township's Department of Public Works (DPW), testified that he was also involved in the disputed ratemaking process during the pertinent timeframe.

the water rate also included a "fixed," "ready-to-serve" charge to cover extra operational expense. The fixed portion of the water rate generally represented about 80% of the utility's required revenue stream, and it was intended to help the Township cover its "steady stream of monthly expenses" despite fluctuating water use and revenue over time.

Similarly, Domine indicated that the sewer rate included a "variable rate," which was intended to recoup operating expenses (including treatment of raw sewage) and depreciation improvements, and the sewer rate also included a "fixed" charge that was intended to recover the remainder of the Township's operating expenses. In addition, both the sewer and water rates included debt service charges, which were assessed in amounts intended to pay the debt service on bonds or other obligations issued by the Township related to water and sewer.

The parties stipulated that some portion of the Township's utility ratepayers were not also on the "tax rolls" that fund the Township's general fund, citing examples including tax-exempt entities like churches. Domine indicated that about 80% of the Township's water customers are also sewer customers, with the remainder using septic-tank systems. A small portion of customers—about 3%—receive sewer services only; they are not water customers. Domine agreed that those "sewer only" customers are billed in one of two ways. The majority pay a fixed annual charge, while the remainder have elected to have a meter installed on their well-water line and are billed "for their sewer based upon actual water usage." Additionally, the water system permits homeowners to install a "secondary" water meter that measures water used outside the home (e.g., for lawn irrigation or swimming pools), and such water usage is not included when calculating the homeowner's sewer charges.

Because the Township has no way of determining the amount of "sewer" services a sewer-only customer uses, the "fixed annual charge" is determined by averaging the rate of the "sewer only" customers who have elected to have a water meter installed. Domine admitted that the sewer ratemaking methodology did not account for the sewer only customers explicitly. But Domine also indicated that, because the Township had been overestimating volume in an attempt to keep the sewer rate from excessively increasing, "a lot" of the time the Township did not collect enough "sewer revenue" to cover the associated costs fully.

According to Theis, the budgeting program for the water and sewer fund—which he sometimes referred to as the creation of a "projected income statement"—involved "a lot of back and forth" "looking at five year trends of all the different accounts within the water and sewer fund," establishing projected figures for "operational" overhead (including staffing expenses), and projecting the anticipated water costs. Of the 18 different Township funds for which annual budgets and projections are prepared, the water and sewer fund was the only "enterprise fund" (i.e., a proprietary, non-tax revenue, self-sustaining fund, which charges for services provided, is not supported by a millage, and falls outside the operating township budget), and it was the most difficult to budget for because it involved "more guess work" than the other funds, particularly with regard to commodity charges and tap sales. For instance, the revenue received during a "dry season" would vary by "millions of dollars" from the revenue received in "a wet season[.]" In

addition to the Township's 18 budgeted funds, Theis also oversees approximately another 10 that aren't budgeted. Most of the Township's utility customers were billed on a quarterly basis, while most of the "suppliers" billed the Township monthly. As a result, in calculating the necessary revenue flow to meet its utility expenses, the Township needed to plan to keep sufficient cash on hand from quarter to quarter.

As an expert witness, plaintiff called Kerry Heid, who is a "rate consultant specializing in the public utility field," ratemaking in particular, and has approximately 40 years of experience in that field. He agreed that the "first step" in utility ratemaking "is to determine the revenue requirement," i.e., the revenue that the utility will need to cover its expenses, and he also agreed that this involves cost projections regarding variable expenses that are generally unknown when the rates are set.

According to Heid, "almost industry-wide, the generally recognized standard to use for generally accepted cost of service and rate making practices for water utilities" was, at the time of trial, set forth in the seventh edition of "the American Water Works Association M1 Manual" (the "M1 Manual"). Heid's opinions in this case concerning the disputed water rates were based on those methodologies and principles. He indicated that there are "two generally accepted methods" by which a utility's revenue requirements are determined: (1) "the cash basis, or the cash method," and (2) "the utility basis." In Heid's opinion, the Township used the cash method in calculating the disputed rates. Under that method, a municipality determines "its cash needs" by considering expenses such as "debt service, which would include principal and interest on bonds or outstanding debt," "operating and maintenance expenses," taxes, "[a]nd any other cash needs that the utility would need in order to operate its utility." The total of such expenses constitutes the utility's "revenue requirement." In determining which expenses, precisely, are properly considered in ratemaking, a utility should only include an expense if it is "prudently incurred" and "necessary for the utility to operate."

According to Heid, after a utility has determined its anticipated revenue requirement, "[t]here are two different sources of funds that the utility needs to consider, such that the total of those fund sources would generate the needed revenue requirement": (1) rate revenue, and (2) "miscellaneous revenues," which are also known as "non-rate revenues." Non-rate revenue includes any "sources of revenue that the utility does receive over and above the actual rates that are developed by the utility." Before determining its rates, a utility should "net out the non-rate revenue from the total revenue requirement." For example, if a utility's initial revenue requirement was estimated to be $100,000, but it expected to generate non-rate revenue of $5,000, it should "design rates that would generate revenues of $95,000."

Heid indicated that, after determining its "net revenue requirement," the utility would determine what portion it "want[ed] to recover through a customer charge," such as the fixed portion of the Township's water rate, and how much the utility wanted to recover by way of "a volumetric charge" for water use. Although there is an element of "discretion" in deciding the proper ratio of the fixed customer charge and volumetric charge, Heid opined that the proper

method was to perform a "cost of service study," which is something that the Township had failed to do, instead relying on what Heid described as "an arbitrary allocation[.]" In any event, Heid indicated that after deducting the fixed charge from the revenue requirement, a utility should divide the remaining portion (i.e., the portion it wished to recover through a volumetric charge) by the expected "total usage," with the result of that equation equaling the appropriate utility rate. In Heid's view, it was "[a]bsolutely not" appropriate for a municipal utility to design its rates to "over-recover," i.e., to recover more than the utility's net revenue requirement.

The Township called Joe Heffernan as an expert witness. Heffernan is a certified public accountant and retired from Plante Moran with at least 30 years of experience in conducting "public sector" accounting audits and consultations. He indicated that municipalities are obliged to have such external audits performed under Michigan law. According to Heffernan, before he reviewed the financial statements in this case, the Township's independent auditing firm had "already looked at the underlying general ledger and tested the internal controls and looked for compliance with laws and regulations[.]" After doing so, the independent auditors issued an audit opinion indicating that the Township's "financial statements are fairly stated" and were "free of material misstatement," meaning that "they're reliable." Similarly, Heffernan discerned "nothing" in the financial statements that would have led him to suspect that the Township's water and sewer department was potentially failing to comply with any applicable regulatory law.

Heffernan testified that Plante Moran audits "125 communities in southeast Michigan." About "[a] third to half of them don't" issue rate memoranda or any other "formal written document" explaining their utility-ratemaking methodology. Nor was he aware of any "requirement" for municipalities to do so. In setting their utility rates, such municipalities "just look at two things, what do our cash reserves look like, do they seem too high or too low, what's the percentage increase that we're going to get from our supplier, and based on whether their cash is too high or too low they bump . . . up or bump . . . down" the rates. Such "simple" ratemaking was "really common," and it "seem[ed] to work," historically resulting in relatively proportional cash inflows and outflows for the utilities that employ it.

Heffernan agreed that it is "possible to reach a reasonable water and sewer rate using a flawed rate model" or no model at all, and he also agreed that "mathematical precision" in calculating rates is neither required nor possible because rate models are based on predictions, "[a]nd honestly, every single one of your individual projections will be wrong" to one degree or another. "[T]he numbers are so big . . . and can change by so much you really have to accept a certain amount of fluctuation and variation[.]"

The Township also called Bart Foster as an expert, with his expertise "in the area of municipal water and sewer service rate setting[.]" Foster has "30-plus years' experience" in "providing financial, management consulting, and rate consulting services to predominantly municipal water and waste water utilities." He has performed such services for "between 10 and 20" municipalities in Michigan, and he was "pretty much regularly engaged for over 30 years with the Detroit Water and Sewage Department until they transitioned into the Great Lakes Water

Authority" (GLWA). At the time of trial, he was employed as a consultant at the GLWA, and he indicated that he was familiar with Michigan regulatory law regarding municipal utilities.[3]

B. "LOST" WATER AND "CONSTRUCTION" WATER

According to Domine, one factor that was considered in setting the water rates was "non-metered water," which was, in essence, "lost" water that the Township purchased but never actually sold. This occurred for "a variety" of reasons, such as broken water mains, leaks, "[c]onstruction water" (i.e., water used in the construction and maintenance of the water system itself), "billing inaccuracies," "meter inaccuracies," and "lag time" in meter reading. During the relevant "class period" years, Domine had estimated the anticipated "lost" water, for ratemaking purposes, at between 5% and 7% of the Township's annual projected water purchase. Such "lost water" figures were included in setting the water rates, intended to offset the cost of the water that the Township had purchased but never sold to its metered customers.

According to Heffernan, "water loss" is something that he commonly encountered in auditing municipal utilities because one "key" metric in "every" such audit was a comparison between "the volume of water purchased and sold by the water and sewer fund[.]" On the other hand, Foster indicated that he disfavored the use of the phrase "lost water"—preferring to use the phrase "unaccounted-for water"—because "lost water" is an "unduly simplified" description. Terminological disputes aside, Foster agreed with Domine and Heffernan about the essential underlying concept, explaining that for a municipality like the Township, which has no water "production facilities" and instead "purchases water wholesale," unaccounted-for water "would simply be how much water is being purchased on a wholesale basis from the provider . . . compared to how much water [the municipality] sells to the customers[.]" Such unaccounted-for water was generally attributable to "the possibility of inaccurate meter reads, both on the purchase side and on the sales side," "natural leakage out of the pipes," and "uses of water for construction purposes that's unmetered[.]" Foster indicated that "the Township had an unaccounted-for water percentage of between 4 and 5 percent," which was "on the low" or "medium side" for municipalities in southeast Michigan. He opined that, because unaccounted-for water was "a cost of maintaining the system," "it is appropriate to recover that" cost in the corresponding utility rates, and it would be inappropriate for the water and sewer fund or the Township's general fund to bear such expense.

Domine indicated that "construction water" is used primarily in "the flushing and filling of the water mains that are being built," in "pressurizing the main," and also when "doing bacteria testing." In his opinion, the use of such unmetered construction water is "necessary . . . for the operation of the system itself[.]"

[3] In substance, Foster's relevant expert opinions were largely identical to those expressed by Heffernan.

C. WATER USED BY TOWNSHIP FACILITIES

In addition to "lost" water, Domine agreed that "the township's facilities use water, but there isn't a check written from the water and sewer fund to the general fund for the value of that water[.]" He explained that, rather than paying for such water with cash, the Township provides in-kind "services and value" to "the water and sewer fund," the value of which "exceeds the value" of the water used by the Township's facilities. Domine and Theis admitted that they were aware of no formal documentation of such in-kind remuneration. As an example of one such in-kind service, Domine indicated that Township firefighters performed inspection, "flushing, and some of the maintenance" on the Township's fire hydrants. As other examples, Theis indicated that his services and those of his staff (i.e., accounting, finance, and human resources services) are provided to the water and sewer fund at no charge, as are the services of the Township's "IT department," which spends approximately 10% of its resources servicing the water and sewer fund. That fund is also provided "maintenance" and "cleaning" services by Township employees.

Although some of the municipal buildings are equipped with water meters, readings were never taken, and thus there was no record of precisely how much water was used by the municipal facilities during the pertinent timeframe. As part of this litigation, however, Domine prepared an estimate of the water used by the Township's facilities, estimating a total annual use of approximately 3.8 million gallons. Based on that figure, he estimated that the combined water and sewer services provided to the Township facilities was worth approximately $35,000 annually,[4] while the water provided to the Township's fire hydrants was valued at $10 per hydrant, for a total of $31,000. Domine and Theis each estimated the value of the Township's in-kind remuneration for such services to be more than $100,000 annually.

Contrastingly, Heid indicated that any in-kind remuneration that the Township provided to the water and sewer fund was inadequate because, based on his estimations, the value of the "public fire protection" services rendered to the Township by the water utility "was in excess of a million dollars every year[.]" And with regard to fire hydrant water usage, Heid indicated that the $10 estimate per hydrant was "grossly inadequate and without any basis[.]"

According to Heffernan, most municipalities "typically" have water meters installed on municipal buildings, and their water and sewer departments typically bill the general fund for such water use. Foster agreed, indicating that he does not "normally see . . . the practice employed by [the] Township" of accepting in-kind remuneration for water from the general fund rather than directly billing the general fund for the water used by municipal facilities. But according to Heffernan, based on his experience with "other communities of a similar size," he estimated that the true value of the in-kind services provided to the water and sewer department by way of

[4] Heid indicated that the $35,000 estimate was facially reasonable.

"general fund" dollars was "in the neighborhood of" $700,000 or $800,000. On that basis, Heffernan opined that he would not consider the Township's facilities to be receiving "free water."

On the other hand, Foster indicated that the value of the water used by the Township facilities and the in-kind services provided to the water and sewer fund were "close to being a wash[.]" But he also indicated that the Township's in-kind remuneration strategy was "perfectly reasonable" and opined that the disputed utility rates would most likely go up, not down, if the Township were to undo the in-kind arrangement and, along with beginning to pay for water used by Township facilities, also begin to charge the water and sewer department for all of the services that it had previously received from the Township at no charge.

D. "NON-RATE" REVENUE

Domine indicated that he never employed the term "non-rate revenue" while working for the Township and had not heard that term before this litigation commenced; rather, he categorized such revenue as "other revenue." His testimony concerning the treatment of non-rate revenue in the ratemaking process was somewhat convoluted. He agreed that the annual rate memoranda "probably" contained no "discussion" of non-rate revenue—those memoranda "never" specified all of the "expenses" underlying the recommended rates—but he disagreed that non-rate revenue was "not factored into" the rate "model" for the disputed utilities, explaining that they were considered as part of the "revenue stream" for the Township's annual budget, but not as a source of revenue attributable to the disputed rates. Later, however, Domine testified that "non-rate revenue . . . is *not* included in the rate calculation. It's considered as extra revenue to pay towards the expenses." (Emphasis added.) Later still, when Domine was asked, "[Y]ou weren't recovering all of your budgeted expenses through the rate, but instead were leaving some of them off because you anticipated getting non-rate revenue[?]", he replied, "Yeah, that—that would be what I've been saying all along." He also indicated that non-rate revenue was "reflected in the numbers" in the annual rate memoranda, explaining that the total operating expenses listed in those documents were actually "the net expenses, after deducting the non-rate" revenue. Notably, Domine qualified his answers somewhat by stating that his memory of such issues was hazy, given that he had retired, and questions about non-rate revenue would be better directed to the Township's finance director, Theis. But Domine also indicated that he "kn[e]w for a fact" that he had deducted non-rate revenue from the total operating expenses before calculating the disputed rates. In effect, this benefited the utility customers, lowering rates.

When the trial court asked Domine whether the deduction of non-rate revenue from total operating expenses had "historically" been "manifest" in his "paperwork," he replied, "It—it just came up in the last couple years . . . you got to understand, for 20 some years, a lot of it, I just did it[.]" Historically, Domine had performed the calculations informally for his own use, using

"notepads and sticky notes," rather than documenting the process formally.[5] However, during his final two years working for the Township, he had created a detailed spreadsheet to explain to his replacement "how the process works[.]" The spreadsheet showed the same process by which Domine had deducted non-rate revenue from the total operating expenses "in the past."

Theis agreed that, with the exception of "the '16, '17 rate memo," the rate memos for the other fiscal years at issue here did not include any "calculation that deducts non-rate revenue before setting the rate." Like Domine, however, Theis disagreed with the contention that non-rate revenue had not been accounted for in calculating the disputed rates, indicating that it had been used to offset projected annual expenses in ratemaking. Theis indicated that certain informal spreadsheets, which he had prepared for his own use in prior years, documented that process of incorporating non-rate revenue into the rates. Theis considered a specific item of non-rate revenue to be attributable as revenue of the water and sewer department if it was "directly related" to those utility services.

On the other hand, Heid indicated that, other than the Township's "rate document for fiscal year 2016-17," in his review of the documents provided to him in this case, Heid had "absolutely not" seen "any evidence" that non-rate revenue was properly accounted for in calculating the disputed rates. On the contrary, after comparing the "operating expenses that were reflected in the budget" for each class-period year "to the operating expenses that were utilized in the" corresponding "rate making model" for that year, Heid opined that the numbers indicated that the Township had not duly "netted out" the non-rate revenue in any fiscal year other than the one beginning in 2016. Heid summarized: "My opinion . . . is that the utility's reasoning or explanation for the treatment of non-rate revenues does not hold water, that they did not net out the non-rate revenue from the operating expenses as reflected in the rate memos." The Township's failure to deduct non-rate revenue "was not a reasonable rate making practice" because it "is commonly accepted that the non-rate revenues should be deducted from the total revenue requirement when establishing rates," and in Heid's reckoning, "if the rate methodology is faulty," then it is not possible to determine whether "the rate is reasonably proportionate" to the underlying utility costs.

On cross-examination, Heid indicated that he had "solely derived" his opinions concerning whether non-rate revenue was duly incorporated into the disputed rates by reviewing the annual "rate memorandums." He had not reviewed any "underlying work papers."

Although Heffernan agreed that non-rate revenues should be accounted for in ratemaking, he indirectly criticized Heid's methodology, indicating that it was not useful to compare the numbers in the rate memoranda and those in the water and sewer fund's annual "budget" because such documents are prepared "at two different points in time," "for two different purposes," utilizing different accounting principles. Thus, inconsistencies between the two documents were

[5] Theis described the prior methodology as, for "lack of a better term," "back of a napkin" calculations, which were not performed "consistently" during the relevant timeframe.

to be expected. Heffernan explained that "quite often" the budget does not have "a great relationship to what actually happens" after the budget is set, and the same is true with regard to rate memoranda.

Heffernan further explained that his analysis of the issues in this case involved "looking through the financial statements, some of the other documents ancillary to the financial statements, and most importantly, having some open discussion with the finance director, [the Department of Public Works (DPW)] director, and talking through what's behind the numbers in order to come to a conclusion." He focused on the financial statements particularly, "because those are what actually happened," whereas the annual utility "budget" was "merely a plan of what you may expect to happen," intended to permit the Township board to grant its "permission" for the "the various department heads . . . to conduct business and spend up to certain amounts for certain purposes." Similarly, although "rate memos can help inform you as to" the thought process employed in ratemaking, they cannot demonstrate the results—"what really happened"—like financial statements do. For that reason, financial statements are vitally important in auditing municipal utilities. They permit an auditor to assess whether the revenues *actually* received by a utility are "proportional" to the *actually* incurred underlying expenses.

Foster's opinions in this case were also primarily founded on his review of the Township's financial statements, and he agreed with Heffernan that they are preferable to the water and sewer fund's budgets and rate memoranda because it was best to evaluate "the effect" of rates and charges "after the fact[.]" Foster added that having been independently audited, the "financial statements have a degree of review that is arguably more—more rigorous than a budget or a rate memoranda."

After reviewing the Township's relevant financial statements, Heffernan and Foster both opined that the Township had duly accounted for non-rate revenues during the pertinent timeframe, although its calculations concerning non-rate revenue were not set forth in the rate memoranda. As Heffernan put it, "The work just wasn't shown." Even so, Heffernan believed that the financial statements and the proportionality of the water and sewer fund's cash flows during the relevant timeframe "clearly" demonstrated that the Township had properly accounted for non-rate revenue in the disputed rates. Heffernan expounded, "That's the great thing about the financial statements, you can't hide. It's in there or else the auditor would be disclaiming their opinion and saying everything is wrong."

Additionally, Heffernan indicated that even assuming, for the sake of argument, that the Township had *not* duly accounted for non-rate revenue in setting the disputed rates, that failure, standing alone, was insufficient to render the rates "unreasonable[.]" Foster agreed, stating that "it wouldn't matter" because if the water and sewer fund had recovered too much in the disputed rates, it would have either adjusted its rates accordingly or taken the opportunity to prudently add to its reserve funds, and if it had recovered too little, "there would need to be rate increases in order to get the reserves at . . . the prudent level."

When asked, on cross-examination, whether failure to account for non-rate revenues would result in "an overcharge to the rate payers," Heffernan replied:

> Potentially. And the reason I say potentially is there's only an overcharge if in fact you have charged them more than their actual cost. And in the rates there are so many other things that could be inaccurate in your rate model and you don't know until you see what—and that's why I look at the financial statements, what were the costs, what was the revenue that came in, that tells you if you've overcharged.

E. THE COUNTY DRAIN CHARGES

Michael McMahon, who is an employee of the Oakland County Water Resources Commissioner's Office, testified that Oakland County assesses fees to its municipalities for maintenance of the county storm-sewer system. The charges for "chapter 4 drains" are generally "assessed . . . to individual property owners," although an "at large portion" is assessed to the municipality and some municipalities pay the "chapter 4" charges on behalf of their residents, while the charges for "chapter 20 drains" are "assessed to municipalities at large."[6] The county also charges municipalities a combined sewer overflow facility fee.

According to McMahon, in 2015, the Township was in arrears of approximately $346,560 with regard to its county drain charges because, before that time, the county "had sort of lapsed on some of [its] assessments." The same situation had occurred with multiple municipalities, and McMahon was tasked with getting all the drain funds out of deficit. Accordingly, he contacted Domine, seeking to establish a budgetary plan for the Township to satisfy its arrearage. Ultimately, it was agreed that the Township would do that over the course of a couple years so that they could budget for it.

Domine indicated that, as a result, in the fiscal year beginning April 1, 2015, the Township began including a line item in its water and sewer budget for "county storm drain maintenance" (the "drain charges"). Before that time, the Township's "chapter 20" drain fees had always been paid out of the Township's general fund with tax dollars, not included as an aspect of the disputed utility budgets. For example, in 2013, $23,000 was paid from the general fund to satisfy the drain charges. The first year after the switch, the new budgetary line item for drain charges was $200,000, which was included in calculating the disputed utility rates. An additional $200,000 was included in the same fashion the next year (i.e., in the fiscal year beginning April 1, 2016), and $75,000 was included for drain charges the year after that.

[6] Domine indicated that, to his knowledge, the Township does not pass any of its "chapter 4 drain" charges onto its tax base or ratepayers.

Domine was unable to explain specifically why the drain charges were shifted from a general-fund obligation to a component of the disputed utility rates, but he recalled the Township's finance director indicating that he was closing the particular general fund from which the drain charges had previously been assessed and reallocating the line items that had been paid out of that fund "to other accounts . . . that would be more appropriate[.]" Domine agreed that one of the functions of the storm-sewer system is to collect water that runs off the road so it doesn't flood the roadways, and the system also prevents soil erosion. However, Domine also testified that the Township does not own any of the roads within it, indicating that they are all owned by the county, the state, or private entities, and the county and state, not the Township, therefore have sole responsibility for installing any new drains that are required to ensure proper drainage from roadways. Trice agreed with that sentiment. According to Domine and Trice, the storm-sewer system also benefits the Township's separate sanitary sewer system by preventing the "infiltration or inflow" that the Township was ordered to remedy in the litigation with DEQ; by lowering the water-treatment charges incurred by the Township (and thereby lowering the disputed utility rates); and by preventing the backflow of raw sewage into the ground, the sewer system, and sewer customers' homes. Trice explained that the county storm drains run parallel with the Township's sanitary sewers, and thus anytime the storm-sewer system floods as a result of improper maintenance, storm water would get into the sanitary sewer system and could wreak havoc (e.g., it could collapse Township pipes).

F. RENT CHARGES

According to Theis, in 2014, the Township began to charge the water and sewer department annual rent of $350,000, which was included as an expense in the disputed ratemaking process in the years that followed. Such rent was paid by the water and sewer fund—by way of a quarterly journal entry in the ledger—to the Township's general fund, for the use of the DPW facility. The DPW facility was constructed "probably" sometime between 2007 and 2009, and it was financed by a new debt millage. The water and sewer fund had occupied the DPW facility since sometime in 2009 or 2010. The Township's motor pool also occupied several automotive repair bays at the DPW facility, which were used to service all of the Township's different departments and funds.

Trice testified that he was the individual who established the amount of the disputed $350,000 rent charge. He calculated that figure by estimating that the water and sewer department was occupying about 30,000 square feet of the DPW facility's total 77,000 square feet, then applying an estimated annual rental rate of $12 per square foot. Trice established that estimated rental rate of $12 per square foot based on storage space that the Township was already renting out in the local district court building, and the figure was also approved of by the Township assessor. In setting the $350,000 annual rent, Trice opined that the Township had used the lowest number available. In his opinion, it would have yielded a much higher rental figure had the Township based the rent on an allocation of all of the actual costs associated with the DPW facility, such as insurance, accounting, IT, HR, administration, and consultants. Trice also indicated that the disputed rental figure was calculated only by reference to the space in the DPW facility actually

occupied by the water and sewer department, it did not include the areas occupied by other departments, such as the motor pool.

In Theis's estimation, the annual rent of $350,000 was reasonable, given the Township's related expenses for depreciation and bond interest with regard to the DPW facility, which were, in concert, over $400,000 a year. In addition, the Township incurred costs for ongoing maintenance, operation, and cleaning of the DPW facility, and it paid a share of the facility's utility bills for gas and electric. In a broader sense, Theis believed that it was appropriate for the water and sewer fund to pay rent for its office space because, "as an enterprise fund, they should be self-sustaining, and all costs and revenues should be coming from and to that base of customers, as opposed to taxpayer[s] in general."

With regard to the disputed rent charges, plaintiff called James Olson as an expert witness. Olson is the director of a company that specializes in preparing federally mandated cost allocation plans for governmental entities, including municipalities. Olson testified that, in his professional opinion, the $350,000 annual rent charge was not "appropriate because it's not based on cost," i.e., "the cost of the facility, . . . utilities, maintenance, insurance; anything that related to capital improvements on the building once it's built, [and] that kind of thing." To the extent that the rent was instead based on depreciation and the interest associated with debt for that facility, Olson viewed that methodology as improper because those expenses were already "paid for" by the special millage that had financed the DPW facility. Olson explained, "Well, if you're a taxpayer, you're paying for the building and its interest cost in a separate bill, so you're paying for that once. You wouldn't pay for it again in the rate that you pay for your water and sewer." In Olson's estimation, the amount of rent charged by the Township for the DPW facility bore no discernible relationship to the properly considered costs, it was instead improperly based on an estimated market rate. However, because of the limited information that had been provided to him, Olson had admittedly been unable to determine the Township's annual maintenance expense for the DPW facility, and he acknowledged that it was "possible that there's some maintenance expense that could properly be charged" to the water and sewer fund. Olson also indicated that his opinion concerning the propriety of the Township's methodology in calculating the disputed rental figure involved a philosophical "gray area" of accounting principles.

On cross-examination, Olson admitted that, as an enterprise fund, it was appropriate for the water and sewer fund to be funding its own office space somehow, and he was not of the opinion that it was *altogether* inappropriate for the Township to charge that fund some amount of rent. Additionally, Olson conceded that it would be appropriate for the Township to consider the central service costs related to the DPW facility—including accounting, financial, auditing, human resources, insurance, security, legal, and "IT" services—in determining the proper rental amount, along with "general administrative expenses[.]" Because plaintiff's counsel had not supplied Olson with the necessary information, Olson had been unable to prepare a full cost allocation plan for the water and sewer fund, and he was also unable to comment on how, precisely, the Township had calculated the disputed rental amount. Finally, Olson admitted that, although he was not aware of any federal funding related to the DPW facility, his opinions in this case were based exclusively

on federal regulations establishing guidelines for development of indirect costs for federal programs.

When asked to critique Olson's opinion concerning the rent charges, Heffernan indicated that Olson's reliance on federal regulations was inappropriate because those regulations do "not apply to any spending that's not of federal dollars," and although every township in Michigan receives at least "a little bit" of federal funding in the form of a community development block grant, only those specific federal funds must be spent in accordance with the federal regulations relied on by Olson. Heffernan also disagreed with Olson's ultimate opinion that the disputed rent charges were inappropriate. In Heffernan's view, there were "hundreds of activities" funded by the Township's general fund that impacted the water and sewer fund's finances, and the overarching concern was to ensure that the overall allocation of expenses was "fair" when viewed in the context of the "whole system." Indeed, after performing such a review in this case and learning about all of the services that the Township's general fund provides to the water and sewer department without compensation, Heffernan believed that the $350,000 annual rent for the DPW facility represented "undercharging," not an overcharge.

G. OPEB CHARGES

Domine confirmed that "OPEB" charges—i.e., charges for "[o]ther post-employment benefits"—were one budgetary line item that was factored into the disputed utility rates. According to Theis, "OPEB refers to benefits which are primarily health insurance expenses that the township is obligated . . . to pay on behalf of retirees," including both those already retired and current employees who will become retirees in the future. Aside from health-insurance expenses, which are by far the largest OPEB item, all expenses of retirees fall under the broad penumbra of "OPEB" expenses.

Heffernan testified that, unlike pension funds, which Michigan municipalities are constitutionally required to keep funded at actuarially determined levels, there is no such requirement with regard to OPEB funding, and thus many municipalities "really kind of ignored" OPEB funding "up until about 15 years ago[.]" Under accounting principles set forth by the Governmental Accounting Standards Board (GASB) somewhere between 2006 and 2008, however, a municipality is required to treat its unfunded OPEB obligations as a liability, which tends to incentivize it to begin the process of properly funding such obligations.[7] In doing so, there is generally an element of "catch up"—i.e., setting aside funds for the amortization of the unfunded actual accrued liability—while also setting aside funds to pay for the OPEB costs of one's current employees. It is "strongly" recommended for municipalities to be proactive about funding their OPEB obligations because it reduces the net present value cost of that benefit. Additionally,

[7] On cross-examination, Heffernan admitted that the GASB has no authority to *compel* municipalities to duly fund their OPEB obligations, only to direct them concerning how such obligations should be accounted for in financial documents.

Heffernan opined that municipalities have "a moral obligation" to do so, although there are still some communities that have not funded any of their OPEB obligations. He compared failing to fund OPEB requirements to not setting aside money for pension funds, which he viewed as "bonkers." He explained: "[T]o not pay today's cost for that really says I'm going to have employees provide me services and I'm going to tell them, in exchange for the services you provide me I'll give you a salary; I'll also give you this benefit that I'll ask your grandchildren to pay."

In Theis's view, OPEB entitlements were "earned" by employees during their work tenure, and the Township's obligation to fulfill those entitlements accrued at the same time. Heffernan agreed with Theis that employees "earned" their OPEB benefits during their working career with the Township, although such benefits are "paid for," primarily in the form of insurance premiums, after the employees retire. Theis indicated that the inclusion of OPEB charges in the disputed utility rates began in 2009, by way of a resolution passed by the Township board, and at some point, the Township also began to include OPEB charges in the fees charged by its cable studio and building inspection fund. The amount of the disputed OPEB charges included in the utility rates—which varied over the relevant years from about $200,000 to approximately $577,000—was based on a "very complicated calculation" that was, in turn, based on "a moving target" in the form of the latest actuarial reports concerning the Township's future OPEB obligations. Ultimately, during the fiscal year that began March 31, 2016, the Township transferred the $2.7 million in OPEB charges that had accrued in the water and sewer fund into a return-yielding retiree health care trust, which is "dedicated to . . . currently retired water and sewer employees as well as trying to save for the future retirees of the water and sewer fund."[8] Since then, smaller annual contributions of the accrued OPEB charges have been deposited to that trust. Such OPEB funds are partially intended as "catch up" to cover some of the past service cost, which was necessary "because all the prior administrations didn't set aside that money as the employees were earning it, which is what you should do." Theis indicated that the Township's "OPEB costs are jumping up exponentially each year" and are "some of the largest in the state," with current actuarial projections anticipating the future OPEB obligations of the Township at more than $160 million, more than $10 million of which is attributable to retirees or employees of the water and sewer fund.

According to Theis, by paying $2.7 million into the OPEB trust, the Township made an immediate impact on its current OPEB expenses. "[T]he OPEB line item expense immediately decreased the following year," which resulted in a corresponding decrease in the disputed utility rates, particularly in light of certain recently enacted GASB accounting practices for municipalities. In part, Theis admitted that the OPEB charges in the disputed rates were necessary because the Township can only collect so much in a millage and they get rolled back by Headlee and so forth. He indicated that, although he is aware of "nothing . . . that forces" the Township to

[8] In the Township's "main operating funds"—its "general fund, road fund, and public safety fund," which employ about 80% of the Township's employees—at the close of each fiscal year, any surplus funds are used to fund a similar OPEB trust for the employees of those funds.

proactively set aside funding for its OPEB expenses, the Township's goal is to fully fund its OPEB obligations in trust, thereby relieving the current operating budget and rate payers from that retiree expense. Theis hoped that it would actually accomplish that goal sometime during his career, but he had doubts, given that, at the time of trial, the Township was "only 3 percent funded." In his view, the disputed OPEB charges were something that was ultimately for the benefit of not just the Township, but the rate payers, given that new legislation was being contemplated that might force the Township to more aggressively fund its OPEB obligations, which could compel a more dramatic rate increase in the future. In Theis's opinion, it was prudent to be proactive, not reactive, with regard to such budgetary issues.

In Heffernan's view, there was nothing "improper" about the Township's transfer of $2.7 million to the OPEB trust. And Heffernan agreed that transfer will ultimately result in significant OPEB savings to the water and sewer fund because, once held in such a trust, up to 70% of the funds can be invested in "equities" with an expected annual return of 7% or more, whereas money held in the water and sewer fund is subject to certain regulations that has historically limited the annual return to under 1%.

H. PUBLIC FIRE PROTECTION (PFP) CHARGES

Domine indicated that, aside from delivering potable water to the Township's customer, the municipal water system is also is also used for "firefighting capability," providing water to the Township's fire hydrants. According to Trice, the Township's water customers receive a special benefit from the Township's fire hydrants because those hydrants are only placed along the course of the "public water system[.]"

Heid agreed that the provision of fire protection capabilities is one of the two fundamental functions of a municipal water supply utility, with the other being the provision of potable water to municipal customers. By nature, however, those functions fundamentally differ insofar as municipal customers use water on a relatively constant basis, whereas a fire hydrant generally serves in a standby capacity, being used only when there is a fire or "the utility needs to flush their system for periodic maintenance." Nevertheless, the PFP function of a water system carries "a very significant cost" because "[g]enerally, . . . all of the facilities have to be oversized. They have to be two or three times the size that they would be" otherwise. Also, to provide PFP capability, a water system must have a source of supply that provides more water, a greater amount of elevated storage, larger water mains, and either extra higher-powered booster pumping stations. Hence, "[t]ypically, public fire protection is considered a service because public fire protection does require the utility to overbill, if you will, because it needs to be able to meet those particular demands when you do have a fire." Professional standards would generally require that the value of such PFP services be paid for out of a municipality's general fund, not borne by the municipal water utility and its ratepayers.

Heid indicated that, in determining the portion of a utility's PFP expenses that is properly allocable to the municipality, there are two generally employed methods. The first, "preferable,"

and "most widespread method" is to per-form "a fully allocated cost of service study where the utility actually calculates the capacity requirements associated with providing public fire protection service and determining the cost of providing that service and what the rate should be for providing that service." The second is an antiquated method that was developed in Maine in 1961 (the "Maine Curve method"). Under the Maine Curve method, the peak day requirements of the utility are calculated by multiplying the estimated average daily water usage by an "average peak" factor of 2½, thereby estimating the "peak day" (or "peak hour demand") on the system's water usage. Subsequently, the utility's *overall* "peak day requirements" are compared to the calculated peak day requirements associated with providing public fire protection, as calculated by a formula that is based upon population that establishes the estimated need of fire flow. The ratio between those two figures is then charted on a graph of "the Maine Curve" to determine what percentage of the water utility's gross revenue should be recovered by PFP charges assessed to the given municipality's general fund.

Heid did not attempt to analyze the Township's PFP expenses under the preferable 'fully allocated cost of service study" method because he had inadequate information, and it is "virtually impossible" to do so in the adversarial setting of litigation because the process relies on the candid opinions of the given utility's staff members. Rather, for each year at issue in this case, Heid calculated the Township's public fire protection costs utilizing the Maine Curve methodology. In doing so, he estimated the Township's overall "peak day requirements" using the "average peak" factor of 2½, and he admitted that, if the Township's actual peak day requirements varied from that estimated figure, it would alter his analysis. Using the estimated figure, however, the results indicated that, during the relevant years, the Township's water and sewer fund should have recovered between 10% to 15% of its gross revenue by way of PFP charges paid by the Township's general fund. Indeed, under the Maine Curve method, the minimum appropriate charge to a municipality for PFP services is 6% of the water utility's gross revenues. Heid opined that the Township had acted improperly by failing to pay such expenses out of its general fund and instead recovering its PFP expenses in the disputed water rates, which effectively forced the water utility's "end use customers" to pay for PFP services that were provided to all of the Township.

On cross-examination, however, Heid admitted that the M1 Manual indicates that assessing PFP costs to the rate payers, rather than the municipal taxpayers, is one method for meeting any revenue requirement for the PFP costs. Moreover, it is a method that is, in Heid's experience, used "from time to time under certain circumstances," although he did not specify when or under what circumstances. Heid also reaffirmed that the M1 Manual embodies the generally accepted rate making principles for water utilities.

About 96% of Heffernan's auditing experience involved Michigan municipal and governmental entities, and he indicated that he had never before encountered a PFP challenge like the one at issue in this case. Indeed, as far as Heffernan knew, neither his direct clients nor any other client of Plante Moran had ever been subject to any kind of requirement to have a PFP charge like the one described by Heid, although Heffernan had encountered municipalities that did so voluntarily. Similarly, Foster testified that, "most" water distribution systems in Michigan don't

even identify what the PFP costs are, and those that *do* generally recover such costs through their water rates, not by charging the general fund. Foster was aware of only one Michigan municipality that ostensibly recovered (or had in the past recovered) PFP charges in the fashion suggested by Heid, and it did so only because a local ordinance explicitly mandated the practice. When Foster was asked whether the Maine Curve method is "widely recognized as a method of determining fire protection costs" in Michigan, he replied: "I don't believe so. In the few instances that I'm aware that an entity goes through the practice of allocating . . . public fire protection costs, other methods besides the Maine curve are used."

Heffernan explained that, for municipal utilities, it is difficult to accurately follow generally accepted accounting principles (GAAP) concerning "revenue recognition" and "expense recognition," which is somewhat similar to the non-GAAP concept that is commonly referred to as the "matching principle." Under GAAP, "[e]xpenses should be recognized at the time the transaction occurs that causes you to incur a cost, regardless of when the cash flow goes out," and the same principle generally applies to revenues, although there are exceptions. In the context of municipal utilities, however, following such principles is difficult because water meters are generally read on a quarterly basis, and thus a utility can only estimate how much water was used at any given time. Accordingly, the goal is to use such estimates to "get it materially right."

On cross-examination, when Heffernan was asked whether he was "aware of . . . any state or local laws that require" PFP charges "to be incorporated as part of a general fund obligation as opposed to a water and sewer" fund obligation, he replied that he could think of only one such law. He had reviewed one attorney-prepared "interpretation" of the Revenue Bond Act of 1933, MCL 141.101 *et seq*., which suggested "that if you have a revenue bond, . . . it's better to have the general fund paying for" PFP charges.

I. CASH BALANCE OF THE TOWNSHIP'S WATER AND SEWER FUND

According to Theis, the Township's "water and sewer" fund was one of several Township "funds" with its "own set of books," separate from the "general fund." As an "enterprise" fund, the state did not require the Township to maintain an annual "budget" for the water and sewer fund, but the Township nevertheless did so in the interest of "transparency" and accurate ratemaking. From 2011 to 2017, the water and sewer fund had total "cash inflows of 156-ish million dollars, and cash outflows" of "151 point something million." Theis opined that this represented clearly proportionate cash outflows of 96% of the cash inflows.

Theis agreed that, as of March 31, 2010, the Township's water and sewer fund included "about $4 million dollars of cash and cash equivalents[.]" One year later, on March 31, 2011, the fund included approximately $6.6 million in cash and cash equivalents; on March 31, 2012, it contained about $11.5 million; on March 31, 2013, it contained roughly $14.5 million; on March 31, 2014, it contained "in excess of $18 million"; on March 31, 2015, following annual capital-asset purchases of $5.7 million, it contained about $12.5 million; on March 31, 2016, after the $2.7

million OPEB transfer, it contained approximately $7.8 million; and on March 31, 2017, it contained about $8 million.

After reviewing the water and sewer fund's cash flows over that same period and duly considering its non-rate revenues, Heffernan opined that those cash inflows and outflows, which were within 4 percent of one another over the course of the relevant timeframe, were "very proportional." If anything, Heffernan believed that the Township should have been "trying to increase their cash investment reserves a little bit" more. Put succinctly, his opinion was that from 2011 to 2017, the water and sewer fund's "total accumulation of cash, even though it varied from year to year, wasn't unreasonable[.]"

Foster agreed that the disputed rates and charges were both reasonable and proportional to the underlying utility costs, summarizing his opinion as follows:

> Based on my review of the water and sewer rates in place between 2010 and 2017, . . . the revenues generated by the water and sewer rates have been commensurate with the revenue requirements of the water and sewer enterprise fund to provide service to the customers of the Township. The amount of money recovered through those rates has been proportionate to the cost of providing the service to the residents and businesses in the Township.

On cross-examination, however, Foster conceded that, hypothetically speaking, even if the disputed rates were duly proportional to the underlying utility expenses, the water and sewer fund could nevertheless use the revenue *generated* by such rates for clearly improper purposes, such as purchasing an expensive vacation home for the Township's board members.

Theis confirmed that the Township's water and sewer fund operated at a net loss in four of the fiscal years from 2005 to 2010, which forced the Township to subsidize it with cash from other Township funds. In 2010, for example, the water and sewer fund ended "9 of the 12 months . . . with negative operating cash." Over the years, Theis implemented multiple changes aimed at remedying such shortfalls, and since 2012, the water and sewer fund had no negative balances at any month end, although there had been "low balances." One month in 2017, for example, the fund was left with only $1,800 in cash on hand. Theis also endeavored to build up a sufficient "emergency reserve" in the water and sewer fund to address emergent breaks and repairs of items such as water mains, which can cost "hundreds of thousands of dollars" or even "millions" to repair, along with operating reserves, debt reserves, and capital improvement reserves. According to Theis, such reserve funding is essential "for the prudent operation of a healthy water and sewer fund," and despite his best efforts, he believed that the water and sewer fund was "still not in a position to have proper reserves[.]" He further opined that having total reserves of about $13 or $14 million was a "pretty conservative, appropriate . . . target to get to."

Theis admitted that, in reviewing financial statements for the disputed years, he found one instance in 2015 where a $600,000 expense was mistakenly counted twice in setting the disputed utility rates, thereby raising the rates. But he highlighted this as proof of how important it is to

view the water and sewer fund as a whole, rather than focusing on individual line items, noting that despite including the $600,000 expense twice in setting the rates for 2015, those rates ultimately resulted in an overall loss for the water and sewer fund that year, raising insufficient revenue to cover the fund's annual expenses.

Heffernan indicated that although there's no exact science to determine how much a municipal utility should keep in reserves, the water and sewer fund's reserves of about $4 million in 2010 "felt a little bit low." There is a consensus among experts that it is appropriate to maintain reserves for two fundamental areas: operating expenses and capital expenses (including future capital projects). In practice, Heffernan generally recommended that his clients maintain operational reserves of about 25% of their annual operating revenue, while his recommendation concerning capital reserves was dependent on the capital expenses the client anticipated in the next two to three years. Although a municipality could instead fund its capital projects on a pay-as-you-go basis, that was a "somewhat riskier" approach that Heffernan would "probably" advise against. After reviewing the water and sewer fund's 20-year capital plan, Heffernan opined that in the neighborhood of $13.9 million was an appropriate reserve target, and he agreed that the reserve levels at the time of trial were still "well below" what was advisable.

Foster added that his review of the Township's financial records during the relevant timeframe demonstrated that "the amounts that were specifically identified on the rate memoranda as capital improvements, and the amounts that were actually, from the audited statements, spent on capital improvements over that time period are remarkably close." This supported his opinion that the rates and charges have generated revenues commensurate with the revenues required to operate and finance capital improvements to the system over the time in question.

In addition, Heffernan opined that a municipality's reserve level is an appropriate consideration in both municipal utility ratemaking and in determining the proportionality of disputed utility rates. In short, a utility should "be setting [its] rates in a manner that will get the reserves where they should be." If the reserves are too low, rates should be increased—even if this results in temporarily "disproportional" cash flows—and the converse is equally true. On cross-examination, Heffernan admitted that the Township did not have a written plan with regard to its target reserve figures, but he explained that, based on the other 125 cities and townships that he was familiar with as an auditor, it was "highly unusual" for a municipality to have such a written plan.

J. TRIAL COURT'S OPINION, JUDGMENT, AND AMENDED JUDGMENT

Following the parties' closing arguments, the trial court took the matter under advisement and, on July 12, 2018, it announced its opinion orally from the bench.[9] The court ruled in favor of the Township with regard to all of plaintiff's claims pursued under § 31 of the Headlee Amendment, entering a judgment of no cause of action with respect to those claims. Generally, the court reasoned that, under the test set forth in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998), plaintiff failed to demonstrate that the disputed charges in this case constituted unlawful tax exactions.

Turning to plaintiff's common-law claims for assumpsit for money had and received, the trial court ruled partially in favor of both parties. With regard to non-rate revenue and revenue attributable to the Township's sewer-only customers ("sewer-only revenue"), the court ruled in plaintiff's favor despite repeatedly finding that in light of the Township's ratemaking methodology—which the court referred to as "abstruse, recondite methodology"—the court was unable to determine whether the disputed rates were proportional to the associated utility costs and, if not, what "damages" figure was warranted. The trial court also chided the Township for failing to "show its work," indicating that, based on the record before the court, it was "not evident that the rates are just and reasonable."

This was a common theme in the trial court's decision. The court recognized that both *Novi v Detroit*, 433 Mich 414, 428-429; 446 NW2d 118 (1989), and *Trahey v Inkster*, 311 Mich App 582, 594, 597-598; 876 NW2d 582 (2015), held that municipal utility rates are presumed to be reasonable and that the plaintiff bears the burden of rebutting that presumption when challenging such rates. But the trial court indirectly criticized *Trahey*'s reasoning, and it refused to rely on the presumption of reasonableness in deciding this case. The court described that presumption as a "substitute for reason" and an exercise in "thoughtless thoughtfulness," at least as applied here; suggested that *Novi* and *Trahey* are outdated, having relied on caselaw from "1942 and 1943"; and indicated that application of the presumption of reasonableness in this case would "bastardize the presumption" and "absolutely, necessarily, unequivocally transform it into an unrebuttable presumption[.]" In support, the trial court reasoned that "[i]t is clear from a reading of the law that a presumption exists once the details are on the table for all to see. First comes the details, then comes the presumption." In this instance, the trial court reasoned, the Township's unclear ratemaking methods had

> impeded the Court, and more importantly, [the] customer[s] and taxpayers from passing upon the question of whether the [Township's] rates are proportionate to its costs. This impediment, abstrusity . . . estops invocation of the presumptive reasonableness, the thoughtful thoughtfulness presumption of the rates. Short of

[9] It appears that the trial court had prepared some sort of written decision, which it read into the record rather than issuing a written opinion.

> blind deference to [the Township], . . . [the Township's] impediment . . . hamstrings the Court . . . from even being able to hear a claim of disproportion. In a word, if the presumption were to prevail here, the presumption is and evermore shall be . . . unrebuttable.

After ruling in plaintiff's favor on that basis regarding the non-rate revenue and sewer-only revenue, the trial court reserved its ruling concerning the proper "damages" figures. The court indicated that, if the parties were unable to settle concerning such figures, the Township would be permitted to "chime in" with regard to why, in light of the Township's failure to "show its work," the court should not simply accept plaintiff's related damage calculations. After subsequently considering the matter further, the trial court awarded a "refund to Plaintiff and the Class" of approximately $2.935 million with regard to the "non-rate revenue" claim and about $2.173 million with regard to the sewer-only revenue.

As to plaintiff's claim concerning "lost water," the trial court also ruled in plaintiff's favor. After construing Bloomfield Township Ordinance § 38-225 ("The township shall pay for all water *used* by it in accordance with the foregoing schedule of rates. . . .") (emphasis added) and § 38-226 ("All water service shall be charged on the basis of water *consumed* as determined by a meter installed on the premises of the user by the department.") (emphasis added), the court agreed with plaintiff that, under those provisions, "[i]f water is not consumed, as determined by a meter under [§ 28-226], then by process of elimination, or by default, [it] must be water used by the Township under [§ 38-225]." Put differently: "The cost for this truly lost water bucket per ordinance . . . was destined to be borne on the shoulders of the general fund taxpayers." The trial court also rejected any argument that the Township paid for such "truly lost water" by way of the in-kind services it provides to the water and sewer fund. Rather than ruling concerning the amount of "damages," the trial court instructed the parties "to crunch the numbers."

As to water "used" by the Township's municipal facilities, the trial court held that, although the Township's "rationalization" concerning in-kind remuneration was "obfuscated," plaintiff had failed to "overcome . . . the presumptive reasonableness of the Township's decision to pay" for such water with in-kind services. The trial court also rejected plaintiff's contention that the in-kind arrangement violated Bloomfield Township Ordinance § 38-225, reasoning that the ordinance "does not specify" that in-kind services cannot be used as a form of payment. Nevertheless, the trial court found "liability in Plaintiff's favor" and in favor of the plaintiff class. It awarded no monetary "refund" but ordered defendant to "henceforth" and "permanently" provide "explicit accounting . . . with explicit valuations" of the in-kind services that the Township provides as payment to the water and sewer fund, including payments for "construction water," "lost water," PFP charges, rent, and water used by municipal facilities.

On the other hand, with regard to "construction water," the trial court held that such water is "used" by both the Township and the ratepayers within the meaning of Bloomfield Township Ordinance § 38-225, and it rejected the argument that the Township paid for such water via the in-kind services it provides to the water and sewer fund. On that basis, the trial court ruled in

plaintiff's favor concerning the construction water, again reserving its ruling concerning the amount of "damages" and instructing the parties "to crunch the numbers." After further considering the matter, the trial court eventually entered an amended judgment ordering the Township to issue "a refund to Plaintiff and the Class in the amount of" approximately $3.69 million related to "the Township's own water use," which seemingly covered both "lost water" and "construction water."

With regard to plaintiff's non-Headlee claim concerning the disputed county drain charges, the trial court stated no reasoning in support of its holding. Rather, it simply stated: "Storm water drain, judgment, no cause of action."

As to the disputed rent charges, without explaining its reasoning, the trial court ruled in plaintiff's favor with regard to "[l]iability," but it refused to award any "damages[.]" However, as noted earlier, it issued a permanent injunction against the Township, ordering it to explicitly document any in-kind services used to pay such rent charges.

Similarly, with regard to OPEB charges, the trial court ruled in plaintiff's favor with regard to "liability," but it refused to award any "damages[.]" However, the trial court permanently enjoined the Township to "explicitly document the OPEB dollars in setting its water and sewer rates." The trial court reasoned that the Township's commingling of OPEB-charge revenues that had not yet been funded into the OPEB trust with "surplus" funds in the water and sewer fund was improper given that, until such OPEB funds were transferred to trust, they could be utilized by the water and sewer department "for whatever it deems appropriate."

Finally, as to PFP charges, without explaining its reasoning, the trial court ruled "no cause of action in part," and "liability in Plaintiff's favor in part," initially holding that plaintiff "prevail[ed] in a dollar amount equal to the cost of water in fire hoses over the relevant time frame paid by the general fund." After considering the matter further, however, the trial court entered its amended judgment holding that plaintiff and the plaintiff class were entitled to no "refund" in that regard because the Township "already pays" for such water by way of in-kind services. But the trial court issued a permanent injunction ordering the Township to expressly document such in-kind services and their associated valuations, and it also ordered the Township provide "explicit accounting of water in fire hoses to be paid for by the general fund[.]"

Approximately two months after the trial court announced its decision, it held a hearing concerning the proper remedies in this case. While entertaining argument in that respect, the trial court asked plaintiff's counsel whether, in light of the Township's "abstruse, recondite" ratemaking, there was some "legal vehicle" by which the court might award plaintiff "damages" despite its having found both that it was unable to determine whether the disputed rates were actually disproportionate to the associated costs and that the amount of any disproportionality was impossible to determine based on the record evidence. The trial court indicated that it would keep that issue "on the backburner" and allow plaintiff to argue the issue further at a later date.

Less than two weeks later, however, the trial court entered its initial judgment in this case. That initial judgment explicitly indicated that it was not a final order and that the trial court retained jurisdiction "for all purposes[.]" But in a subsequently entered order, the trial court ruled: "[T]he inquiry to plaintiff was and remains this: 'Is there a legal or equitable doctrine which would yield a judicial adjudication in favor of one party because the other party obscured proofs needed for that judicial adjudication?'."

Hence, about three months after the initial judgment was entered, plaintiff filed a motion for relief from judgment under MCR 2.612(C)(1)(f), requesting entry of an amended judgment on the basis that there were, in fact, several legal or equitable doctrine that would yield a judicial adjudication in plaintiff's favor because the Township had obscured proofs. At the ensuing motion hearing, the trial court indicated that plaintiff's motion was "inaptly titled" as a motion for relief from judgment and would, instead, be treated as a motion to "supplement" the initial judgment. The court acknowledged that it "remain[ed] unsure if the [Township] committed the singular wrong of passing a rate disproportionate to costs," explaining that, in the court's estimation, the "wrong" committed by the Township "was wont of clarity" in its "abstruse recondite rates[.]" Based on the caselaw cited by plaintiff, the trial court indicated that it was persuaded that "such wrong of unclarity itself . . . fulfills the element Plaintiff needed to prove that the Defendant's rates were disproportionate to costs in the amount of nonrate revenue and sewer-only receipts[.]"

Thus, the trial court granted plaintiff most of her requested relief, entering an amended judgment awarding plaintiff and the plaintiff class, in sum, approximately $9.58 million (including prejudgment interest) in "refunds," along with the permanent injunctive relief described earlier. The instant appeals ensued.

II. ANALYSIS

A. STANDARDS OF REVIEW

On appeal, the parties raise several distinct claims of error, which we review under varying standards. "This Court . . . reviews de novo the proper interpretation of statutes and ordinances," *Gmoser's Septic Serv, LLC v East Bay Charter Twp*, 299 Mich App 504, 509; 831 NW2d 881 (2013), and the legal question of whether a municipal utility charge constitutes an unlawful exaction under § 31 of the Headlee Amendment, *Mapleview Estates, Inc v City of Brown City*, 258 Mich App 412, 413-414; 671 NW2d 572 (2003). As a general rule, this Court also reviews equitable issues de novo, *Sys Soft Technologies, LLC v Artemis Technologies, Inc*, 301 Mich App 642, 650; 837 NW2d 449 (2013), reviewing any related factual findings by the trial court for clear error, *Canjar v Cole*, 283 Mich App 723, 727; 770 NW2d 449 (2009). "A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *In re AGD*, 327 Mich App 332, 338; 933 NW2d 751 (2019). In reviewing a trial court's factual findings, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

However, a trial court's decision to grant equitable relief in the form of an injunction is generally reviewed for an abuse of discretion. *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 33-34 & n 12; 896 NW2d 39 (2016). "A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes, or when it makes an error of law." *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 320; 900 NW2d 680 (2017) (*Planet Bingo*) (quotation marks and citation omitted).

B. PLAINTIFF'S ASSUMPSIT CLAIMS

The parties disagree whether the trial court's use of its equitable powers was proper here. As appellant, the Township argues that, having found that plaintiff had failed to demonstrate that the disputed rates were disproportionate to the underlying costs, the trial court erred by disregarding the presumption that those rates were reasonable. The Township also argues that the trial court erred by awarding plaintiff and the plaintiff class both the monetary award and permanent injunctive relief that it did. Contrastingly, by way of plaintiff's cross-appeal, she contends that the trial court should have awarded additional refunds related to the disputed OPEB, PFP, and rent charges. We agree with the Township that the trial court erred by failing to apply the presumption that the disputed rates were reasonable and abused its discretion by granting plaintiff permanent injunctive relief despite her failure to demonstrate that doing so was necessary to prevent irreparable harm.[10]

Aside from the claims that plaintiff asserted under the Headlee Amendment—which we analyze later in this opinion—plaintiff's claims in this action were all captioned as claims for "**ASSUMPSIT/MONEY HAD AND RECEIVED**[.]" As our Supreme Court long ago recognized in *Moore v Mandlebaum*, 8 Mich 433, 448 (1860):

> [T]he action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties, and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover. And that, as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action.

[10] Our decision in this regard renders moot the Township's argument that the trial court erred or abused its discretion by amending its initial judgment to award additional "damages." Hence, we decline to decide that issue. See *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016) ("A matter is moot if this Court's ruling cannot for any reason have a practical legal effect on the existing controversy.") (quotation marks and citations omitted).

Accord *Trevor v Fuhrmann*, 338 Mich 219, 224; 61 NW2d 49 (1953), citing *Moore*, 8 Mich at 448. At common law, assumpsit was a proper vehicle for recovering unlawful "fees," "charges," or "exaction[s]"—including unlawful utility charges—that the plaintiff had paid to a municipality under compulsion of local law. See *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 704; 178 NW2d 484 (1970) (quotation marks and citations omitted). Notably, such an action "will not lie against one who has not been personally *enriched* by the transaction" because the fundamental "basis" of the action "is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same." *Trevor*, 338 Mich at 224-225 (quotation marks and citations omitted; emphasis added).

"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[.]" *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013). 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." *Wright v Genesee Co*, 504 Mich 410, 421; 934 NW2d 805 (2019).

In contemporary municipal utility ratemaking cases, a similar focus on principles of "unjust enrichment" is encapsulated within the rebuttable presumption that a municipality's utility rates are reasonable. See generally *Novi*, 433 Mich at 428-429; *Trahey*, 311 Mich App at 594, 597-598. In *Novi*, 433 Mich at 417-418, 428, our Supreme Court was charged with deciding whether MCL 123.141 had abrogated "the longstanding principle of presumptive reasonableness of municipal utility rates," had impacted the applicable burden of proof, or had altered the traditionally circumspect scope of judicial review. Ruling in the context of a *municipality's* wholesale-rate challenge under MCL 123.141(2)—not a *ratepayer's* challenge under MCL 123.141(3)—the Supreme Court held that MCL 123.141 had not meaningfully altered the presumption of reasonableness, burden of proof, or scope of judicial review, reasoning, in part, as follows:

> Historically, this Court has accorded great deference to legislatively authorized rate-making authorities when reviewing the validity of municipal water rates. . . .
>
> * * *
>
> [R]ate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates.
>
> * * *
>
> Michigan courts, as well as those in other jurisdictions, have recognized the longstanding principle of presumptive reasonableness of municipal utility rates. These courts have stressed a policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates. As this Court noted in [*Plymouth v Detroit*, 423 Mich 106, 128-129; 377 NW2d 689 (1985)], the Court

in *Federal Power Comm v Hope Natural Gas Co*, 320 US 591, 602; 64 S Ct 281; 88 L Ed 333 (1944) stated:

> We held in [*Federal Power Commission v Natural Gas Pipeline Co*, 315 US 575, 62 S Ct 736, 86 L Ed 1037 (1942)] that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (Citations omitted.)

* * *

The Michigan Legislature's intention that courts refrain from strictly scrutinizing municipal utility rate-making is reflected in several statutory provisions. . . .

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. The decision of the Court of Appeals, however, superimposes Michigan courts as ultimate rate-making authorities despite the absence of any express statutory language or legislative history that would support such a role in the rate-making process.

* * *

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 [i.e., the public act that last amended MCL 123.141,] 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)[.] [*Novi*, 433 Mich at 425-433 (bracketed alterations added).]

Because *Novi* involved a rate challenge pursued by a municipality under MCL 123.141(2), not a ratepayer challenge pursued under MCL 123.141(3), *Novi*'s statutory analysis focused almost exclusively on MCL 123.141(2). However, in *Trahey*, 311 Mich App at 594, 597-598, this Court expanded the scope of *Novi*'s pertinent holdings, applying them in the context of a resident-ratepayer challenge under MCL 123.141(3). Thus, the presumption of reasonableness was extended to the rates a municipality charges its ratepayers. *Id*. at 594. The plaintiff bears the burden of rebutting the presumption of reasonableness "by a proper showing of evidence." *Id*. "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." *Shaw v Dearborn*, 329 Mich App 640, 654; 944 NW2d 153 (2019),[11] quoting *Trahey*, 311 Mich App at 595 (emphasis in *Shaw*).

As authority for its position aside from *Trahey*, *Shaw*, and *Novi*, the Township relies on, among other things, two unpublished decisions of this Court that were decided together in 2019. Plaintiff argues that this Court should disregard those unpublished decisions because they are not binding and "were wrongly decided." Plaintiff is correct that unpublished decisions of this Court are not precedentially binding under MCR 7.215(C)(1), but she fails to recognize that they may nevertheless be considered as "persuasive or instructive" authority.[12] See *Kern v Kern-Koskela*, 320 Mich App 212, 241; 905 NW2d 453 (2017).

In any event, the heart of the parties' dispute regards the manner in which the rule of law set forth in *Trahey* should be applied. Specifically, citing in support *Trahey*, 311 Mich App at 595 ("[a]bsent 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") (emphasis added),

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[11] The pending application for leave to appeal in *Shaw* has been held in abeyance pending our Supreme Court's decision in *Detroit Alliance Against Rain Tax v City of Detroit*, ___ Mich ___; 937 NW2d 120 (2020). *Shaw v Dearborn*, ___ Mich ___; 944 NW2d 720 (2020).

[12] In the context of similar challenges raised under the Headlee Amendment, this Court has recognized that it "presumes the amount of the fee to be reasonable, unless the contrary appears on the face of the law itself or is established by proper evidence[.]" *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 665-666; 697 NW2d 180 (2005). But because the instant rate challenges are not pursued under the Headlee Amendment, such authority is not dispositive here.

plaintiff argues that in a ratepayer challenge like the one at bar (i.e., one pursued under MCL 123.141(3)), if a plaintiff *does* present clear evidence of either illegal or improper expenses included in a municipal utility's rates, the presumption of reasonableness is no longer a relevant consideration—that is, the plaintiff need not also demonstrate that the rates, viewed as a comprehensive whole, are unreasonable. Put differently, plaintiff argues that *Trahey* stands for the proposition 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.

In stark contrast, the Township argues that, under *Trahey*, even if a *specific* expense that is included in formulating a challenged municipal utility rate is shown to be either illegal or improper, the plaintiff nevertheless bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed as a *whole*. In other words, the Township argues that absent a showing that the disputed rates actually overcharged plaintiff and the plaintiff class for the related water and sewer services, plaintiff's challenge to those rates—and her request for monetary "damages" in particular—is fatally flawed. We agree with the Township.

In our view, the flaw in plaintiff's argument rests less on a textual dissection of *Trahey* than it does on the fundamental nature of plaintiff's equitable "assumpsit" claims. "[E]quity regards and treats as done what in good conscience ought to be done." *Allard v Allard (On Remand)*, 318 Mich App 583, 597; 899 NW2d 420 (2017) (quotation marks and citation omitted). Had plaintiff sought a declaratory judgment that certain costs included in the disputed water and sewer rates were improper or illegal, perhaps she would be correct that the presumption of reasonableness would be irrelevant. Instead, however, by asserting her claims for assumpsit, plaintiff sought "restitution"—in the form of a refund to herself and the plaintiff class—of whatever amount was necessary to "correct for the unfairness flowing from" the Township's "benefit received," i.e., its "unjust retention of a benefit owed to another." See *Wright*, 504 Mich at 417-418, 422-423. 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. See *id*. at 419 ("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 correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded *excessive and unjust benefits* to his or her rightful position.") (emphasis added).

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. Moreover, even assuming, arguendo, that plaintiff is correct concerning this Court's holding in *Trahey*, she fails to recognize that, to the extent that *Trahey* might be read as inconsistent with our Supreme Court's decisions concerning the essential nature of unjust enrichment and restitution in *Wright*, or with *Novi*'s holding regarding the continued viability of the presumption of reasonableness, *Trahey* must be

ignored under the doctrine of vertical stare decisis. See *In re AGD*, 327 Mich at 339 (noting that, under the doctrine of vertical stare decisis, only our Supreme Court has authority to overrule one of its prior decisions, and until that Court does so, its former decisions remain binding on all lower courts); *Allen v Charlevoix Abstract & Engineering Co*, 326 Mich App 658, 665; 929 NW2d 804 (2019) (noting that this Court is "required to ignore" its former published decisions "in favor of any conflicting Supreme Court precedent").

The application of such principles in this case is straightforward. On several occasions, the trial court explicitly found that plaintiff had failed to rebut the presumption of reasonableness or demonstrate that the disputed rates were excessive in comparison to the associated costs of providing the related water and sewer services. On this record, we perceive no basis to disturb those factual findings. On the contrary, without a comprehensive rate study—or some similar evidence demonstrating that the disputed rates excessively compensated the Township for the related utility services—one can at best speculate about whether the disputed rates were proportional to the underlying costs. And several of the testifying experts at trial specifically indicated that, based on a review of the Township's audited financial statements, its cash inflows and outflows over the disputed period were proportional. Therefore, we are not definitely and firmly convinced that the trial court made a mistake when it found that plaintiff had failed to demonstrate disproportionality in the rates.

In light of that finding, however, the trial court erred by nevertheless ordering defendants to refund more than $9 million to plaintiff and the plaintiff class. Given that plaintiff failed to demonstrate that the Township would be excessively (and thus unjustly) enriched by the retention of such funds, the trial court should not have ordered the refund that it did. See *Wright*, 504 Mich at 417-418, 422-423; *Trahey*, 311 Mich App at 594, 597-598.

We also conclude that the trial court abused its discretion by granting plaintiff a permanent injunction requiring the Township to document its ratemaking efforts in a specified fashion. "Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, *and there exists a real and imminent danger of irreparable injury*." *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992) (quotation marks and citation omitted; emphasis added). See also *Royal Oak Sch Dist v State Tenure Comm*, 367 Mich 689, 693; 117 NW2d 181 (1962) ("Equity should not be used to obtain injunctive relief where there is no proof that complainant would suffer irreparable injury."). Moreover, the party seeking injunctive relief has the burden of demonstrating that the requested injunction is appropriate and necessary. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 3; 753 NW2d 595 (2008); *Dutch Cookie Machine Co v Vande Vrede*, 289 Mich 272, 280; 286 NW 612 (1939).

As noted, we find no basis to disturb the trial court's finding that plaintiff failed to demonstrate that the disputed rates were actually disproportionate to the underlying utility costs. Consequently, plaintiff also failed to demonstrate that the injunctive relief ordered by the trial court was necessary to avert irreparable harm. On this record, one cannot tell whether plaintiff or the plaintiff class suffered any harm at all as a result of the disputed rates or ratemaking practices, let

alone an *irreparable* injury or the real and imminent danger of suffering such an injury. By nevertheless granting a permanent injunction against the Township with regard to its ratemaking methodology, the trial court abused its discretion, overstepping the proper bounds of both its injunctive powers and the limited scope of judicial review that is appropriate in ratemaking cases such as this one. See *Dutch Cookie Machine Co*, 289 Mich at 280 (holding that the party seeking an injunction bears the burden of proving that its issuance is warranted); *Novi*, 433 Mich at 428, 431 (discussing "the difficulties inherent in the rate-making process," "the statutory and practical limitations on the scope of judicial review," and the general "policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates").

C. THE REVENUE BOND ACT OF 1933

As cross-appellant, plaintiff contends that the trial court erred by failing to recognize that the disputed PFP charges are unlawful under the Revenue Bond Act of 1933 (RBA), MCL 141.101 *et seq*. In particular, plaintiff argues that those charges are unlawful because they permit the Township to receive "free service" in contravention of MCL 141.118(1), which provides, in pertinent part:

> Except as provided in subsection (2),[13] free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality. The reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both . . . .

Specifically, plaintiff argues that the Township receives "free" PFP services, in contravention of MCL 141.118(1), because the Township's water and sewer fund, not its general fund, pays for those services by incorporating the PFP expenses into the disputed utility rates.

Assuming, without deciding, that the RBA is applicable here, that plaintiff is entitled to pursue a private cause of action seeking damages for violation of the RBA (which is an issue that she has failed to brief), that such a private action constitutes a valid end-around of the presumption-of-reasonableness standard discussed in *Trahey* and *Novi*, and that plaintiff is correct that it *would* violate MCL 141.118(1) if the Township were to fail to pay for its PFP services in the manner alleged, plaintiff's argument is nevertheless unavailing. Plaintiff ignores the fact that, in the trial court's amended judgment, it expressly found that the Township did, in fact, pay for the disputed PFP expenses by way of in-kind remuneration provided to the water and sewer fund. In plaintiff's

[13] The referenced subsection, MCL 141.118(2), is irrelevant here, given that it applies to "[a] public improvement that is a hospital or other health care facility . . . ."

brief as cross-appellant, she fails to explicitly argue that the trial court's finding in that regard was clearly erroneous, and we discern no basis for disturbing it.

There was extensive evidence at trial concerning the in-kind services the Township renders to its water and sewer fund, with Heffernan estimating their annual value at somewhere around $700,000 or $800,000. On the other hand, there was a relative dearth of evidence concerning the proper value for the trial court to ascribe to the PFP services. Plaintiff's own expert, Heid, admitted that the "preferable" method of assessing the value of such services was to perform "a fully allocated cost of service study" and that he had failed to do so, having instead used the "antiquated" Maine Curve methodology. Therefore, we are not persuaded that the trial court clearly erred when it found that the Township's provision of in-kind services constituted sufficient payment for the disputed PFP services. And in light of the finding that the Township *was* paying for those PFP services, we cannot conclude that the trial court erred by failing to hold that the Township was receiving "free" PFP services in contravention of MCL 141.118(1).

D. MCL 123.141(3)

Plaintiff also argues that the trial court erred by failing to recognize that the PFP charges are unlawful under MCL 123.141(3) ("The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed *the actual cost of providing the service*.") (emphasis added). But plaintiff fails to explain how even a *proven* violation MCL 123.141(3), standing alone, exempts her instant claim from the presumption-of-reasonableness standard set forth in *Trahey*, 311 Mich App at 594, 597-598, which regarded a rate challenge pursued under the same statute: MCL 123.141(3). In our estimation, the rule of law set forth in *Trahey* concerning the presumption of reasonableness is binding here and that presumption must be applied. See MCR 7.215(J)(1). And for the reasons explained in part II(B) of this opinion, we conclude that plaintiff's assumpsit claims under MCL 123.141(3) are not viable in light of the presumption of reasonableness discussed in *Trahey* and *Novi*. Hence, we reject plaintiff's instant claim of error.

E. PLAINTIFF'S CLAIMS UNDER HEADLEE § 31

Finally, plaintiff argues that the trial court erred or clearly erred by holding that the disputed OPEB, county drain, and PFP charges were not unlawful exactions under § 31 of the Headlee Amendment. We disagree.

"The Headlee Amendment was adopted by referendum effective December 23, 1978." *Shaw*, 329 Mich App at 652. It was "proposed as part of a nationwide 'taxpayer revolt' in which taxpayers were attempting to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level." *Durant v State Bd of Ed*, 424 Mich 364, 378; 381 NW2d 662 (1985). Such purposes "would be thwarted if a local authority could charge higher utility rates to raise revenue and then use some of the excess funds to finance a public-works project." *Shaw*, 329 Mich App at 643. As enacted, the Headlee Amendment "imposes on

state and local government a fairly complex system of revenue and tax limits." *Durant v Michigan*, 456 Mich 175, 182; 566 NW2d 272 (1997).

Plaintiff's claims here are pursued under § 31 of the Headlee Amendment, which provides, in pertinent part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified 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. . . .
>
> The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment. [Const 1963, art 9, § 31.]

As our Supreme Court observed in *Durant*, 456 Mich at 182-183, "Section 31 prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." "Although the levying of a new tax without voter approval violates the Headlee Amendment, a charge that constitutes a user fee does not," and the party challenging a given municipal utility charge under § 31 "bears the burden of establishing the unconstitutionality of the charge at issue." *Shaw*, 329 Mich App at 653.

As authority in support of plaintiff's position, she primarily relies on *Bolt*, 459 Mich 152, which set forth a three-prong test for determining whether a municipal charge represents a permissible "user fee" or an impermissible "tax" under Headlee § 31. In *Shaw*, 329 Mich App at 653, this Court observed that in *Bolt*, our Supreme Court explained 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. In general, "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 (cleaned up). Under *Bolt*, courts apply three key criteria when distinguishing 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) a user fee is voluntary in that users are "able to refuse or limit their use of the commodity or service." *Id*. at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005) (cleaned up).

Notably, the presumption of reasonableness regarding municipal utility rates is a "pertinent" consideration when considering the second *Bolt* factor. *Shaw*, 329 Mich App at 654.

In *Shaw*, 329 Mich App 650-652, 664-669, this Court recently employed the *Bolt* factors in considering a Headlee challenge somewhat similar to the one now at bar. The *Shaw* Court upheld the challenged water and sewer rates in that case, holding that they were permissible user fees. *Shaw*, 329 Mich App at 669. In part, this Court reasoned:

> [P]laintiff . . . posits that there are embedded taxes within her utility rates, arguing that a charge need not pay for infrastructure to qualify as a disguised tax. . . .
>
> * * *
>
> Under the analysis suggested by plaintiff, a city could never use funds obtained from city-wide water or sewer ratepayers to install, repair, or replace any particular pipe or facility that is part of the overall water or sewer system. Take, for example, a water main that runs beneath a major thoroughfare on the west side of any average city. The water main does not transport water to the residential homes, commercial businesses, or industrial factories on the east side of that city. Yet, when the water main ruptures and must be repaired, the city can use funds obtained from the general pool of water ratepayers to make the repairs—without transforming its water rates into an unconstitutional tax. The city is not constrained by the Headlee Amendment to determine which specific homes, businesses, or factories in the city use water that flows through the specific water main that burst, and then use revenues derived from only those users to pay the cost of repairing that burst pipe. *When the city uses funds paid by water ratepayers throughout the entire city to pay for the repairs to the burst water main, that repair does not transform the city's water rates into an illegal tax on the ratepayers who use water that flows through pipes other than the one that burst. Rather, the water rates are used to operate and maintain a viable water-supply system for the entire city and the revenues used to make the repairs serve a regulatory purpose of providing water to all of the city's residents*. [*Shaw*, 329 Mich App at 663-665 (emphasis added).]

Shaw's analysis of the *Bolt* factors strongly supports the propriety of the trial court's Headlee ruling in this case. Addressing the first factor, in *Shaw*, 329 Mich App at 666, this Court held that it was

> beyond dispute that the city's water and sewer rates comprise a valid user fee because the rates serve the regulatory purpose of providing water and sewer service to the city's residents. Although the rates generate funds to pay for the operation and maintenance of the water and sewer systems in their entirety, this by itself does not establish that the rates serve primarily a revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is

> in support of the underlying regulatory purpose." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999). Further, . . . the cost of operating and maintaining the caissons, is part of the cost of providing sewer service to the city's ratepayers. Dearborn must provide sewer service in conformance with state and federal regulatory requirements, and keeping the caissons functional helps ensure that sewage is properly treated before it is released into the environment.

Similarly, in this case, it is undisputed that the contested rates are assessed to fund the operational and capital expenses of the Township's water and sewer system, which serves the primary function of providing water and sewer services to the Township's ratepayers. Moreover, to the extent that those rates result in surpluses during some fiscal years, Domine indicated that the Township's 20-year capital improvement program was, at least in part, necessitated by the entry of an "abatement order" against the Township, which arose out of litigation with the DEQ and regarded the level of water "infiltration" in the Township's sewer system. Categorically, such obligations arising out of administrative-agency regulations serve a regulatory purpose. On the strength of the entire record, we hold that the Township's act of raising a prudent level of both revenue and capital and operational reserves through the disputed rates—including revenue to fund its OPEB obligations, the costs of providing fire protection services to the community, expenses related to the county storm-drain system, and necessary capital improvements—primarily serves valid regulatory purposes.

Nor are we persuaded by plaintiff's contention that, because some who are not ratepayers may benefit from the water and sewer system, the disputed rates must be an improper tax. By way of example, although county storm-sewer systems certainly benefit the general public when viewed on a macro scale—e.g., by preventing roadways from flooding, limiting soil erosion and the pollution of waterways, and decreasing demand on regional wastewater-treatment facilities—the vast majority of governmental enterprises benefit the general public, rather than just one regional subset of the public, when viewed on such a scale. As in *Shaw*, plaintiff's proposed application of the first *Bolt* factor would effectively hamstring municipal utilities, preventing them from raising the funds necessary to comply with mandatory state and federal regulations if doing so will yield any sort of incidental benefit for society at large. In any event, viewing the disputed rates as a whole, we are persuaded that they primarily serve valid regulatory purposes under the first *Bolt* factor, which favors the determination that they are user fees rather than taxes.

In considering the second *Bolt* factor, in *Shaw*, 329 Mich App at 666-668, this Court reasoned, in pertinent part, that the disputed "water and sewer rates" in that case

> constitute[d] a valid user fee because users pa[id] their proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. Mathematic precision is not required when reviewing the reasonable proportionality of a utility fee. "Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component, sewerage

> may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax." *Bolt*, 459 Mich at 164-165 (cleaned up).
>
> * * *
>
> Plaintiff reasons that the amount of water that a ratepayer withdraws from the tap bears no relation to the amount of stormwater that enters the combined-sewer system, and she argues that funds derived from water ratepayers therefore cannot be used to pay for the construction, operation, or maintenance of anything related to stormwater without transforming the water and sewer rates into an unconstitutional tax. Plaintiff further argues that the city should design a system of charging property owners, rather than ratepayers, for the removal of stormwater that flows across their property before entering the combined-sewer system or the separated-storm system. Yet, under the Headlee Amendment, it is not this Court's role to determine whether a municipal government has chosen the best, wisest, most efficient, or most fair system for funding a municipal improvement or service. This Court's role, rather, is to determine whether a particular charge imposed by a municipal government is a true user fee or a disguised tax. [Quotation marks and citations partially omitted.]

In this case, on several occasions, the trial court expressly found that plaintiff had failed to demonstrate that the disputed utility rates were disproportionate to the underlying utility costs, and as already explained, we see no basis for disturbing that factual finding. Because plaintiff did not carry her burden of demonstrating disproportionality, it necessarily follows that the second *Bolt* factor militates in favor of the Township's position. See *Shaw*, 329 Mich App at 653 (observing that "the plaintiff bears the burden of establishing the unconstitutionality of the charge at issue").

With regard to the final factor, this Court in *Shaw* ruled as follows:

> The third *Bolt* factor also weighs in favor of finding that Dearborn's water and sewer rates constitute a valid user fee. Each individual user decides the amount and frequency of usage, i.e., each user decides how much water to draw from the tap. See *Ripperger v Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585 (1954) (explaining that "[n]o one can be compelled to take water unless he chooses" and that charges for water and sewer services based on water usage do not comprise taxes); *Mapleview Estates, Inc*[, 258 Mich App at 417] (holding that an increased fee for connecting new homes to water and sewer systems was voluntary because, *inter alia*, "those who occupy plaintiff's homes have the ability to choose how much water and sewer they wish to use"). The purported charges at issue in this case are voluntary because each user of the city's water and sewer system can control how much water they use. [*Shaw*, 329 Mich App at 669.]

The instant case is distinguishable from *Shaw* with respect to the third *Bolt* factor. In this case, the parties agree that the disputed water and sewer rates were each comprised of both a

variable rate, which was based on metered water usage, and a fixed rate. Indeed, Theis testified that the fixed portion of the water rate generally represented about 80% of the utility's required revenue stream. Contrastingly, in *Shaw*, it was "uncontested that Dearborn determine[d] its water and sewer rates based on metered-water usage" alone. *Id*. at 667-668 (distinguishing *Bolt* on the basis that the disputed rates in *Bolt* were "flat rates," not variable rates based on "metered-water usage").

On this record, we conclude that use of the Township's water and sewer services cannot be viewed as "voluntary" for purposes of the *Bolt* inquiry. If a charge is "effectively compulsory," it is not voluntary. *Bolt*, 459 Mich at 167. With the exception of those sewer-only customers who have elected not to have a meter installed to track their actual well-water usage, it is technically true that the Township's water and sewer customers can avoid paying the *variable* portion of the disputed rates by refusing to use any water. But the *fixed* portions of those rates constitute flat-rate charges like those in *Bolt*, 459 Mich at 157 n 6, and such flat rates can only be avoided by not being a utility customer in the first instance. To the extent that the Township contends that the fixed rates are nevertheless voluntary because ratepayers can avoid paying them by moving elsewhere, that argument is unavailing. See *id*. at 168 ("The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property."). In light of *Bolt*, 459 Mich at 167-168, we conclude that at least the fixed portion of the disputed rates here—the most sizable portion—is effectively compulsory. Thus, the third *Bolt* factor weighs in favor of plaintiff's position.

On balance, plaintiff has failed to carry her burden of demonstrating that the disputed rates are impermissible taxes, rather than user fees, for purposes of Headlee § 31. The first and second *Bolt* factors clearly favor the conclusion that the disputed charges are proper user fees, and with regard to the third factor, "the 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." See *Wheeler*, 265 Mich App at 666. Therefore, the trial court did not err by entering a no-cause judgment against plaintiff with regard to her Headlee claims.

Affirmed in part, reversed in part, and remanded to the trial court for entry of a judgment of no cause of action in the Township's favor. We do not retain jurisdiction.

/s/ Cynthia Diane Stevens
/s/ Christopher M. Murray
/s/ Deborah A. Servitto

EXHIBIT B

STATE OF MICHIGAN

OAKLAND COUNTY CIRCUIT COURT

JAMILA YOUMANS,
individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CHARTER TOWNSHIP OF BLOOMFIELD,
a municipal corporation,

Defendant.

Case No. 2016-152613-CZ
Hon. Daniel P. O'Brien

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STIPULATED ORDER REGARDING ENTRY OF CORRECTED AMENDED JUDGMENT

At a session of the Oakland County Circuit Court
held in the City of Pontiac, State of Michigan
on this 22 day of April, 2019

PRESENT: DANIEL PATRICK O'BRIEN
Circuit Court Judge

This matter having come before the Court upon stipulated of the parties, and the Court being otherwise advised in these premises:

WHEREAS the Court on April 3, 2019 entered an Amended Judgment;

WHEREAS due to an apparent technical malfunction, Page 4 was missing from the Amended Judgment;

WHEREAS the Corrected Amended Judgment attached hereto as Exhibit 1 is identical to the Amended Judgment that was entered on April 3, 2019, except that the parties have inserted Page 4 in the form in which it was presented to the Court in Plaintiff's Motion for Entry of Amended Judgment;

IT IS ORDERED that the Corrected Amended Judgment attached hereto as Exhibit 1 is entered and supersedes the Court's April 3, 2019 Amended Judgment;

IT IS FURTHER ORDERED that the Corrected Amended Judgment is entered for the correction of the clerical error only, and the parties preserve all appellate rights and arguments;

IT IS FURTHER ORDERED that all time periods that run from the date of entry of a judgment or order under the Michigan Court Rules, including, but not limited to, the time to bring an appeal, shall run from the date of this Order entering the Corrected Amended Judgment, and not from the date of the April 3, 2019 Amended Judgment.

/S/DANIEL PATRICK O'BRIEN

Circuit Court Judge MRS

STIPULATED AND AGREED:

KICKHAM HANLEY PLLC

By: */s/Gregory D. Hanley*
Gregory D. Hanley (P51204)
Attorney for Plaintiff

SECREST WARDLE

By: */s/Mark S. Roberts*
Mark S. Roberts (P44382)
Attorney for Defendant

KH158543

STATE OF MICHIGAN

OAKLAND COUNTY CIRCUIT COURT

JAMILA YOUMANS,
individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CHARTER TOWNSHIP OF BLOOMFIELD,
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(248) 851-9500
Attorneys for Defendant

Rodger D. Young (P22652)
Henry W. Saad (P24177)
Young & Associates
27725 Stansbury Blvd., Suite 125
Farmington Hills, MI 48334
(248) 353-8650
Attorneys for Defendant

CORRECTED **AMENDED JUDGMENT**

At a session of the Oakland County Circuit Court
held in the City of Pontiac, State of Michigan
on this 3 day of ~~March~~ April, 2019

PRESENT: DANIEL P. O'BRIEN
Circuit Court Judge

The Court, having conducted a bench trial in this case and having issued its opinion on the record on July 12, 2018:

WHEREAS this case is a certified class action on behalf of a class consisting of persons and entities who paid Defendant Charter Township of Bloomfield (the "Township") for water and

sanitary sewage disposal services at any time between April 21, 2010 and September 17, 2018 (the "Class Period");

WHEREAS Plaintiff filed a First Amended Complaint ("FAC") containing the following five Counts:

Count I: Violation of the Headlee Amendment

Count II: Assumpsit/Money Had and Received – Unreasonable Water and Sewer Rates

Count III: Assumpsit/Money Had and Received – Violation of MCL 141.118 (Revenue Bond Act)

Count IV: Assumpsit/Money Had and Received – Violation of MCL 123.141 (Water Furnished Outside Territorial Limits Act)

Count V: Assumpsit/Money Had and Received – Violation of Township Ordinance § 38-225

WHEREAS the parties tried this case to the bench in February 2018;

WHEREAS Plaintiff presented its case to the Court by separating her claims into seven types of alleged overcharges as follows:

1. Non-Rate Revenues (Counts I, II and IV)
2. Sewer Only Revenues (Counts I and II)
3. Rent Charges (Counts I, II and IV)
4. Township's Own Water Use (Counts II, III, and V)
5. OPEB Charges (Counts I, II and IV)
6. County Drain Charges (Counts I and II)
7. Public Fire Protection Service (Counts I, II, III and IV)

WHEREAS the Court read its Opinion in this case from the bench on July 12, 2018 and found in favor of Plaintiff on certain issues and in favor of the Township on other issues;

WHEREAS the Court's Opinion adhered to Plaintiff's division of her claims into the seven types of overcharges described above;

WHEREAS the Court has found certain types of overcharges to be unlawful under more than one count of Plaintiff's FAC, and other types of overcharges to be lawful under one count but

unlawful under another count, any refund awarded with respect to any of the types of overcharges described above is not intended to be cumulative with any other refund awarded with respect to the same type of overcharge (i.e., an award of $1 as to Non-Rate Revenues on Count II is not cumulative with an award of $1 as to Non-Rate Revenues on Count IV, but is cumulative with an award of $1 as to Sewer Only Revenues on Count II), such that multiple instances of relief as to any single type of overcharge, under multiple counts of the FAC, reflect only different reasons why Plaintiff is entitled to a single refund for a particular type of overcharge;

WHEREAS on September 17, 2018, the Court entered a Judgment in this action;

WHEREAS Plaintiff filed a Motion for Relief from Judgment, which the Court finds was more properly a motion to supplement the September 17, 2018 Judgment;

WHEREAS the Township filed a Motion for Entry of Final Judgment;

WHEREAS on March 18, 2019, the Court heard Plaintiff's Motion for Relief from Judgment and the Township's Motion for Entry of Final Judgment;

IT IS ORDERED that Plaintiff's Motion for Relief from Judgment is **GRANTED** for the reasons stated on the record, and the Township's Motion for Entry of Final Judgment is **DENIED** for the reasons stated on the record.

The Amended Judgment of the Court is as follows:

I. **IT IS ORDERED THAT** this Amended Judgment amends, supersedes and replaces the Court's September 17, 2018 Judgment.

II. **IT IS FURTHER ORDERED** that as to Count I of Plaintiff's FAC, Violation of the Headlee Amendment, a judgment of no cause of action is entered in favor of the Township with respect to each claimed overcharge, for the reasons stated on the record.

III. **IT IS FURTHER ORDERED** that as to Counts II and IV of Plaintiff's FAC, to the extent those Counts are based upon Non-Rate Revenues not being deducted in the Township's rate model, a judgment in favor of the Plaintiff and the Class and against the Township is entered as

follows:

1. For the reasons stated on the record, the Township shall pay a refund to Plaintiff and the Class in the amount of $2,935,063.00, which, subject to further orders of the Court, shall be paid into a common fund for distribution to the Class and payment of class counsel's fees and costs.
2. For the reasons stated on the record, the Township is permanently ordered to explicitly document its consideration of the Non-Rate Revenue in setting its water and sewer rates.

III. IT IS FURTHER ORDERED that as to Count II of Plaintiff's FAC, to the extent that Count is based upon Sewer-Only Revenues not being deducted in the Township's rate model, a judgment in favor of the Plaintiff and the Class and against the Township is entered as follows:

1. For the reasons stated on the record, the Township shall pay a refund to Plaintiff and the Class in the amount of $2,173,282.00, which, subject to further orders of the Court, shall be paid into a common fund for distribution to the Class and payment of class counsel's fees and costs.
2. For the reasons stated on the record, the Township is permanently ordered to explicitly document its consideration of all Sewer Only Revenue in setting its water and sewer rates.

IV. IT IS FURTHER ORDERED that as to Counts II and IV of Plaintiff's FAC, to the extent those Counts are based upon the Township's inclusion in its water and sewer rates of rent expense for space in its Department of Public Works Building that is used by the Water and Sewer Division, a judgment in favor of Plaintiff and the Class and against the Township is entered as follows:

1. The Township is liable to Plaintiff and the Class, but Plaintiff and the Class have suffered no damages and are entitled to no refund, for the reasons stated on the

record.

2. For the reasons stated on the record, the Township is permanently ordered to explicitly document all instances where the Township exchanges money or "in-kind" services belonging to its General Fund for money or in-kind services belonging to its Water and Sewer Fund.

V. **IT IS FURTHER ORDERED** that as to Counts II, III and V of Plaintiff's FAC, to the extent those Counts are based upon the Township's Own Water Use, a judgment in favor of Plaintiff and the Class and against the Township is entered as follows:

1. For the reasons stated on the record, the Township shall pay a refund to Plaintiff and the Class in the amount of $3,690,241.00 through March 31, 2017, which, subject to further orders of the Court, shall be paid into a common fund for distribution to the Class and payment of class counsel's fees and costs.
2. For the reasons stated on the record, the Township is permanently ordered to explicitly document all instances where in-kind provision of services is used to reimburse the Township's Water and Sewer Fund for services provided by the Township's General Fund or instances where the General Fund pays for certain water used for operation and maintenance but then properly charges the Water and Sewer Fund for these operational expenses.

VI. **IT IS FURTHER ORDERED** that, as to Counts II and IV of Plaintiff's FAC, to the extent that those Counts are based upon the Township's inclusion of OPEB Charges in the Rates, a judgment in favor of Plaintiff and the Class and against the Township is entered as follows:

1. For the reasons stated on the record, the Township is liable to Plaintiff and the Class, but Plaintiff and the Class are not entitled to any refund.
2. For the reasons stated on the record, the Township is permanently ordered to explicitly document the OPEB dollars in setting its water and sewer rates.

VII. IT IS FURTHER ORDERED that, as to Count II of Plaintiff's FAC, to the extent that that Count is based upon the Township's inclusion of County Drain Charges in the Rates, a judgment of no cause of action is entered in favor of the Township.

VIII. IT IS FURTHER ORDERED that, as to Counts II, III and IV of Plaintiff's FAC, to the extent that those Counts are based upon the Public Fire Protection costs, a judgment in favor of Plaintiff and the Class and against the Township is entered as follows:

1. For the reasons stated on the record, the Township is required to pay the cost of water that passes through fire hoses. The Township already pays for this water, however, through the provision of in-kind services provided to the Water and Sewer Fund by the General Fund, therefore there is no refund owed to Plaintiff and the Class.
2. For the reasons stated on the record, the Township is permanently ordered to explicitly document payment of the cost of water that passes through fire hoses by providing in-kind services from its General Fund to its Water and Sewer Fund.

IX. IT IS FURTHER ORDERED that Plaintiff and the Class are entitled to pre-judgment interest on the total principal amount of the judgment, which is $8,798,586.00. Interest began to run when Plaintiff filed her Complaint on April 21, 2016. The total principal amount of the judgment, plus interest in favor of Plaintiff and the Class through the date of entry of this Amended Judgment is $9,580,655.00. In addition, this Amended Judgment will earn post-judgment interest at the statutory rate until satisfied by the Township.

X. IT IS FURTHER ORDERED that Plaintiff is the prevailing party and is entitled to tax her costs under MCR 2.625. Costs are hereby taxed by the Court on signing the judgment as provided under MCR 2.625(F)(1), in the amount of ~~$27,993.40~~ $13,199.65, as set forth in the Bill of Costs attached hereto as Exhibit A.

XI. **IT IS FURTHER ORDERED** that the questions of an award of common fund attorney fees to counsel for Plaintiff and the Class and an incentive award to the class representative are held in abeyance pending the resolution of any appeal of this Judgment. The Court retains jurisdiction for the purpose of considering an award of common fund attorney fees to Class counsel and an incentive award to the class representative.

This is a final order that resolves all pending claims and closes the case.

Daniel Patrick O'Brien
Circuit Court Judge MLS

Defendant's Attorney Mark Roberts declined to sign this order approved as to form. Plaintiff's Counsel has added a note to this effect in accordance with the court's comments from the bench.

Approved as to form:

Edward F Kickham (P70332)
Attorney for Plaintiff and the Class

EXHIBIT A

STATE OF MICHIGAN

OAKLAND COUNTY CIRCUIT COURT

JAMILA YOUMANS,
individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CHARTER TOWNSHIP OF BLOOMFIELD,
a municipal corporation,

Defendant.

Case No. 2016-152613-CZ
Hon. Daniel P. O'Brien

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff and the Class

Mark S. Roberts (P44382)
Secrest Wardle
2600 Troy Center Drive
P.O. Box 5025
Troy, MI 48007-5025
(248) 851-9500
Attorneys for Defendant

Rodger D. Young (P22652)
Henry W. Saad (P24177)
Young & Associates
27725 Stansbury Blvd., Suite 125
Farmington Hills, MI 48334
(248) 353-8650
Attorneys for Defendant

PLAINTIFF'S BILL OF COSTS

Plaintiff states as follows for her Bill of Costs under MCR 2.625.

Cost	Authority	Amount
Expert witness fees	MCL 600.2164(1) ("No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case.").	**$2,387.02** (James Olson trial prep and testimony) **$13,042.50** (Kerry Heid trial prep and testimony) *See* Exhibit A hereto.

	Expert witness fees are recoverable for trial preparation and testimony at trial. *See Miller Bros. v. Department of Natural Resources*, 203 Mich. App. 674, 691, 513 N.W.2d 217 (1994) ("Finally, we find no abuse of discretion in the trial court's award of plaintiffs' expert witness fees incurred in preparing for trial, even though those experts did not testify.").	
Deposition Transcripts	MCL 600.2549 ("Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.").	**$585.00** Wayne Domine, 8/16/16. *See* 2/8/18 Trial Trans., p. 78. Also Jason Theis, 8/16/16. *See* 2/13/18 Trial Trans., p. 26. (On the same invoice with Domine's deposition and included in that $585.00.) **$564.90** Bart Foster, 8/10/17. *See* Trial Trans. 2/22/18, p. 70; Trial Trans. 2/26/18, p. 59. **$601.35** Joe Heffernan. *See* Trial Trans. 2/22/18, p. 180. *See* Exhibit B hereto.
Lay Witness Fees	MCL 600.2552(1) ("A witness who attends any action or proceeding pending in a court of record shall be paid a witness fee of $12.00 for each day and $6.00 for each half day, or may be paid for his or her loss of working time but not more than $15.00 for each day shall be taxable as costs as his or her witness fee. Except as provided in sections 7 and 13 of chapter XV of the code of criminal procedure, 1927 PA 175, MCL 775.7 and 775.13, a witness shall be reimbursed as provided in subsection (5) for his or her traveling expenses in coming to the place of attendance and returning from the place of attendance, to be estimated from the residence of the witness, if his or her residence is within this state, or from the boundary line of this	**$48.00** (Witness fees for 4 witnesses) *See* Exhibit C hereto.

	state that the witness passed in coming into this state, if his or her residence is out of this state.")	
Witness Mileage	MCL 600.2552(5) ("Beginning on the effective date of the amendatory act that added this subsection, the per-mile rate of reimbursement of traveling expenses for witnesses shall be the same as the per-mile rate of reimbursement of traveling expenses established by directives of the department of management and budget for state officers and unclassified employees of state agencies while engaged in the performance of state business, pursuant to section 217 of the management and budget act, 1984 PA 431, MCL 18.1217." MCL 18.1217, WCA Travel Reimbursement Rates 2018: $0.545 per mile	**$89.38** (Kerry Heid – 164 miles from Michigan-Ohio border to court and back at .545 per mile) **$89.38** (James Olson - 164 miles to and from Bay City at .545 per mile)
Electronic Filing Fees	MCL 600.1990 ("Any electronic filing system fee paid by a party is a recoverable taxable cost.")	**$950.87** *See* Exhibit D hereto.
Class Action Notification Costs	MCR 3.501(C)(6)(b) ("Upon termination of the action, the court may allow as taxable costs the expenses of notification incurred by the prevailing party."). Plaintiff reserves the right to supplement this bill of costs to include the cost of notifying class members of the judgment and distributing the refund award to class members according to their pro rata shares (less attorney fees, non-taxable out-of-pocket costs, and any incentive award, all of which are subject to Court approval).	**$7,934.48** (US Mailing House – Mailing of Initial Notice) **$1,592.74** (Publication of Initial Notice in the Oakland Press) *See* Exhibit E hereto.
Service of Process Fees	MCL 600.2559. The prevailing party may tax the statutory fees of court officers who serve process and perform other related services. *Harbour Towne Marina Ass'n v Geile (In re Fees of Court Officer)*, 222 Mich App 234, 564 NW2d 509 (1997).	**$29.78** (Service of complaint on 5/2/16 - base statutory fee of $26 plus $3.78 for 7 miles at the 2016 rate of .54 per mile) **$26.00** (Service of trial subpoena on defendant's

		expert) **$52.00** (Service of trial subpoenas on lay witnesses) *See* Exhibit F hereto.
	Total Taxable Costs	~~$27,993.40~~ 13,199.65

This Bill of Costs is supported by the Affidavit of Gregory D. Hanley, attached hereto as Exhibit G. Plaintiff requests that the Court tax costs in the amount of ~~$27,993.40~~ 13,199.65 against Defendant.

Respectfully submitted,

KICKHAM HANLEY PLLC.

By: */s/ Gregory D. Hanley*

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff and the Class

Dated: March 27, 2019
KH158368

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2019 I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filing Participants.

/s/ Kim Plets
Kim Plets

EXHIBIT A

INVOICE

MGT CONSULTING GROUP

Project: **FSMI | FY17 | Kickham Hanley | Witness | MI | 7765**

Invoice #33131 due April 08, 2018

STATUS: Open (31 days left)

ISSUE DATE: March 09, 2018

PAYMENT SCHEDULE: Net 30

TO: Mr. Gregory Hanley
Kickham Hanley, PLC
300 Balmoral Centre
32121 Woodward Avenue
Royal Oak, Michigan 48073

FROM: MGT of America Consulting, LLC (MGT Consulting Group)
P. O. Box 5498, Tallahassee, Florida 32314
PHONE: 989-316-2220
Employer Identification Number for LLC 81-0890071

STATEMENT OF SERVICES

TITLE	SUBTOTAL
Professional Expert Witness for a Cost Allocation Plan Dispute	$2,387.02
See below for fee explaination	

Terms: Total amount due within 30 days of invoice date. A service charge of 1 1/2% per month will be assessed on any unpaid balance over 60 days.

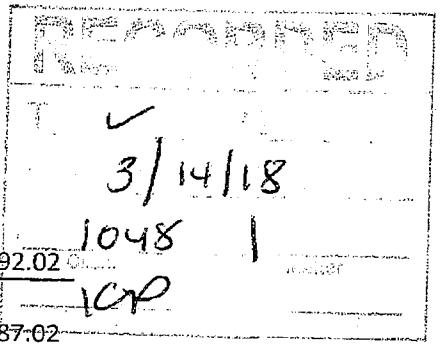
Fixed Fee	$2,387.02
Total	**$2,387.02**

Jim Olson 9 hours $255/hour $ 2,295.00

Date	Item	Hours
2/12/2018	Bloomfield	2
2/13/2018	Bloomfield	7
		9

Mileage to Pontiac for Trial 172 miles @ $0.535/mile $ 92.02

Total $ 2,387.02



HEID RATE AND REGULATORY SERVICES

Statement of Services

BILL TO:

Gregory D. Hanley, Esq.
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073

Invoice No. 4
Date: April 5, 2018

Date	Description	Amount
Jan.-Mar. 2018	Ratemaking Support in Bloomfield Township Water	$13,042.50
	and Sewer Litigation. Preparation for and	
	participation at trial.	
	70.50 hours @ $185/hour	
Jan.-Mar. 2018	Out-of-Pocket Travel Expenses to/from Detroit	$ 1,351.18
	Total Due	$14,393.68

Terms: 30 days

Kerry A. Heid, P.E.

Heid Rate and Regulatory Services
3212 Brookfield Drive
Newburgh, IN 47630

Phone: (812) 858-0508
Cellular: (812) 568-5955
Fax: (812) 858-0509
Email: kaheid@wowway.com

EXHIBIT B

INVOICE

Judy Jettke
& Associates
COURT REPORTING AND VIDEO

Invoice No.	Invoice Date	Job No.
5749	8/12/2017	2080
Job Date	**Case No.**	
7/26/2017	2016-152613-CZ	
Case Name		
Youmans v Charter Township of Bloomfield		
Payment Terms		
Net 30		

Gregory D. Hanley
Kickham Hanley
32121 Woodward Ave.
Ste. 300
Royal Oak, MI 48073

ORIGINAL TRANSCRIPT OF:
Joseph Heffernan 601.35

TOTAL DUE >>> $601.35

Thank you for your business!
586.783.0060

RECORDED
T ✓ Q
DATE 8/17/17
1048 J
Client Matter
KP
Initials Approved

Tax ID: 27-2977466

Please detach bottom portion and return with payment.

Gregory D. Hanley
Kickham Hanley
32121 Woodward Ave.
Ste. 300
Royal Oak, MI 48073

Job No. : 2080 BU ID : JJA
Case No. : 2016-152613-CZ
Case Name : Youmans v Charter Township of Bloomfield

Invoice No. : 5749 Invoice Date : 8/12/2017
Total Due : $ 601.35

PAYMENT WITH CREDIT CARD
Cardholder's Name:
Card Number:
Exp. Date: Phone#:
Billing Address:
Zip: Card Security Code:
Amount to Charge:
Cardholder's Signature:
Email:

Remit To: **Judy Jettke and Associates**
309 Southbound Gratiot
Suite 2
Mount Clemens, MI 48043

INVOICE

Judy Jettke
& Associates
COURT REPORTING AND VIDEO

Invoice No.	Invoice Date	Job No.
5773	8/20/2017	2224
Job Date	**Case No.**	
8/10/2017	2016-152613-CZ	
Case Name		
Youmans v Charter Township of Bloomfield		
Payment Terms		
Net 30		

Gregory D. Hanley
Kickham Hanley
32121 Woodward Ave.
Ste. 300
Royal Oak, MI 48073

ORIGINAL TRANSCRIPT OF:
Bart Foster

564.90

TOTAL DUE >>> **$564.90**

Thank you for your business!
586.783.0060

RECORDED
T V Q
DATE 8/25/17
1048 / 1
Client Matter
Initials Approved

Tax ID: 27-2977466

Please detach bottom portion and return with payment.

Gregory D. Hanley
Kickham Hanley
32121 Woodward Ave.
Ste. 300
Royal Oak, MI 48073

Job No. : 2224 BU ID :JJA
Case No. : 2016-152613-CZ
Case Name : Youmans v Charter Township of Bloomfield

Invoice No. : 5773 Invoice Date :8/20/2017
Total Due : $ 564.90

PAYMENT WITH CREDIT CARD AMEX MasterCard VISA

Cardholder's Name:
Card Number:
Exp. Date: Phone#:
Billing Address:
Zip: Card Security Code:
Amount to Charge:
Cardholder's Signature:
Email:

Remit To: **Judy Jettke and Associates**
309 Southbound Gratiot
Suite 2
Mount Clemens, MI 48043

JUDY JETTKE & ASSOCIATES

COURT REPORTING & VIDEO

309 S. Gratiot, Suite 2
Mt. Clemens, MI 48043
Tel: 586-783-0060
Fax: 586-226-2996
Fed.ID# 36-4529167

To: Gregory D. Hanley
Kickham Hanley
32121 Woodward Ave.
Suite 300
Royal Oak, MI 48073

Invoice: 45627

Date: August 25, 2016

Case Name: Jamila Youmans vs. Charter Twp. of Bloomfield

Date: August 16, 2016

Witness Name(s): Jason Theis & Wayne Domine

Location: Troy, MI

Description: Original and copy of Etranscript & PDF each witness

Amount Due if paid by: September 25, 2016	$	585.00
Late Charge:	$	10.00
Amount Due if paid after: September 25, 2016	$	595.00

Thank You!
Amy Bertin

Please Charge My: ☐ MasterCard ☐ VISA

Card #

Expiration Date

Signature

ORIGINAL INVOICE
NET 30 DAYS

RECORDED
T V Q
DATE 8/26/16
1048 1
Client Matter
KP
Initials Approved

EXHIBIT C

7740

Kickham Hanley PLLC
GENERAL ACCOUNT
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073

INDEPENDENT BANK
74-265/724

1/16/2018

PAY TO THE ORDER OF Charter Township of Bloomfield $ **12.00

Twelve and 00/100********** DOLLARS

Charter Township of Bloomfield

Void After 90 Days

AUTHORIZED SIGNATURE

MEMO Subpoena Fee

Security features. Details on back.

⑈007740⑈ ⑆072402652⑆ 112 295 8⑈

Kickham Hanley PLLC 7740

Charter Township of Bloomfield 1/16/2018

Date	Type	Reference	Original Amt.	Balance Due	Discount	Payment
1/16/2018	Bill	Subpoena Fee	12.00	12.00		12.00
					Check Amount	12.00

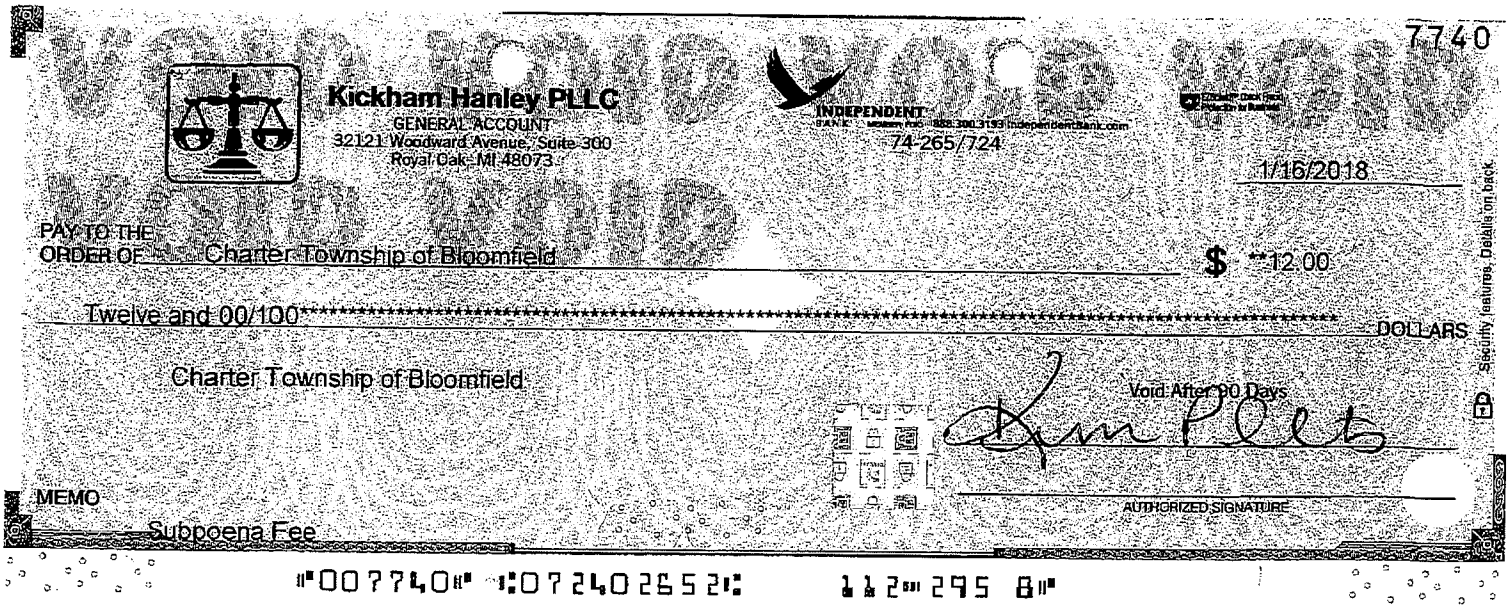
General Account - KH Subpoena Fee 12.00

Kickham Hanley PLLC 7740

Charter Township of Bloomfield 1/16/2018

Date	Type	Reference	Original Amt.	Balance Due	Discount	Payment
1/16/2018	Bill	Subpoena Fee	12.00	12.00		12.00
					Check Amount	12.00

General Account - KH Subpoena Fee 12.00



7740

Kickham Hanley PLLC
GENERAL ACCOUNT
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073

INDEPENDENT BANK
74-265/724

1/16/2018

PAY TO THE ORDER OF Charter Township of Bloomfield

$ **12.00

Twelve and 00/100********** DOLLARS

Charter Township of Bloomfield

Void After 90 Days

MEMO Subpoena Fee

AUTHORIZED SIGNATURE

Security features. Details on back.

⑈007740⑈ ⑆072402652⑆ 112 295 8⑈

Kickham Hanley PLLC 7740

Charter Township of Bloomfield 1/16/2018

Date	Type	Reference	Original Amt.	Balance Due	Discount	Payment
1/16/2018	Bill	Subpoena Fee	12.00	12.00		12.00
					Check Amount	12.00

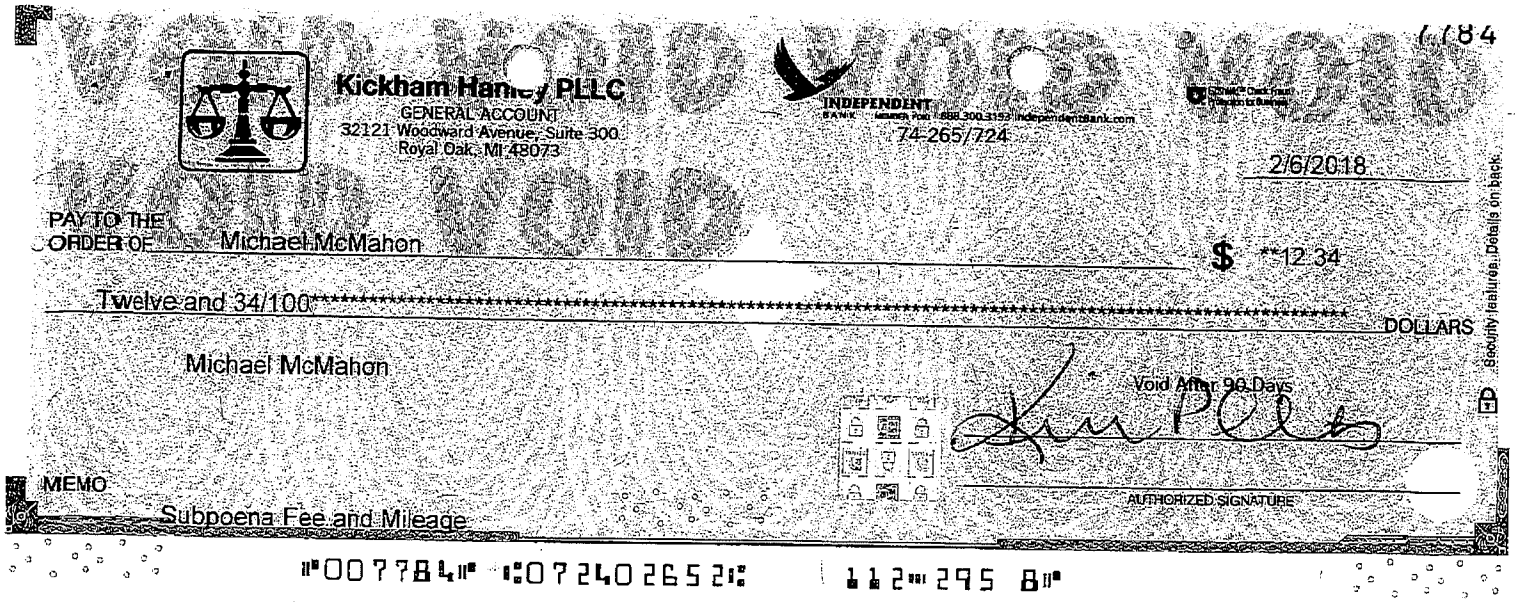
General Account - KH Subpoena Fee 12.00

Kickham Hanley PLLC 7740

Charter Township of Bloomfield 1/16/2018

Date	Type	Reference	Original Amt.	Balance Due	Discount	Payment
1/16/2018	Bill	Subpoena Fee	12.00	12.00		12.00
					Check Amount	12.00

General Account - KH Subpoena Fee 12.00



Kickham Hanley PLLC
GENERAL ACCOUNT
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073

INDEPENDENT BANK
74-265/724

7784

2/6/2018

PAY TO THE ORDER OF Michael McMahon

$ **12.34

Twelve and 34/100********** DOLLARS

Michael McMahon

Void After 90 Days

MEMO Subpoena Fee and Mileage

AUTHORIZED SIGNATURE

Security features. Details on back.

⑈007784⑈ ⑆072402652⑆ 112295 8⑈

Kickham Hanley PLLC 7784

Michael McMahon

Date	Type	Reference	Original Amt.	Balance Due	2/6/2018 Discount	Payment
2/6/2018	Bill	Subpoena Fee	12.34	12.34		12.34
					Check Amount	12.34

General Account - KH Subpoena Fee and Mileage 12.34

Kickham Hanley PLLC 7784

Michael McMahon

Date	Type	Reference	Original Amt.	Balance Due	2/6/2018 Discount	Payment
2/6/2018	Bill	Subpoena Fee	12.34	12.34		12.34
					Check Amount	12.34

General Account - KH Subpoena Fee and Mileage 12.34

EXHIBIT D

Bloomfield.W&S Class Action:Bloomfield (continued)

Date / ID	Timekeeper / Expense	Price / Markup %	Quantity	Amount	Total
[redacted]					
Activity: On-Line Filing Fees					
9/15/2017 241281	Kimberly On-Line Filing On-Line Filing Fees (6)	72.26	1.000	72.26	Billable
7/10/2017 240285	Kimberly On-Line Filing On-Line Filing Fees	2.58	1.000	2.58	Billable
4/5/2017 239081	Kimberly On-Line Filing On-Line Filing Fees	25.75	1.000	25.75	Billable
4/5/2017 239082	Kimberly On-Line Filing On-Line Filing Fees	2.58	1.000	2.58	Billable
4/26/2017 239304	Kimberly On-Line Filing On-Line Filing Fees	25.75	1.000	25.75	Billable

Bloomfield.W&S Class Action:Bloomfield (continued)

Date ID	Timekeeper Expense	Price Markup %	Quantity	Amount	Total	
1/16/2019 248287	Kimberly On-Line Filing On-Line Filing Fees		20.60	1.000	20.60	Billable
10/4/2018 246854	Kimberly On-Line Filing On-Line Filing Fees		20.60	1.000	20.60	Billable
8/22/2018 246350	Kimberly On-Line Filing On-Line Filing Fees		20.60	1.000	20.60	Billable
7/28/2017 240590	Kimberly On-Line Filing On-Line Filing Fees (9)		25.80	1.000	25.80	Billable
5/31/2017 239826	Kimberly On-Line Filing On-Line Filing Fees		25.81	1.000	25.81	Billable
10/18/2017 241638	Kimberly On-Line Filing On-Line Filing Fees (3)		36.13	1.000	36.13	Billable
5/17/2017 239684	Kimberly On-Line Filing On-Line Filing Fees (5/1, 5/2, 5/3, 5/4, 5/10, 5/16, 5/17, 5/19 & 5/23)		72.25	1.000	72.25	Billable
6/1/2017 239889	Kimberly On-Line Filing On-Line Filing Fees		5.16	1.000	5.16	Billable
6/6/2017 239928	Kimberly On-Line Filing On-Line Filing Fees		5.16	1.000	5.16	Billable
7/12/2017 240289	Kimberly On-Line Filing On-Line Filing Fees		2.58	1.000	2.58	Billable
6/12/2017 239958	Kimberly On-Line Filing On-Line Filing Fees		2.58	1.000	2.58	Billable
7/12/2017 240288	Kimberly On-Line Filing On-Line Filing Fees		5.16	1.000	5.16	Billable
6/16/2017 240176	Kimberly On-Line Filing On-Line Filing Fees		5.16	1.000	5.16	Billable

Bloomfield.W&S Class Action:Bloomfield (continued)

Date ID	Timekeeper Expense	Price Markup %	Quantity	Amount	Total	
10/11/2017 241590	Kimberly On-Line Filing On-Line Filing Fees (2)		10.32	1.000	10.32	Billable
7/5/2017 240244	Kimberly On-Line Filing On-Line Filing Fees		25.81	1.000	25.81	Billable
6/7/2017 239931	Kimberly On-Line Filing On-Line Filing Fees		2.58	1.000	2.58	Billable
10/26/2016 236685	Kimberly On-Line Filing On-Line Filing Fees		2.58	1.000	2.58	Billable
5/16/2016 234279	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
6/22/2016 234743	Kimberly On-Line Filing On-Line Filing Fees		2.58	1.000	2.58	Billable
7/11/2016 235018	Kimberly On-Line Filing On-Line Filing Fees		2.58	1.000	2.58	Billable
11/30/2016 237247	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
11/18/2016 237044	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
11/18/2016 237043	Kimberly On-Line Filing On-Line Filing Fees		2.58	1.000	2.58	Billable
11/16/2016 237041	Kimberly On-Line Filing On-Line Filing Fees		36.05	1.000	36.05	Billable
7/19/2016 235152	Kimberly On-Line Filing On-Line Filing Fees		36.05	1.000	36.05	Billable
11/2/2016 236849	Kimberly On-Line Filing On-Line Filing Fees		2.58	1.000	2.58	Billable

Bloomfield.W&S Class Action:Bloomfield (continued)

Date / ID	Timekeeper / Expense	Price / Markup %	Quantity	Amount	Total	
11/4/2016 236846	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
12/12/2016 237609	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
10/21/2016 236589	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
7/22/2016 235294	Kimberly On-Line Filing On-Line Filing Fees		2.58	1.000	2.58	Billable
7/22/2016 235295	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
10/10/2016 236494	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
10/7/2016 236493	Kimberly On-Line Filing On-Line Filing Fees		15.45	1.000	15.45	Billable
8/17/2016 235640	Kimberly On-Line Filing On-Line Filing Fees		30.90	1.000	30.90	Billable
9/21/2016 236267	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
8/22/2016 235641	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
8/23/2016 235644	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
9/19/2016 236043	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
3/30/2017 238955	Kimberly On-Line Filing On-Line Filing Fees		25.75	1.000	25.75	Billable

Bloomfield.W&S Class Action:Bloomfield (continued)

Date ID	Timekeeper Expense	Price Markup %	Quantity	Amount	Total	
2/14/2017 238351	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
3/29/2017 238949	Kimberly On-Line Filing On-Line Filing Fees		25.75	1.000	25.75	Billable
3/27/2017 238928	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
3/24/2017 238926	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
3/15/2017 238823	Kimberly On-Line Filing On-Line Filing Fees		2.58	1.000	2.58	Billable
4/21/2016 234149	Kimberly On-Line Filing On-Line Filing Fees		182.83	1.000	182.83	Billable
5/24/2016 234278	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
2/16/2017 238353	Kimberly On-Line Filing On-Line Filing Fees		2.58	1.000	2.58	Billable
3/29/2017 238950	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
1/12/2017 237921	Kimberly On-Line Filing On-Line Filing Fees		5.15	1.000	5.15	Billable
1/10/2017 237838	Kimberly On-Line Filing On-Line Filing Fees		36.05	1.000	36.05	Billable
1/10/2017 237839	Kimberly On-Line Filing On-Line Filing Fees		2.58	1.000	2.58	Billable
2/13/2017 238349	Kimberly On-Line Filing On-Line Filing Fees		30.90	1.000	30.90	Billable

Bloomfield.W&S Class Action:Bloomfield (continued)

Date	Timekeeper	Price	Quantity	Amount	Total
ID	Expense	Markup %			
Total: On-Line Filing Fees					$950.87

[redacted]

EXHIBIT E

US Mailing House

US Mailing House - 1050 East Valencia Drive - Fullerton, CA 92831
Phone: (714) 888-8838 Fax:

Invoice

Attn: EDWARD KICKHAM
KICKHAM HANLEY PLLC
32121 WOODWARD AVE STE 300
ROYAL OAK MI 48073

Job Name: CLASS ACTION NOTICE #10 ENVELOPE
EDWARD KICKHAM
Invoice # 73411 **CustCode:** KICKHAM
Invoice Date: **PO#:**
Date of Service: 9/27/2017
Terms:

Qty	Description	Unit Price	Ext Price
Data Processing			
1	NCOA database	50.00000	$50.00
19152	CASS / presort data	0.00800	$153.22
1	Formatting PDF + Cleanup	120.00000	$120.00
		SubTotal:	**$323.22**
Lettershop			
19152	Fold	0.01550	$296.86
19152	Insert letters	0.01200	$229.82
19152	Sort mail	0.01000	$191.52
		SubTotal:	**$718.20**
Inkjet			
19152	INKJET ADDRESS OUR #10 REGULAR ENVELOPES WITH RETURN ADDRESS, MAILING ADDRESS AND PERMIT	0.03333	$638.34
		SubTotal:	**$638.34**
Offset Printing			
19152	3 PAGE 8.5 X 11 PRINTED ON 70# WHITE OFFSET	0.06300	$1,206.58
		SubTotal:	**$1,206.58**
Postage			
Our Permit	19,152	0.254669486	$4,877.43
Convenience Fee	1	170.71	$170.71
		Postage Paid:	**$0.00**
		Postage Used:	**$5,048.14**
		Postage Subtotal:	**$5,048.14**

Sub Total:	**$2,886.34**
Tax:	**$0.00**
Credit:	**$0.00**
Services Total:	**$2,886.34**

Comments:

STANDARD MAIL

RECORDED

T ✓ Q

DATE 9/26/17

1048 / 1

Client Matter

ICP

Initials Approved

Attn: EDWARD KICKHAM
KICKHAM HANLEY PLLC
32121 WOODWARD AVE STE 300
ROYAL OAK MI 48073

Job Name: CLASS ACTION NOTICE #10 ENVELOPE
EDWARD KICKHAM
Invoice # 73411 **CustCode:** KICKHAM
Invoice Date: **PO#:**
Date of Service: 9/27/2017
Terms:

Qty	Description	Unit Price	Ext Price
		Balance Due:	**$7,934.48**

21ST CENTURY media

digitalfirst MEDIA

AGING OF ACCOUNTS

CURRENT	OVER 30 DAYS	OVER 60 DAYS	OVER 90 DAYS	TOTAL AMOUNT DUE
$1,592.74	$0.00	$0.00	$0.00	$1,592.74

DATE	BILLED ACCOUNT #	ADVERTISING NUMBER	ADVERTISEMENT/CLIENT NAME
09/30/2017	924635	924635	KICKHAM HANLEY PLLC

Any discrepancy in advertising charges must be communicated to the Credit Department by calling: 1-855-664-5860

ADVERTISING INVOICE / STATEMENT

DATE	DESCRIPTION	AD #	SIZE	X's	UNITS/QTY	RUN DATES	NET AMOUNT
PREVIOUS BALANCE							$0.00
09/28/17	Oakland Press	1430027	660.00 Lines	5	660.00	09/28/2017 09/28/2017	
	Subtotal - LEGAL NOTICE NOTICE OF CLASS A			5	660.00		$1,592.74

RECORDED
T ✓ Q
DATE 10/12/17
1048
Client Matter
KP
Invoice Approved

PREVIOUS BALANCE	$0.00

BALANCE DUE	$1,592.74

REMITTANCE PORTION: DETACH AND RETURN THIS PORTION WITH YOUR PAYMENT

21st Century Media - Michigan
PO Box 65220
Colorado Spgs, CO 80962

BILLING PERIOD	ADVERTISING/CLIENT NAME		
9/1/2017 - 9/30/2017	KICKHAM HANLEY PLLC		
ADVERTISING NUMBER	ACCOUNT NUMBER	TERMS OF PAYMENT	
924635	924635	Due Upon Receipt	
DATE	CURRENT	TOTAL AMOUNT DUE	AMOUNT ENCLOSED
09/30/2017	$1,592.74	$1,592.74	

1168 1 AB 0.403 E0299X IC328 D2889358633 S2 P4684755 0001:0001

KICKHAM HANLEY PLLC
32121 WOODWARD AVE STE 300
ROYAL OAK MI 48073-0999

REMIT TO:

21st Century Media - Michigan
PO Box 780154
Philadelphia, PA 19178-0154

1100000MICH0000009246350000009246350000000000000001592740001592740930201 70

EXHIBIT F

Remit Payment To:

Lestats Legal Support, Inc.
P.O. Box 2307
Southfield, MI 48037-2307

248-586-9850 (Office)
248-586-1655 (Fax)

Invoice

Date Billed	Invoice #
1/19/2018	35302

Bill to Attorney:	Service upon:
Kickham Hanley, PLLC. Edwad F. Kickham 32121 Woodward Ave. Suite 300 Royal Oak, MI 48073	OAKLAND COUNTY WATER RESOURCES COMMISSION ONE PUBLIC WORKS DR. 95 WEST WATERFORD, MI 48328-1907

Attorney File No.	Terms	Server	Result Date	Court	Case #
	Due on receipt	MGH	1/17/2018	O.C.C.C.	16-152613-CZ

Description of Service Invoiced	Amount
PERSONALLY SERVED DATE/DAY: 1/17/18 WEDNESDAY TIME OF SERVICE: 3:15 P.M. Plantiff: Jamila Youmans Defendant: Charter Township Of Bloomfield Attachments: SUBPOENA, $12 CHECK, EXHIBITS, LETTER	
Rush Service Fee.	20.00
Subpoena Service: C/O JULIA WOODSIDE (PERSON IN CHARGE)	40.00

RECORDED
DATE 1/24/18
1048
Cash Master
Initials Approved

Lestats Legal Support, Inc. greatly appreciates your business. Thank you.

Invoice Amount: $60.00

Please include invoice number on check to insure proper payment credit.

Balance Due: $60.00

Original Proof(s) of service(s) and/or Legal Service Instructions are attached to this invoice. Lestats does not hold copies.

TAX ID# 38-3032031

Remit Payment To:

Lestats Legal Support, Inc.
P.O. Box 2307
Southfield, MI 48037-2307

248-586-9850 (Office)
248-586-1655 (Fax)

Invoice

Date Billed	Invoice #
1/19/2018	35301

Bill to Attorney:	Service upon:
Kickham Hanley, PLLC. Edwad F. Kickham 32121 Woodward Ave. Suite 300 Royal Oak, MI 48073	CHARTER TOWNSHIP OF BLOOMFIELD 4200 TELEGRAPH RD. BLOOMFIELD TWP., MI 48303-0489

Attorney File No.	Terms	Server	Result Date	Court	Case #
	Due on receipt	MGH	1/17/2018	O.C.C.C.	16-152613-CZ

Description of Service Invoiced	Amount
PERSONALLY SERVED DATE/DAY: 1/17/18 WEDNESDAY TIME OF SERVICE: 3:50 P.M.	
Plantiff: Jamila Youmans Defendant: Charter Township Of Bloomfield	
Attachments: SUBPOENA, $12 CHECK, EXHIBITS, LETTER	
Rush Service Fee.	20.00
Subpoena Service: C/O CAROL MILLER (CLERK)	40.00

RECORDED
T C Q
DATE 1/24/18
1048
Client Matter
CP
Key Approved

Your business is appreciated and we find it a priviledge to being of service to your legal needs.

Invoice Amount: $60.00

Balance Due: $60.00

Please include invoice number on check to insure proper payment credit.

Original Proof(s) of service(s) and/or Legal Service Instructions are attached to this invoice. Lestats does not hold copies.

TAX ID# 38-3032031

INVOICE

VERITEXT LEGAL SOLUTIONS

Invoice No.	Invoice Date	Payment Terms
1218534	2/27/2018	Due upon receipt
Order No.	**Order Date**	**Case No.**
33747.001	1/26/2018	2016-152613-CZ
Case Name		
Jamila Youmans v. Charter Township of Bloomfield		
Records Pertaining To		
Service		

Edward F. Kickham
Kickham Hanley
32121 Woodward Avenue
Suite 300
Royal Oak, MI 48073

Records From	Ordered By	Reference Info.
Bart Foster The Foster Group 12719 Wenonga Lane Leawood, KS 66209	Edward F. Kickham Kickham Hanley 32121 Woodward Avenue Suite 300 Royal Oak, MI 48073	Client Matter No.: Claim No.: Insured: D/O/L:

Service ()	145.00
TOTAL DUE >>>	**$145.00**

We thank you for your prompt payment of this invoice.
We are happy to serve you at 216-621-9660.

(-) Payments/Credits:	0.00
(+) Finance Charges/Debits:	0.00
(=) New Balance:	**$145.00**

RECORDED
T ✓ Q
DATE 3/16/18
1048 1
Check Memo
160
Initials Approved

Tax ID: 20-3132569

Phone: (248) 544-1500 Fax:

Please detach bottom portion and return with payment.

Edward F. Kickham
Kickham Hanley
32121 Woodward Avenue
Suite 300
Royal Oak, MI 48073

Invoice No. : 1218534
Invoice Date : 2/27/2018
Total Due : $145.00

Remit To: **Veritext Records**
1100 Superior Avenue
Suite 1820
Cleveland, OH 44114

Order No. : 33747.001
BU ID : RCR
Case No. : 2016-152613-CZ
Case Name : Jamila Youmans v. Charter Township of Bloomfield

EXHIBIT G

STATE OF MICHIGAN

OAKLAND COUNTY CIRCUIT COURT

JAMILA YOUMANS,
individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CHARTER TOWNSHIP OF BLOOMFIELD,
a municipal corporation,

Defendant.

Case No. 2016-152613-CZ
Hon. Daniel P. O'Brien

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff and the Class

Mark S. Roberts (P44382)
Secrest Wardle
2600 Troy Center Drive
P.O. Box 5025
Troy, MI 48007-5025
(248) 851-9500
Attorneys for Defendant

Rodger D. Young (P22652)
Henry W. Saad (P24177)
Young & Associates
27725 Stansbury Blvd., Suite 125
Farmington Hills, MI 48334
(248) 353-8650
Attorneys for Defendant

AFFIDAVIT OF GREGORY D. HANLEY

The undersigned Affiant, Gregory D. Hanley, deposes and says the following of her personal knowledge:

1. I am a member of the firm Kickham Hanley PLLC, which is class counsel in the *Youmans v. Charter Township of Bloomfield* case.

2. I am lead counsel in *Youmans* and have personal knowledge concerning the matters set forth in this Affidavit.

3. I have read Plaintiff's Bill of Costs and state that (a) each item of cost or disbursement claimed is correct and has been necessarily incurred in the action, and (b) the services for which fees have been charged were actually performed.

4. The costs sought that were incurred in connection with providing notice to the Class of the pendency of this action are authorized under MCR 3.501(C)(6)(b), which provides that "[u]pon termination of the action, the court may allow as taxable costs the expenses of notification incurred by the prevailing party."

5. The costs sought for deposition transcripts are for transcripts that were filed with the clerk of the court and were read into evidence and/or otherwise necessarily used at trial.

6. As to the requested witness fees, the distances traveled and days actually attended are as set forth in the Bill of Costs and supporting documents and have been calculated pursuant to the applicable court rules and/or statutes.

7. I also calculated the amount of pre-judgment interest owing on the judgment. My calculations were as follows:

The principal amount of the judgment is **$8,798,586**

With prejudgment interest through March 31, 2019, the total amount owed is **$9,580,655**

This breaks down as follows:

Township's failure to pay for its own water use – $3,690,241
Township's failure to account for Non-Rate Revenues -- $2,935,063
Township's failure to account for Sewer-Only Revenues -- $2,173,282

Plaintiff and the Class are entitled to prejudgment interest on $8,798,586 from April 21, 2016 (the date the Complaint was filed) through the date of entry of judgment, and then post-judgment interest thereafter.

The judgment interest rates in Michigan for this period appear below:

Jan. 1, 2019 – 3.848%
July 1, 2018 — 3.687%
Jan. 1, 2018— 2.984%

July 1, 2017 — 2.902%
Jan. 1, 2017 — 2.426%
July 1, 2016 — 2.337%
Jan. 1, 2016 — 2.571%

The following is a calculation of the interest through March 31, 2019 (interest is calculated for six-month periods but is compounded annually):

April 21, 2016 – June 30, 2016 – $43,382.50 ($619.75 per day x 70 days)
July 1, 2016 – December 31, 2016 – $102,811.47

New principal amount December 31, 2016 -- $8,944,779.97

January 1, 2017 – June 30, 2017 – $108,500.18
July 1, 2017 – December 31, 2017 – $129,788.75

New principal amount December 31, 2017 – $9,183,068

January 1, 2018 – June 30, 2018 – $137,011
July 1, 2018 – December 31, 2018 – $169,289

New principal amount December 31, 2018 – $9,489,368

January 1, 2019 – March 31, 2019 – $91,287

Amount owing as of March 31, 2019 – $9,580,655

Dated: March 27, 2019

Gregory D. Hanley

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

The foregoing was subscribed and sworn to before me this 27th day of March, 2019, by Gregory D. Hanley.

Notary Public, Macomb County, Michigan
My Commission Expires: 12/21/2020
Acting in the County of Oakland

KH158438

EXHIBIT C

YOUNG & ASSOCIATES
ATTORNEYS AND COUNSELORS
ORCHARDS CORPORATE CENTER
27725 STANSBURY BOULEVARD, SUITE 125
FARMINGTON HILLS, MICHIGAN 48334

RODGER D. YOUNG

(248) 353-8620
FAX (248) 479-7828
E-MAIL young@youngpc.com
WEBSITE www.youngpc.com

NEW YORK OFFICE
845 UNITED NATIONS PLAZA
SUITE 37-C
NEW YORK, NEW YORK 10017
(212) 223-1222
FAX (212) 421-4214

January 22, 2021

FILED VIA MIFILE

Michigan Court of Appeals
Columbia Center
201 West Big Beaver Road, Suite 800
Troy, MI 48084

Re: *Youmans v Charter Twp of Bloomfield* (Docket No. 348614) – Request for Publication

Dear Hons. Stephens, Murray, and Servitto:

The Charter Township of Bloomfield (the "Township") sends this communication, in accordance with MCR 7.215(D). The Township respectfully requests publication of this Court's Per Curiam Opinion in the above referenced action, attached hereto as Exhibit A. The Township respectfully asserts that this case involves a significant case of public interest. See MCR 7.215(B)(5). As previously stated, this is especially true in this case where counsel for Plaintiffs have made a "cottage industry" out of threatening to and suing municipalities on issues essentially identical to the instant case.

This lawsuit was a certified class action wherein the class challenged the Township's municipal utility rates and ratemaking practices. Axiomatically, these public utilities are "regulated and used for the public benefit," and thereby this lawsuit meaningfully implicated the public interest. See *In re Retail Wheeling Tariffs*, 227 Mich App 442, 459-460 (1998) rev'd on other grounds sub nom *Consumers Power Co v Pub Serv Comm's*, 460 Mich 148, 596 (1999). For example, in *Lansing Ass'n of Sch Administrators v Lansing Sch Dist Bd of Ed*, 216 Mich App 79, 89 n 8 (1996), the Court noted the significant "public interest in the area of government," specifically, how governments use funds collected from the public. That lawsuit pertained to public education, but the same logic applies to municipal utility rates—people have a strong interest therein. The operations of the Township's Water and Sewer Department requires a large portion of the Township's budget, and ratepayers

increasingly hold the Township's Board of Directors and administrators accountable for these moneys and rates. See *id.* Further, the public continues to have an increasing interest in the utility rates and ratemaking process. The public also expects the Township—a public body—to be accountable for its actions. See *id*; see also *Tomkiewicz v Detroit News, Inc*, 246 Mich App 662, 669 (2001) quoting *Rosenblatt v Baer*, 383 US 75, 86 (1966) (acknowledging "the general public interest in the . . . performance of all government employees").

Although the Township brought its appeal to reverse the trial court's judgment awarding monetary and equitable relief, the Township's victory constituted a momentous triumph for local governments statewide, as well as the public at large whom they represent. Due to this action's significance to the public interest, both the Michigan Municipal League ("MML") and the Michigan Township Association ("MTA"), representing municipalities and townships statewide, submitted an amicus brief supporting the Township's position. They did so because, as they stated:

> all of the governmental entities throughout the state who operate water and sewer utilities have an interest in these issues. This matter could substantially affect these municipal utilities because the decision in this case could (1) change their understanding of when and how they can use fee revenue to cover costs related to their water and sewer systems; (2) alter how and under what circumstances they allocate system component costs to system users; and (3) vitiate the statutorily-conferred authority that municipal legislative bodies have to set utility rates.
>
> [Ex. B, MML and MTA Motion for Leave to File Amicus Curiae Brief, p 3]

In short, since the governmental entities throughout the state represent the public, the Court's written Opinion in this case involves not only legal issues of significant interest to the Township, but legal issues of significant public interest.

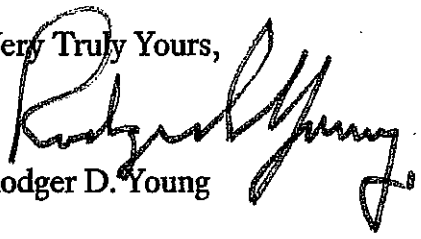
Similarly, the trial court's original judgment awarding monetary and equitable relief would have negatively affected the public. Specifically, as the Township would have been responsible for millions of dollars in damages, it would have needed to pay that judgment using the only moneys it has, i.e. public tax dollars. That would have required either potentially cutting funding for other public services or raising Township residents' taxes—either way, the public would have suffered. In other words, although all members of the certified class would have received a miniscule portion of the monetary relief paid by the

Township, those same class members would have effectively been paying themselves, plus the significant attorney fees sought by opposing counsel, perhaps ultimately paying more than the amount they would have received through a judgment.

Furthermore, this lawsuit has tarnished the Township's previously sterling reputation for operating an award-winning Water and Sewer Department. [See, e.g., Ex. C, Awards Announcement (Township awarded the Michigan Rural Water Association "Utility of the Year – over 15,000 Population" for both water and wastewater)]. Publication of this Court's Per Curiam Opinion would affirm that reputation. This would not only be beneficial to the Township, but it would benefit the public interest insofar as it would restore the public's confidence in the Township after the Township withstood the meritless accusations set forth in this lawsuit. Assisting the public in trusting their local governments certainly benefits the public interest. See *Missouri, Kansas & Texas R Co v May*, 194 US 267, 270 (1904) (recognizing members of legislative branch as "ultimate guardians of the liberties and welfare of the people . . . .").

Although this Court did not itself issue its Opinion in this matter for publication, by setting forth its thorough, highly detailed 38-page opinion, this Court's Opinion certainly appears suitable to be published. Based on the legal issues analyzed therein, which are of significant public interest, we respectfully submit this Court should grant the Township's request and publish its written Opinion.

Very Truly Yours,



Rodger D. Young

JDA/tg

YOUMANS V CHARTER TOWNSHIP OF BLOOMFIELD (DOCKET NO. 348614) – REQUEST FOR PUBLICATION

EXHIBIT A

Youmans v Charter Township of Bloomfield, unpublished per curiam opinion of the Court of Appeals issued January 7, 2021 (Docket No. 348614)

STATE OF MICHIGAN

COURT OF APPEALS

JAMILA YOUMANS, and all others similarly situated,

Plaintiff-Appellee/Cross-Appellant,

v

CHARTER TOWNSHIP OF BLOOMFIELD,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
January 7, 2021

No. 348614
Oakland Circuit Court
LC No. 2016-152613-CZ

Before: STEPHENS, P.J., and MURRAY, C.J. and SERVITTO, JJ.

PER CURIAM.

In this certified class action, plaintiff Jamila Youmans, who is the sole class representative, challenged certain municipal utility rates and ratemaking practices of defendant, Charter Township of Bloomfield ("the Township"). Defendant appeals as of right the trial court's amended judgment, entered after a bench trial, that awarded plaintiff and the plaintiff class permanent injunctive relief and more than $9 million in restitution. Plaintiff has filed a cross-appeal, challenging the trial court's refusal to award damages for certain components of the Township's water and sewer rates.[1] We affirm the trial court's ruling concerning plaintiff's claims based upon a violation of § 31 of the Headlee Amendment, Const 1963, art 9, § 31, reverse its judgment awarding monetary and equitable relief to plaintiff and the plaintiff class, and remand for entry of a judgment of no cause of action in favor of the Township.

I. FACTUAL AND PROCEDURAL BACKGROUND

[1] By leave of this Court, the Michigan Municipal League and the Michigan Townships Association have submitted an amicus brief that supports the Township's position. *Youmans v Charter Twp of Bloomfield*, unpublished order of the Court of Appeals, entered January 29, 2020 (Docket No. 348614).

This case arises out of plaintiff's challenge to various aspects of the Township's water and sewer rates and its related ratemaking methodology during the "class period," which commenced on April 21, 2010, for purposes of plaintiff's assumpsit claims (i.e., six years before plaintiff initiated this action) and on April 21, 2015, for purposes of plaintiff's Headlee claims (i.e., one year before plaintiff initiated this action). In October 2016, the trial court entered an order "certifying this case as a class action" and appointing plaintiff as the sole class representative. Plaintiff's amended complaint included six counts, the first of which asserted several claims for violation of § 31 of the Headlee Amendment, and the remainder of which asserted claims for "**ASSUMPSIT/MONEY HAD AND RECEIVED**" with regard to both certain specific components of the Township's water and sewer rates and the "arbitrary, capricious, and unreasonable" nature of those rates and the underlying ratemaking processes. After the trial court denied the parties' competing motions for summary disposition, the matter proceeded to a 10-day bench trial.

A. THE UTILITY SYSTEMS AND BASIC RATEMAKING METHODOLOGY

Wayne Domine, the director of the Township's "engineering and environmental services" department from 1991 until his retirement in May 2017, testified that the Township consists of approximately 18,000 parcels of realty, approximately 3,000 of which are not serviced by the Township's water utility. The water system provides treated, potable water to its municipal customers, but it is also used for firefighting capability, providing water to the Township's fire hydrants.

According to Domine, much of the Township's water system was privately constructed by real estate developers beginning in the 1920's. The infrastructure was originally a piecemeal collection of "several subdivision well water supply systems throughout the township." However,

> [i]n 1963, the township had decided that the existing well systems would not be adequate to provide the water quality and quantity required to maintain the projected future demands of the community. The connection to the City of Detroit system was found to be most dependable for the health and welfare of the township residents. Several miles of transmission mains were constructed. . . . Since then over 200 miles of lateral water mains have been extended into areas either by means of special assessments or developer funded projects.

Since 2004, the Township has been subject to an abatement order, which arose out of litigation with the Michigan Department of Environmental Quality (DEQ), to "dry out" the sewer system, i.e., prevent water infiltration into the system. After performing a long-term needs study, the Township approved a 20-year capital improvement program, which is funded by the inclusion of a "water debt charge" in the disputed utility rates.

Domine agreed that the Township's sewer system is a separated system, with "one set of pipes for sanitary sewage," and a separate storm-sewer system, which is "intended to collect storm water runoff or . . . water from the land" and discharges such water directly into a waterway. The

Township does not own its storm-sewer system, other than the storm drains that are on the property of the township. Rather, the storm-sewer system is owned and maintained, in concert, by several county and state entities. Oakland County bills the Township for the "sewer flow" that exits in the Township, as estimated by approximately 30 meters located in various areas, based on the Township's proportional contribution to the entire system. Conversely, the Township does not measure "sewer flow" in order to determine the rate that it charges its municipal sewage customers; it bases the overarching sewer rate on water usage, which is the common practice throughout Oakland County.

Domine was involved in the Township's annual budgeting (on a limited basis) and water and sewer ratemaking from before the class periods in this case commenced until his May 2017 retirement.[2] He also coauthored the "annual rate memorandum," which included an outline of recommended water and sewer rates and was presented to the Township "board" for approval each year. The "first" consideration in ratemaking was "to gather up all the expenses, and then determine a revenue that would cover those expenses." Put simply, the rates were intended to allow the Township to "[b]reak even," but the process is complex, generally taking place "over several months." By nature, the rates are predictive—intended to cover expenses that will be incurred after the rates are set—and thus they merely *estimate* the revenue that will be required. Accordingly, to provide a "margin of error," the rates were generally set to generate "a revenue stream slightly above" the projected expenses, but in some years during Domine's tenure, the "water and sewer fund" was operating at a deficit. Even so, and in at least one year, a midyear adjustment to the rates was required to prevent an excessive deficit. The ratemaking process employed by the Township did not focus on individual line items; it employed a holistic approach, focusing on generating sufficient overall annual revenue to cover the overall annual costs.

Jason Theis testified that he served as either the Township's finance director or deputy finance director at all times pertinent to this case, during which time he was also involved in the annual budgeting process for the Township's water and sewer fund. Theis is a certified "public finance officer," which is akin to being a certified public accountant, but with an exclusive focus on governmental, rather than private, finance and accounting. He indicated that, in setting the disputed utility rates, it was desirable to budget both revenues and expenses "conservatively," in hopes of ensuring sufficient revenue to cover expenses. As a result, with regard to individual line items in the budget, the actual amounts received or expended often varied considerably from the projections used in setting the rates. Over the ratemaking period of six months, the disputed rates would go "through many different iterations."

According to Domine and Theis, the water rate included a "variable rate" for consumption, which was intended to recover the Township's operating expenses, depreciation improvements, and the cost of the water purchased from the Southeastern Oakland County Water Authority, and

[2] Thomas Trice, the director of the Township's Department of Public Works (DPW), testified that he was also involved in the disputed ratemaking process during the pertinent timeframe.

the water rate also included a "fixed," "ready-to-serve" charge to cover extra operational expense. The fixed portion of the water rate generally represented about 80% of the utility's required revenue stream, and it was intended to help the Township cover its "steady stream of monthly expenses" despite fluctuating water use and revenue over time.

Similarly, Domine indicated that the sewer rate included a "variable rate," which was intended to recoup operating expenses (including treatment of raw sewage) and depreciation improvements, and the sewer rate also included a "fixed" charge that was intended to recover the remainder of the Township's operating expenses. In addition, both the sewer and water rates included debt service charges, which were assessed in amounts intended to pay the debt service on bonds or other obligations issued by the Township related to water and sewer.

The parties stipulated that some portion of the Township's utility ratepayers were not also on the "tax rolls" that fund the Township's general fund, citing examples including tax-exempt entities like churches. Domine indicated that about 80% of the Township's water customers are also sewer customers, with the remainder using septic-tank systems. A small portion of customers—about 3%—receive sewer services only; they are not water customers. Domine agreed that those "sewer only" customers are billed in one of two ways. The majority pay a fixed annual charge, while the remainder have elected to have a meter installed on their well-water line and are billed "for their sewer based upon actual water usage." Additionally, the water system permits homeowners to install a "secondary" water meter that measures water used outside the home (e.g., for lawn irrigation or swimming pools), and such water usage is not included when calculating the homeowner's sewer charges.

Because the Township has no way of determining the amount of "sewer" services a sewer-only customer uses, the "fixed annual charge" is determined by averaging the rate of the "sewer only" customers who have elected to have a water meter installed. Domine admitted that the sewer ratemaking methodology did not account for the sewer only customers explicitly. But Domine also indicated that, because the Township had been overestimating volume in an attempt to keep the sewer rate from excessively increasing, "a lot" of the time the Township did not collect enough "sewer revenue" to cover the associated costs fully.

According to Theis, the budgeting program for the water and sewer fund—which he sometimes referred to as the creation of a "projected income statement"—involved "a lot of back and forth" "looking at five year trends of all the different accounts within the water and sewer fund," establishing projected figures for "operational" overhead (including staffing expenses), and projecting the anticipated water costs. Of the 18 different Township funds for which annual budgets and projections are prepared, the water and sewer fund was the only "enterprise fund" (i.e., a proprietary, non-tax revenue, self-sustaining fund, which charges for services provided, is not supported by a millage, and falls outside the operating township budget), and it was the most difficult to budget for because it involved "more guess work" than the other funds, particularly with regard to commodity charges and tap sales. For instance, the revenue received during a "dry season" would vary by "millions of dollars" from the revenue received in "a wet season[.]" In

addition to the Township's 18 budgeted funds, Theis also oversees approximately another 10 that aren't budgeted. Most of the Township's utility customers were billed on a quarterly basis, while most of the "suppliers" billed the Township monthly. As a result, in calculating the necessary revenue flow to meet its utility expenses, the Township needed to plan to keep sufficient cash on hand from quarter to quarter.

As an expert witness, plaintiff called Kerry Heid, who is a "rate consultant specializing in the public utility field," ratemaking in particular, and has approximately 40 years of experience in that field. He agreed that the "first step" in utility ratemaking "is to determine the revenue requirement," i.e., the revenue that the utility will need to cover its expenses, and he also agreed that this involves cost projections regarding variable expenses that are generally unknown when the rates are set.

According to Heid, "almost industry-wide, the generally recognized standard to use for generally accepted cost of service and rate making practices for water utilities" was, at the time of trial, set forth in the seventh edition of "the American Water Works Association M1 Manual" (the "M1 Manual"). Heid's opinions in this case concerning the disputed water rates were based on those methodologies and principles. He indicated that there are "two generally accepted methods" by which a utility's revenue requirements are determined: (1) "the cash basis, or the cash method," and (2) "the utility basis." In Heid's opinion, the Township used the cash method in calculating the disputed rates. Under that method, a municipality determines "its cash needs" by considering expenses such as "debt service, which would include principal and interest on bonds or outstanding debt," "operating and maintenance expenses," taxes, "[a]nd any other cash needs that the utility would need in order to operate its utility." The total of such expenses constitutes the utility's "revenue requirement." In determining which expenses, precisely, are properly considered in ratemaking, a utility should only include an expense if it is "prudently incurred" and "necessary for the utility to operate."

According to Heid, after a utility has determined its anticipated revenue requirement, "[t]here are two different sources of funds that the utility needs to consider, such that the total of those fund sources would generate the needed revenue requirement": (1) rate revenue, and (2) "miscellaneous revenues," which are also known as "non-rate revenues." Non-rate revenue includes any "sources of revenue that the utility does receive over and above the actual rates that are developed by the utility." Before determining its rates, a utility should "net out the non-rate revenue from the total revenue requirement." For example, if a utility's initial revenue requirement was estimated to be $100,000, but it expected to generate non-rate revenue of $5,000, it should "design rates that would generate revenues of $95,000."

Heid indicated that, after determining its "net revenue requirement," the utility would determine what portion it "want[ed] to recover through a customer charge," such as the fixed portion of the Township's water rate, and how much the utility wanted to recover by way of "a volumetric charge" for water use. Although there is an element of "discretion" in deciding the proper ratio of the fixed customer charge and volumetric charge, Heid opined that the proper

method was to perform a "cost of service study," which is something that the Township had failed to do, instead relying on what Heid described as "an arbitrary allocation[.]" In any event, Heid indicated that after deducting the fixed charge from the revenue requirement, a utility should divide the remaining portion (i.e., the portion it wished to recover through a volumetric charge) by the expected "total usage," with the result of that equation equaling the appropriate utility rate. In Heid's view, it was "[a]bsolutely not" appropriate for a municipal utility to design its rates to "over-recover," i.e., to recover more than the utility's net revenue requirement.

The Township called Joe Heffernan as an expert witness. Heffernan is a certified public accountant and retired from Plante Moran with at least 30 years of experience in conducting "public sector" accounting audits and consultations. He indicated that municipalities are obliged to have such external audits performed under Michigan law. According to Heffernan, before he reviewed the financial statements in this case, the Township's independent auditing firm had "already looked at the underlying general ledger and tested the internal controls and looked for compliance with laws and regulations[.]" After doing so, the independent auditors issued an audit opinion indicating that the Township's "financial statements are fairly stated" and were "free of material misstatement," meaning that "they're reliable." Similarly, Heffernan discerned "nothing" in the financial statements that would have led him to suspect that the Township's water and sewer department was potentially failing to comply with any applicable regulatory law.

Heffernan testified that Plante Moran audits "125 communities in southeast Michigan." About "[a] third to half of them don't" issue rate memoranda or any other "formal written document" explaining their utility-ratemaking methodology. Nor was he aware of any "requirement" for municipalities to do so. In setting their utility rates, such municipalities "just look at two things, what do our cash reserves look like, do they seem too high or too low, what's the percentage increase that we're going to get from our supplier, and based on whether their cash is too high or too low they bump . . . up or bump . . . down" the rates. Such "simple" ratemaking was "really common," and it "seem[ed] to work," historically resulting in relatively proportional cash inflows and outflows for the utilities that employ it.

Heffernan agreed that it is "possible to reach a reasonable water and sewer rate using a flawed rate model" or no model at all, and he also agreed that "mathematical precision" in calculating rates is neither required nor possible because rate models are based on predictions, "[a]nd honestly, every single one of your individual projections will be wrong" to one degree or another. "[T]he numbers are so big . . . and can change by so much you really have to accept a certain amount of fluctuation and variation[.]"

The Township also called Bart Foster as an expert, with his expertise "in the area of municipal water and sewer service rate setting[.]" Foster has "30-plus years' experience" in "providing financial, management consulting, and rate consulting services to predominantly municipal water and waste water utilities." He has performed such services for "between 10 and 20" municipalities in Michigan, and he was "pretty much regularly engaged for over 30 years with the Detroit Water and Sewage Department until they transitioned into the Great Lakes Water

Authority" (GLWA). At the time of trial, he was employed as a consultant at the GLWA, and he indicated that he was familiar with Michigan regulatory law regarding municipal utilities.[3]

B. "LOST" WATER AND "CONSTRUCTION" WATER

According to Domine, one factor that was considered in setting the water rates was "non-metered water," which was, in essence, "lost" water that the Township purchased but never actually sold. This occurred for "a variety" of reasons, such as broken water mains, leaks, "[c]onstruction water" (i.e., water used in the construction and maintenance of the water system itself), "billing inaccuracies," "meter inaccuracies," and "lag time" in meter reading. During the relevant "class period" years, Domine had estimated the anticipated "lost" water, for ratemaking purposes, at between 5% and 7% of the Township's annual projected water purchase. Such "lost water" figures were included in setting the water rates, intended to offset the cost of the water that the Township had purchased but never sold to its metered customers.

According to Heffernan, "water loss" is something that he commonly encountered in auditing municipal utilities because one "key" metric in "every" such audit was a comparison between "the volume of water purchased and sold by the water and sewer fund[.]" On the other hand, Foster indicated that he disfavored the use of the phrase "lost water"—preferring to use the phrase "unaccounted-for water"—because "lost water" is an "unduly simplified" description. Terminological disputes aside, Foster agreed with Domine and Heffernan about the essential underlying concept, explaining that for a municipality like the Township, which has no water "production facilities" and instead "purchases water wholesale," unaccounted-for water "would simply be how much water is being purchased on a wholesale basis from the provider . . . compared to how much water [the municipality] sells to the customers[.]" Such unaccounted-for water was generally attributable to "the possibility of inaccurate meter reads, both on the purchase side and on the sales side," "natural leakage out of the pipes," and "uses of water for construction purposes that's unmetered[.]" Foster indicated that "the Township had an unaccounted-for water percentage of between 4 and 5 percent," which was "on the low" or "medium side" for municipalities in southeast Michigan. He opined that, because unaccounted-for water was "a cost of maintaining the system," "it is appropriate to recover that" cost in the corresponding utility rates, and it would be inappropriate for the water and sewer fund or the Township's general fund to bear such expense.

Domine indicated that "construction water" is used primarily in "the flushing and filling of the water mains that are being built," in "pressurizing the main," and also when "doing bacteria testing." In his opinion, the use of such unmetered construction water is "necessary . . . for the operation of the system itself[.]"

[3] In substance, Foster's relevant expert opinions were largely identical to those expressed by Heffernan.

C. WATER USED BY TOWNSHIP FACILITIES

In addition to "lost" water, Domine agreed that "the township's facilities use water, but there isn't a check written from the water and sewer fund to the general fund for the value of that water[.]" He explained that, rather than paying for such water with cash, the Township provides in-kind "services and value" to "the water and sewer fund," the value of which "exceeds the value" of the water used by the Township's facilities. Domine and Theis admitted that they were aware of no formal documentation of such in-kind remuneration. As an example of one such in-kind service, Domine indicated that Township firefighters performed inspection, "flushing, and some of the maintenance" on the Township's fire hydrants. As other examples, Theis indicated that his services and those of his staff (i.e., accounting, finance, and human resources services) are provided to the water and sewer fund at no charge, as are the services of the Township's "IT department," which spends approximately 10% of its resources servicing the water and sewer fund. That fund is also provided "maintenance" and "cleaning" services by Township employees.

Although some of the municipal buildings are equipped with water meters, readings were never taken, and thus there was no record of precisely how much water was used by the municipal facilities during the pertinent timeframe. As part of this litigation, however, Domine prepared an estimate of the water used by the Township's facilities, estimating a total annual use of approximately 3.8 million gallons. Based on that figure, he estimated that the combined water and sewer services provided to the Township facilities was worth approximately $35,000 annually,[4] while the water provided to the Township's fire hydrants was valued at $10 per hydrant, for a total of $31,000. Domine and Theis each estimated the value of the Township's in-kind remuneration for such services to be more than $100,000 annually.

Contrastingly, Heid indicated that any in-kind remuneration that the Township provided to the water and sewer fund was inadequate because, based on his estimations, the value of the "public fire protection" services rendered to the Township by the water utility "was in excess of a million dollars every year[.]" And with regard to fire hydrant water usage, Heid indicated that the $10 estimate per hydrant was "grossly inadequate and without any basis[.]"

According to Heffernan, most municipalities "typically" have water meters installed on municipal buildings, and their water and sewer departments typically bill the general fund for such water use. Foster agreed, indicating that he does not "normally see . . . the practice employed by [the] Township" of accepting in-kind remuneration for water from the general fund rather than directly billing the general fund for the water used by municipal facilities. But according to Heffernan, based on his experience with "other communities of a similar size," he estimated that the true value of the in-kind services provided to the water and sewer department by way of

[4] Heid indicated that the $35,000 estimate was facially reasonable.

"general fund" dollars was "in the neighborhood of" $700,000 or $800,000. On that basis, Heffernan opined that he would not consider the Township's facilities to be receiving "free water."

On the other hand, Foster indicated that the value of the water used by the Township facilities and the in-kind services provided to the water and sewer fund were "close to being a wash[.]" But he also indicated that the Township's in-kind remuneration strategy was "perfectly reasonable" and opined that the disputed utility rates would most likely go up, not down, if the Township were to undo the in-kind arrangement and, along with beginning to pay for water used by Township facilities, also begin to charge the water and sewer department for all of the services that it had previously received from the Township at no charge.

D. "NON-RATE" REVENUE

Domine indicated that he never employed the term "non-rate revenue" while working for the Township and had not heard that term before this litigation commenced; rather, he categorized such revenue as "other revenue." His testimony concerning the treatment of non-rate revenue in the ratemaking process was somewhat convoluted. He agreed that the annual rate memoranda "probably" contained no "discussion" of non-rate revenue—those memoranda "never" specified all of the "expenses" underlying the recommended rates—but he disagreed that non-rate revenue was "not factored into" the rate "model" for the disputed utilities, explaining that they were considered as part of the "revenue stream" for the Township's annual budget, but not as a source of revenue attributable to the disputed rates. Later, however, Domine testified that "non-rate revenue . . . is *not* included in the rate calculation. It's considered as extra revenue to pay towards the expenses." (Emphasis added.) Later still, when Domine was asked, "[Y]ou weren't recovering all of your budgeted expenses through the rate, but instead were leaving some of them off because you anticipated getting non-rate revenue[?]", he replied, "Yeah, that—that would be what I've been saying all along." He also indicated that non-rate revenue was "reflected in the numbers" in the annual rate memoranda, explaining that the total operating expenses listed in those documents were actually "the net expenses, after deducting the non-rate" revenue. Notably, Domine qualified his answers somewhat by stating that his memory of such issues was hazy, given that he had retired, and questions about non-rate revenue would be better directed to the Township's finance director, Theis. But Domine also indicated that he "kn[e]w for a fact" that he had deducted non-rate revenue from the total operating expenses before calculating the disputed rates. In effect, this benefited the utility customers, lowering rates.

When the trial court asked Domine whether the deduction of non-rate revenue from total operating expenses had "historically" been "manifest" in his "paperwork," he replied, "It—it just came up in the last couple years . . . you got to understand, for 20 some years, a lot of it, I just did it[.]" Historically, Domine had performed the calculations informally for his own use, using

"notepads and sticky notes," rather than documenting the process formally.[5] However, during his final two years working for the Township, he had created a detailed spreadsheet to explain to his replacement "how the process works[.]" The spreadsheet showed the same process by which Domine had deducted non-rate revenue from the total operating expenses "in the past."

Theis agreed that, with the exception of "the '16, '17 rate memo," the rate memos for the other fiscal years at issue here did not include any "calculation that deducts non-rate revenue before setting the rate." Like Domine, however, Theis disagreed with the contention that non-rate revenue had not been accounted for in calculating the disputed rates, indicating that it had been used to offset projected annual expenses in ratemaking. Theis indicated that certain informal spreadsheets, which he had prepared for his own use in prior years, documented that process of incorporating non-rate revenue into the rates. Theis considered a specific item of non-rate revenue to be attributable as revenue of the water and sewer department if it was "directly related" to those utility services.

On the other hand, Heid indicated that, other than the Township's "rate document for fiscal year 2016-17," in his review of the documents provided to him in this case, Heid had "absolutely not" seen "any evidence" that non-rate revenue was properly accounted for in calculating the disputed rates. On the contrary, after comparing the "operating expenses that were reflected in the budget" for each class-period year "to the operating expenses that were utilized in the" corresponding "rate making model" for that year, Heid opined that the numbers indicated that the Township had not duly "netted out" the non-rate revenue in any fiscal year other than the one beginning in 2016. Heid summarized: "My opinion . . . is that the utility's reasoning or explanation for the treatment of non-rate revenues does not hold water, that they did not net out the non-rate revenue from the operating expenses as reflected in the rate memos." The Township's failure to deduct non-rate revenue "was not a reasonable rate making practice" because it "is commonly accepted that the non-rate revenues should be deducted from the total revenue requirement when establishing rates," and in Heid's reckoning, "if the rate methodology is faulty," then it is not possible to determine whether "the rate is reasonably proportionate" to the underlying utility costs.

On cross-examination, Heid indicated that he had "solely derived" his opinions concerning whether non-rate revenue was duly incorporated into the disputed rates by reviewing the annual "rate memorandums." He had not reviewed any "underlying work papers."

Although Heffernan agreed that non-rate revenues should be accounted for in ratemaking, he indirectly criticized Heid's methodology, indicating that it was not useful to compare the numbers in the rate memoranda and those in the water and sewer fund's annual "budget" because such documents are prepared "at two different points in time," "for two different purposes," utilizing different accounting principles. Thus, inconsistencies between the two documents were

[5] Theis described the prior methodology as, for "lack of a better term," "back of a napkin" calculations, which were not performed "consistently" during the relevant timeframe.

to be expected. Heffernan explained that "quite often" the budget does not have "a great relationship to what actually happens" after the budget is set, and the same is true with regard to rate memoranda.

Heffernan further explained that his analysis of the issues in this case involved "looking through the financial statements, some of the other documents ancillary to the financial statements, and most importantly, having some open discussion with the finance director, [the Department of Public Works (DPW)] director, and talking through what's behind the numbers in order to come to a conclusion." He focused on the financial statements particularly, "because those are what actually happened," whereas the annual utility "budget" was "merely a plan of what you may expect to happen," intended to permit the Township board to grant its "permission" for the "the various department heads . . . to conduct business and spend up to certain amounts for certain purposes." Similarly, although "rate memos can help inform you as to" the thought process employed in ratemaking, they cannot demonstrate the results—"what really happened"—like financial statements do. For that reason, financial statements are vitally important in auditing municipal utilities. They permit an auditor to assess whether the revenues *actually* received by a utility are "proportional" to the *actually* incurred underlying expenses.

Foster's opinions in this case were also primarily founded on his review of the Township's financial statements, and he agreed with Heffernan that they are preferable to the water and sewer fund's budgets and rate memoranda because it was best to evaluate "the effect" of rates and charges "after the fact[.]" Foster added that having been independently audited, the "financial statements have a degree of review that is arguably more—more rigorous than a budget or a rate memoranda."

After reviewing the Township's relevant financial statements, Heffernan and Foster both opined that the Township had duly accounted for non-rate revenues during the pertinent timeframe, although its calculations concerning non-rate revenue were not set forth in the rate memoranda. As Heffernan put it, "The work just wasn't shown." Even so, Heffernan believed that the financial statements and the proportionality of the water and sewer fund's cash flows during the relevant timeframe "clearly" demonstrated that the Township had properly accounted for non-rate revenue in the disputed rates. Heffernan expounded, "That's the great thing about the financial statements, you can't hide. It's in there or else the auditor would be disclaiming their opinion and saying everything is wrong."

Additionally, Heffernan indicated that even assuming, for the sake of argument, that the Township had *not* duly accounted for non-rate revenue in setting the disputed rates, that failure, standing alone, was insufficient to render the rates "unreasonable[.]" Foster agreed, stating that "it wouldn't matter" because if the water and sewer fund had recovered too much in the disputed rates, it would have either adjusted its rates accordingly or taken the opportunity to prudently add to its reserve funds, and if it had recovered too little, "there would need to be rate increases in order to get the reserves at . . . the prudent level."

When asked, on cross-examination, whether failure to account for non-rate revenues would result in "an overcharge to the rate payers," Heffernan replied:

> Potentially. And the reason I say potentially is there's only an overcharge if in fact you have charged them more than their actual cost. And in the rates there are so many other things that could be inaccurate in your rate model and you don't know until you see what—and that's why I look at the financial statements, what were the costs, what was the revenue that came in, that tells you if you've overcharged.

E. THE COUNTY DRAIN CHARGES

Michael McMahon, who is an employee of the Oakland County Water Resources Commissioner's Office, testified that Oakland County assesses fees to its municipalities for maintenance of the county storm-sewer system. The charges for "chapter 4 drains" are generally "assessed . . . to individual property owners," although an "at large portion" is assessed to the municipality and some municipalities pay the "chapter 4" charges on behalf of their residents, while the charges for "chapter 20 drains" are "assessed to municipalities at large."[6] The county also charges municipalities a combined sewer overflow facility fee.

According to McMahon, in 2015, the Township was in arrears of approximately $346,560 with regard to its county drain charges because, before that time, the county "had sort of lapsed on some of [its] assessments." The same situation had occurred with multiple municipalities, and McMahon was tasked with getting all the drain funds out of deficit. Accordingly, he contacted Domine, seeking to establish a budgetary plan for the Township to satisfy its arrearage. Ultimately, it was agreed that the Township would do that over the course of a couple years so that they could budget for it.

Domine indicated that, as a result, in the fiscal year beginning April 1, 2015, the Township began including a line item in its water and sewer budget for "county storm drain maintenance" (the "drain charges"). Before that time, the Township's "chapter 20" drain fees had always been paid out of the Township's general fund with tax dollars, not included as an aspect of the disputed utility budgets. For example, in 2013, $23,000 was paid from the general fund to satisfy the drain charges. The first year after the switch, the new budgetary line item for drain charges was $200,000, which was included in calculating the disputed utility rates. An additional $200,000 was included in the same fashion the next year (i.e., in the fiscal year beginning April 1, 2016), and $75,000 was included for drain charges the year after that.

[6] Domine indicated that, to his knowledge, the Township does not pass any of its "chapter 4 drain" charges onto its tax base or ratepayers.

Domine was unable to explain specifically why the drain charges were shifted from a general-fund obligation to a component of the disputed utility rates, but he recalled the Township's finance director indicating that he was closing the particular general fund from which the drain charges had previously been assessed and reallocating the line items that had been paid out of that fund "to other accounts . . . that would be more appropriate[.]" Domine agreed that one of the functions of the storm-sewer system is to collect water that runs off the road so it doesn't flood the roadways, and the system also prevents soil erosion. However, Domine also testified that the Township does not own any of the roads within it, indicating that they are all owned by the county, the state, or private entities, and the county and state, not the Township, therefore have sole responsibility for installing any new drains that are required to ensure proper drainage from roadways. Trice agreed with that sentiment. According to Domine and Trice, the storm-sewer system also benefits the Township's separate sanitary sewer system by preventing the "infiltration or inflow" that the Township was ordered to remedy in the litigation with DEQ; by lowering the water-treatment charges incurred by the Township (and thereby lowering the disputed utility rates); and by preventing the backflow of raw sewage into the ground, the sewer system, and sewer customers' homes. Trice explained that the county storm drains run parallel with the Township's sanitary sewers, and thus anytime the storm-sewer system floods as a result of improper maintenance, storm water would get into the sanitary sewer system and could wreak havoc (e.g., it could collapse Township pipes).

F. RENT CHARGES

According to Theis, in 2014, the Township began to charge the water and sewer department annual rent of $350,000, which was included as an expense in the disputed ratemaking process in the years that followed. Such rent was paid by the water and sewer fund—by way of a quarterly journal entry in the ledger—to the Township's general fund, for the use of the DPW facility. The DPW facility was constructed "probably" sometime between 2007 and 2009, and it was financed by a new debt millage. The water and sewer fund had occupied the DPW facility since sometime in 2009 or 2010. The Township's motor pool also occupied several automotive repair bays at the DPW facility, which were used to service all of the Township's different departments and funds.

Trice testified that he was the individual who established the amount of the disputed $350,000 rent charge. He calculated that figure by estimating that the water and sewer department was occupying about 30,000 square feet of the DPW facility's total 77,000 square feet, then applying an estimated annual rental rate of $12 per square foot. Trice established that estimated rental rate of $12 per square foot based on storage space that the Township was already renting out in the local district court building, and the figure was also approved of by the Township assessor. In setting the $350,000 annual rent, Trice opined that the Township had used the lowest number available. In his opinion, it would have yielded a much higher rental figure had the Township based the rent on an allocation of all of the actual costs associated with the DPW facility, such as insurance, accounting, IT, HR, administration, and consultants. Trice also indicated that the disputed rental figure was calculated only by reference to the space in the DPW facility actually

occupied by the water and sewer department, it did not include the areas occupied by other departments, such as the motor pool.

In Theis's estimation, the annual rent of $350,000 was reasonable, given the Township's related expenses for depreciation and bond interest with regard to the DPW facility, which were, in concert, over $400,000 a year. In addition, the Township incurred costs for ongoing maintenance, operation, and cleaning of the DPW facility, and it paid a share of the facility's utility bills for gas and electric. In a broader sense, Theis believed that it was appropriate for the water and sewer fund to pay rent for its office space because, "as an enterprise fund, they should be self-sustaining, and all costs and revenues should be coming from and to that base of customers, as opposed to taxpayer[s] in general."

With regard to the disputed rent charges, plaintiff called James Olson as an expert witness. Olson is the director of a company that specializes in preparing federally mandated cost allocation plans for governmental entities, including municipalities. Olson testified that, in his professional opinion, the $350,000 annual rent charge was not "appropriate because it's not based on cost," i.e., "the cost of the facility, . . . utilities, maintenance, insurance; anything that related to capital improvements on the building once it's built, [and] that kind of thing." To the extent that the rent was instead based on depreciation and the interest associated with debt for that facility, Olson viewed that methodology as improper because those expenses were already "paid for" by the special millage that had financed the DPW facility. Olson explained, "Well, if you're a taxpayer, you're paying for the building and its interest cost in a separate bill, so you're paying for that once. You wouldn't pay for it again in the rate that you pay for your water and sewer." In Olson's estimation, the amount of rent charged by the Township for the DPW facility bore no discernible relationship to the properly considered costs, it was instead improperly based on an estimated market rate. However, because of the limited information that had been provided to him, Olson had admittedly been unable to determine the Township's annual maintenance expense for the DPW facility, and he acknowledged that it was "possible that there's some maintenance expense that could properly be charged" to the water and sewer fund. Olson also indicated that his opinion concerning the propriety of the Township's methodology in calculating the disputed rental figure involved a philosophical "gray area" of accounting principles.

On cross-examination, Olson admitted that, as an enterprise fund, it was appropriate for the water and sewer fund to be funding its own office space somehow, and he was not of the opinion that it was *altogether* inappropriate for the Township to charge that fund some amount of rent. Additionally, Olson conceded that it would be appropriate for the Township to consider the central service costs related to the DPW facility—including accounting, financial, auditing, human resources, insurance, security, legal, and "IT" services—in determining the proper rental amount, along with "general administrative expenses[.]" Because plaintiff's counsel had not supplied Olson with the necessary information, Olson had been unable to prepare a full cost allocation plan for the water and sewer fund, and he was also unable to comment on how, precisely, the Township had calculated the disputed rental amount. Finally, Olson admitted that, although he was not aware of any federal funding related to the DPW facility, his opinions in this case were based exclusively

on federal regulations establishing guidelines for development of indirect costs for federal programs.

When asked to critique Olson's opinion concerning the rent charges, Heffernan indicated that Olson's reliance on federal regulations was inappropriate because those regulations do "not apply to any spending that's not of federal dollars," and although every township in Michigan receives at least "a little bit" of federal funding in the form of a community development block grant, only those specific federal funds must be spent in accordance with the federal regulations relied on by Olson. Heffernan also disagreed with Olson's ultimate opinion that the disputed rent charges were inappropriate. In Heffernan's view, there were "hundreds of activities" funded by the Township's general fund that impacted the water and sewer fund's finances, and the overarching concern was to ensure that the overall allocation of expenses was "fair" when viewed in the context of the "whole system." Indeed, after performing such a review in this case and learning about all of the services that the Township's general fund provides to the water and sewer department without compensation, Heffernan believed that the $350,000 annual rent for the DPW facility represented "undercharging," not an overcharge.

G. OPEB CHARGES

Domine confirmed that "OPEB" charges—i.e., charges for "[o]ther post-employment benefits"—were one budgetary line item that was factored into the disputed utility rates. According to Theis, "OPEB refers to benefits which are primarily health insurance expenses that the township is obligated . . . to pay on behalf of retirees," including both those already retired and current employees who will become retirees in the future. Aside from health-insurance expenses, which are by far the largest OPEB item, all expenses of retirees fall under the broad penumbra of "OPEB" expenses.

Heffernan testified that, unlike pension funds, which Michigan municipalities are constitutionally required to keep funded at actuarially determined levels, there is no such requirement with regard to OPEB funding, and thus many municipalities "really kind of ignored" OPEB funding "up until about 15 years ago[.]" Under accounting principles set forth by the Governmental Accounting Standards Board (GASB) somewhere between 2006 and 2008, however, a municipality is required to treat its unfunded OPEB obligations as a liability, which tends to incentivize it to begin the process of properly funding such obligations.[7] In doing so, there is generally an element of "catch up"—i.e., setting aside funds for the amortization of the unfunded actual accrued liability—while also setting aside funds to pay for the OPEB costs of one's current employees. It is "strongly" recommended for municipalities to be proactive about funding their OPEB obligations because it reduces the net present value cost of that benefit. Additionally,

[7] On cross-examination, Heffernan admitted that the GASB has no authority to *compel* municipalities to duly fund their OPEB obligations, only to direct them concerning how such obligations should be accounted for in financial documents.

Heffernan opined that municipalities have "a moral obligation" to do so, although there are still some communities that have not funded any of their OPEB obligations. He compared failing to fund OPEB requirements to not setting aside money for pension funds, which he viewed as "bonkers." He explained: "[T]o not pay today's cost for that really says I'm going to have employees provide me services and I'm going to tell them, in exchange for the services you provide me I'll give you a salary; I'll also give you this benefit that I'll ask your grandchildren to pay."

In Theis's view, OPEB entitlements were "earned" by employees during their work tenure, and the Township's obligation to fulfill those entitlements accrued at the same time. Heffernan agreed with Theis that employees "earned" their OPEB benefits during their working career with the Township, although such benefits are "paid for," primarily in the form of insurance premiums, after the employees retire. Theis indicated that the inclusion of OPEB charges in the disputed utility rates began in 2009, by way of a resolution passed by the Township board, and at some point, the Township also began to include OPEB charges in the fees charged by its cable studio and building inspection fund. The amount of the disputed OPEB charges included in the utility rates—which varied over the relevant years from about $200,000 to approximately $577,000—was based on a "very complicated calculation" that was, in turn, based on "a moving target" in the form of the latest actuarial reports concerning the Township's future OPEB obligations. Ultimately, during the fiscal year that began March 31, 2016, the Township transferred the $2.7 million in OPEB charges that had accrued in the water and sewer fund into a return-yielding retiree health care trust, which is "dedicated to . . . currently retired water and sewer employees as well as trying to save for the future retirees of the water and sewer fund."[8] Since then, smaller annual contributions of the accrued OPEB charges have been deposited to that trust. Such OPEB funds are partially intended as "catch up" to cover some of the past service cost, which was necessary "because all the prior administrations didn't set aside that money as the employees were earning it, which is what you should do." Theis indicated that the Township's "OPEB costs are jumping up exponentially each year" and are "some of the largest in the state," with current actuarial projections anticipating the future OPEB obligations of the Township at more than $160 million, more than $10 million of which is attributable to retirees or employees of the water and sewer fund.

According to Theis, by paying $2.7 million into the OPEB trust, the Township made an immediate impact on its current OPEB expenses. "[T]he OPEB line item expense immediately decreased the following year," which resulted in a corresponding decrease in the disputed utility rates, particularly in light of certain recently enacted GASB accounting practices for municipalities. In part, Theis admitted that the OPEB charges in the disputed rates were necessary because the Township can only collect so much in a millage and they get rolled back by Headlee and so forth. He indicated that, although he is aware of "nothing . . . that forces" the Township to

[8] In the Township's "main operating funds"—its "general fund, road fund, and public safety fund," which employ about 80% of the Township's employees—at the close of each fiscal year, any surplus funds are used to fund a similar OPEB trust for the employees of those funds.

proactively set aside funding for its OPEB expenses, the Township's goal is to fully fund its OPEB obligations in trust, thereby relieving the current operating budget and rate payers from that retiree expense. Theis hoped that it would actually accomplish that goal sometime during his career, but he had doubts, given that, at the time of trial, the Township was "only 3 percent funded." In his view, the disputed OPEB charges were something that was ultimately for the benefit of not just the Township, but the rate payers, given that new legislation was being contemplated that might force the Township to more aggressively fund its OPEB obligations, which could compel a more dramatic rate increase in the future. In Theis's opinion, it was prudent to be proactive, not reactive, with regard to such budgetary issues.

In Heffernan's view, there was nothing "improper" about the Township's transfer of $2.7 million to the OPEB trust. And Heffernan agreed that transfer will ultimately result in significant OPEB savings to the water and sewer fund because, once held in such a trust, up to 70% of the funds can be invested in "equities" with an expected annual return of 7% or more, whereas money held in the water and sewer fund is subject to certain regulations that has historically limited the annual return to under 1%.

H. PUBLIC FIRE PROTECTION (PFP) CHARGES

Domine indicated that, aside from delivering potable water to the Township's customer, the municipal water system is also is also used for "firefighting capability," providing water to the Township's fire hydrants. According to Trice, the Township's water customers receive a special benefit from the Township's fire hydrants because those hydrants are only placed along the course of the "public water system[.]"

Heid agreed that the provision of fire protection capabilities is one of the two fundamental functions of a municipal water supply utility, with the other being the provision of potable water to municipal customers. By nature, however, those functions fundamentally differ insofar as municipal customers use water on a relatively constant basis, whereas a fire hydrant generally serves in a standby capacity, being used only when there is a fire or "the utility needs to flush their system for periodic maintenance." Nevertheless, the PFP function of a water system carries "a very significant cost" because "[g]enerally, . . . all of the facilities have to be oversized. They have to be two or three times the size that they would be" otherwise. Also, to provide PFP capability, a water system must have a source of supply that provides more water, a greater amount of elevated storage, larger water mains, and either extra higher-powered booster pumping stations. Hence, "[t]ypically, public fire protection is considered a service because public fire protection does require the utility to overbill, if you will, because it needs to be able to meet those particular demands when you do have a fire." Professional standards would generally require that the value of such PFP services be paid for out of a municipality's general fund, not borne by the municipal water utility and its ratepayers.

Heid indicated that, in determining the portion of a utility's PFP expenses that is properly allocable to the municipality, there are two generally employed methods. The first, "preferable,"

and "most widespread method" is to per-form "a fully allocated cost of service study where the utility actually calculates the capacity requirements associated with providing public fire protection service and determining the cost of providing that service and what the rate should be for providing that service." The second is an antiquated method that was developed in Maine in 1961 (the "Maine Curve method"). Under the Maine Curve method, the peak day requirements of the utility are calculated by multiplying the estimated average daily water usage by an "average peak" factor of 2½, thereby estimating the "peak day" (or "peak hour demand") on the system's water usage. Subsequently, the utility's *overall* "peak day requirements" are compared to the calculated peak day requirements associated with providing public fire protection, as calculated by a formula that is based upon population that establishes the estimated need of fire flow. The ratio between those two figures is then charted on a graph of "the Maine Curve" to determine what percentage of the water utility's gross revenue should be recovered by PFP charges assessed to the given municipality's general fund.

Heid did not attempt to analyze the Township's PFP expenses under the preferable 'fully allocated cost of service study" method because he had inadequate information, and it is "virtually impossible" to do so in the adversarial setting of litigation because the process relies on the candid opinions of the given utility's staff members. Rather, for each year at issue in this case, Heid calculated the Township's public fire protection costs utilizing the Maine Curve methodology. In doing so, he estimated the Township's overall "peak day requirements" using the "average peak" factor of 2½, and he admitted that, if the Township's actual peak day requirements varied from that estimated figure, it would alter his analysis. Using the estimated figure, however, the results indicated that, during the relevant years, the Township's water and sewer fund should have recovered between 10% to 15% of its gross revenue by way of PFP charges paid by the Township's general fund. Indeed, under the Maine Curve method, the minimum appropriate charge to a municipality for PFP services is 6% of the water utility's gross revenues. Heid opined that the Township had acted improperly by failing to pay such expenses out of its general fund and instead recovering its PFP expenses in the disputed water rates, which effectively forced the water utility's "end use customers" to pay for PFP services that were provided to all of the Township.

On cross-examination, however, Heid admitted that the M1 Manual indicates that assessing PFP costs to the rate payers, rather than the municipal taxpayers, is one method for meeting any revenue requirement for the PFP costs. Moreover, it is a method that is, in Heid's experience, used "from time to time under certain circumstances," although he did not specify when or under what circumstances. Heid also reaffirmed that the M1 Manual embodies the generally accepted rate making principles for water utilities.

About 96% of Heffernan's auditing experience involved Michigan municipal and governmental entities, and he indicated that he had never before encountered a PFP challenge like the one at issue in this case. Indeed, as far as Heffernan knew, neither his direct clients nor any other client of Plante Moran had ever been subject to any kind of requirement to have a PFP charge like the one described by Heid, although Heffernan had encountered municipalities that did so voluntarily. Similarly, Foster testified that, "most" water distribution systems in Michigan don't

even identify what the PFP costs are, and those that *do* generally recover such costs through their water rates, not by charging the general fund. Foster was aware of only one Michigan municipality that ostensibly recovered (or had in the past recovered) PFP charges in the fashion suggested by Heid, and it did so only because a local ordinance explicitly mandated the practice. When Foster was asked whether the Maine Curve method is "widely recognized as a method of determining fire protection costs" in Michigan, he replied: "I don't believe so. In the few instances that I'm aware that an entity goes through the practice of allocating . . . public fire protection costs, other methods besides the Maine curve are used."

Heffernan explained that, for municipal utilities, it is difficult to accurately follow generally accepted accounting principles (GAAP) concerning "revenue recognition" and "expense recognition," which is somewhat similar to the non-GAAP concept that is commonly referred to as the "matching principle." Under GAAP, "[e]xpenses should be recognized at the time the transaction occurs that causes you to incur a cost, regardless of when the cash flow goes out," and the same principle generally applies to revenues, although there are exceptions. In the context of municipal utilities, however, following such principles is difficult because water meters are generally read on a quarterly basis, and thus a utility can only estimate how much water was used at any given time. Accordingly, the goal is to use such estimates to "get it materially right."

On cross-examination, when Heffernan was asked whether he was "aware of . . . any state or local laws that require" PFP charges "to be incorporated as part of a general fund obligation as opposed to a water and sewer" fund obligation, he replied that he could think of only one such law. He had reviewed one attorney-prepared "interpretation" of the Revenue Bond Act of 1933, MCL 141.101 *et seq.*, which suggested "that if you have a revenue bond, . . . it's better to have the general fund paying for" PFP charges.

I. CASH BALANCE OF THE TOWNSHIP'S WATER AND SEWER FUND

According to Theis, the Township's "water and sewer" fund was one of several Township "funds" with its "own set of books," separate from the "general fund." As an "enterprise" fund, the state did not require the Township to maintain an annual "budget" for the water and sewer fund, but the Township nevertheless did so in the interest of "transparency" and accurate ratemaking. From 2011 to 2017, the water and sewer fund had total "cash inflows of 156-ish million dollars, and cash outflows" of "151 point something million." Theis opined that this represented clearly proportionate cash outflows of 96% of the cash inflows.

Theis agreed that, as of March 31, 2010, the Township's water and sewer fund included "about $4 million dollars of cash and cash equivalents[.]" One year later, on March 31, 2011, the fund included approximately $6.6 million in cash and cash equivalents; on March 31, 2012, it contained about $11.5 million; on March 31, 2013, it contained roughly $14.5 million; on March 31, 2014, it contained "in excess of $18 million"; on March 31, 2015, following annual capital-asset purchases of $5.7 million, it contained about $12.5 million; on March 31, 2016, after the $2.7

million OPEB transfer, it contained approximately $7.8 million; and on March 31, 2017, it contained about $8 million.

After reviewing the water and sewer fund's cash flows over that same period and duly considering its non-rate revenues, Heffernan opined that those cash inflows and outflows, which were within 4 percent of one another over the course of the relevant timeframe, were "very proportional." If anything, Heffernan believed that the Township should have been "trying to increase their cash investment reserves a little bit" more. Put succinctly, his opinion was that from 2011 to 2017, the water and sewer fund's "total accumulation of cash, even though it varied from year to year, wasn't unreasonable[.]"

Foster agreed that the disputed rates and charges were both reasonable and proportional to the underlying utility costs, summarizing his opinion as follows:

> Based on my review of the water and sewer rates in place between 2010 and 2017, . . . the revenues generated by the water and sewer rates have been commensurate with the revenue requirements of the water and sewer enterprise fund to provide service to the customers of the Township. The amount of money recovered through those rates has been proportionate to the cost of providing the service to the residents and businesses in the Township.

On cross-examination, however, Foster conceded that, hypothetically speaking, even if the disputed rates were duly proportional to the underlying utility expenses, the water and sewer fund could nevertheless use the revenue *generated* by such rates for clearly improper purposes, such as purchasing an expensive vacation home for the Township's board members.

Theis confirmed that the Township's water and sewer fund operated at a net loss in four of the fiscal years from 2005 to 2010, which forced the Township to subsidize it with cash from other Township funds. In 2010, for example, the water and sewer fund ended "9 of the 12 months . . . with negative operating cash." Over the years, Theis implemented multiple changes aimed at remedying such shortfalls, and since 2012, the water and sewer fund had no negative balances at any month end, although there had been "low balances." One month in 2017, for example, the fund was left with only $1,800 in cash on hand. Theis also endeavored to build up a sufficient "emergency reserve" in the water and sewer fund to address emergent breaks and repairs of items such as water mains, which can cost "hundreds of thousands of dollars" or even "millions" to repair, along with operating reserves, debt reserves, and capital improvement reserves. According to Theis, such reserve funding is essential "for the prudent operation of a healthy water and sewer fund," and despite his best efforts, he believed that the water and sewer fund was "still not in a position to have proper reserves[.]" He further opined that having total reserves of about $13 or $14 million was a "pretty conservative, appropriate . . . target to get to."

Theis admitted that, in reviewing financial statements for the disputed years, he found one instance in 2015 where a $600,000 expense was mistakenly counted twice in setting the disputed utility rates, thereby raising the rates. But he highlighted this as proof of how important it is to

view the water and sewer fund as a whole, rather than focusing on individual line items, noting that despite including the $600,000 expense twice in setting the rates for 2015, those rates ultimately resulted in an overall loss for the water and sewer fund that year, raising insufficient revenue to cover the fund's annual expenses.

Heffernan indicated that although there's no exact science to determine how much a municipal utility should keep in reserves, the water and sewer fund's reserves of about $4 million in 2010 "felt a little bit low." There is a consensus among experts that it is appropriate to maintain reserves for two fundamental areas: operating expenses and capital expenses (including future capital projects). In practice, Heffernan generally recommended that his clients maintain operational reserves of about 25% of their annual operating revenue, while his recommendation concerning capital reserves was dependent on the capital expenses the client anticipated in the next two to three years. Although a municipality could instead fund its capital projects on a pay-as-you-go basis, that was a "somewhat riskier" approach that Heffernan would "probably" advise against. After reviewing the water and sewer fund's 20-year capital plan, Heffernan opined that in the neighborhood of $13.9 million was an appropriate reserve target, and he agreed that the reserve levels at the time of trial were still "well below" what was advisable.

Foster added that his review of the Township's financial records during the relevant timeframe demonstrated that "the amounts that were specifically identified on the rate memoranda as capital improvements, and the amounts that were actually, from the audited statements, spent on capital improvements over that time period are remarkably close." This supported his opinion that the rates and charges have generated revenues commensurate with the revenues required to operate and finance capital improvements to the system over the time in question.

In addition, Heffernan opined that a municipality's reserve level is an appropriate consideration in both municipal utility ratemaking and in determining the proportionality of disputed utility rates. In short, a utility should "be setting [its] rates in a manner that will get the reserves where they should be." If the reserves are too low, rates should be increased—even if this results in temporarily "disproportional" cash flows—and the converse is equally true. On cross-examination, Heffernan admitted that the Township did not have a written plan with regard to its target reserve figures, but he explained that, based on the other 125 cities and townships that he was familiar with as an auditor, it was "highly unusual" for a municipality to have such a written plan.

J. TRIAL COURT'S OPINION, JUDGMENT, AND AMENDED JUDGMENT

Following the parties' closing arguments, the trial court took the matter under advisement and, on July 12, 2018, it announced its opinion orally from the bench.[9] The court ruled in favor of the Township with regard to all of plaintiff's claims pursued under § 31 of the Headlee Amendment, entering a judgment of no cause of action with respect to those claims. Generally, the court reasoned that, under the test set forth in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998), plaintiff failed to demonstrate that the disputed charges in this case constituted unlawful tax exactions.

Turning to plaintiff's common-law claims for assumpsit for money had and received, the trial court ruled partially in favor of both parties. With regard to non-rate revenue and revenue attributable to the Township's sewer-only customers ("sewer-only revenue"), the court ruled in plaintiff's favor despite repeatedly finding that in light of the Township's ratemaking methodology—which the court referred to as "abstruse, recondite methodology"—the court was unable to determine whether the disputed rates were proportional to the associated utility costs and, if not, what "damages" figure was warranted. The trial court also chided the Township for failing to "show its work," indicating that, based on the record before the court, it was "not evident that the rates are just and reasonable."

This was a common theme in the trial court's decision. The court recognized that both *Novi v Detroit*, 433 Mich 414, 428-429; 446 NW2d 118 (1989), and *Trahey v Inkster*, 311 Mich App 582, 594, 597-598; 876 NW2d 582 (2015), held that municipal utility rates are presumed to be reasonable and that the plaintiff bears the burden of rebutting that presumption when challenging such rates. But the trial court indirectly criticized *Trahey*'s reasoning, and it refused to rely on the presumption of reasonableness in deciding this case. The court described that presumption as a "substitute for reason" and an exercise in "thoughtless thoughtfulness," at least as applied here; suggested that *Novi* and *Trahey* are outdated, having relied on caselaw from "1942 and 1943"; and indicated that application of the presumption of reasonableness in this case would "bastardize the presumption" and "absolutely, necessarily, unequivocally transform it into an unrebuttable presumption[.]" In support, the trial court reasoned that "[i]t is clear from a reading of the law that a presumption exists once the details are on the table for all to see. First comes the details, then comes the presumption." In this instance, the trial court reasoned, the Township's unclear ratemaking methods had

> impeded the Court, and more importantly, [the] customer[s] and taxpayers from passing upon the question of whether the [Township's] rates are proportionate to its costs. This impediment, abstrusity . . . estops invocation of the presumptive reasonableness, the thoughtful thoughtfulness presumption of the rates. Short of

[9] It appears that the trial court had prepared some sort of written decision, which it read into the record rather than issuing a written opinion.

> blind deference to [the Township], . . . [the Township's] impediment . . . hamstrings the Court . . . from even being able to hear a claim of disproportion. In a word, if the presumption were to prevail here, the presumption is and evermore shall be . . . unrebuttable.

After ruling in plaintiff's favor on that basis regarding the non-rate revenue and sewer-only revenue, the trial court reserved its ruling concerning the proper "damages" figures. The court indicated that, if the parties were unable to settle concerning such figures, the Township would be permitted to "chime in" with regard to why, in light of the Township's failure to "show its work," the court should not simply accept plaintiff's related damage calculations. After subsequently considering the matter further, the trial court awarded a "refund to Plaintiff and the Class" of approximately $2.935 million with regard to the "non-rate revenue" claim and about $2.173 million with regard to the sewer-only revenue.

As to plaintiff's claim concerning "lost water," the trial court also ruled in plaintiff's favor. After construing Bloomfield Township Ordinance § 38-225 ("The township shall pay for all water *used* by it in accordance with the foregoing schedule of rates. . . .") (emphasis added) and § 38-226 ("All water service shall be charged on the basis of water *consumed* as determined by a meter installed on the premises of the user by the department.") (emphasis added), the court agreed with plaintiff that, under those provisions, "[i]f water is not consumed, as determined by a meter under [§ 28-226], then by process of elimination, or by default, [it] must be water used by the Township under [§ 38-225]." Put differently: "The cost for this truly lost water bucket per ordinance . . . was destined to be borne on the shoulders of the general fund taxpayers." The trial court also rejected any argument that the Township paid for such "truly lost water" by way of the in-kind services it provides to the water and sewer fund. Rather than ruling concerning the amount of "damages," the trial court instructed the parties "to crunch the numbers."

As to water "used" by the Township's municipal facilities, the trial court held that, although the Township's "rationalization" concerning in-kind remuneration was "obfuscated," plaintiff had failed to "overcome . . . the presumptive reasonableness of the Township's decision to pay" for such water with in-kind services. The trial court also rejected plaintiff's contention that the in-kind arrangement violated Bloomfield Township Ordinance § 38-225, reasoning that the ordinance "does not specify" that in-kind services cannot be used as a form of payment. Nevertheless, the trial court found "liability in Plaintiff's favor" and in favor of the plaintiff class. It awarded no monetary "refund" but ordered defendant to "henceforth" and "permanently" provide "explicit accounting . . . with explicit valuations" of the in-kind services that the Township provides as payment to the water and sewer fund, including payments for "construction water," "lost water," PFP charges, rent, and water used by municipal facilities.

On the other hand, with regard to "construction water," the trial court held that such water is "used" by both the Township and the ratepayers within the meaning of Bloomfield Township Ordinance § 38-225, and it rejected the argument that the Township paid for such water via the in-kind services it provides to the water and sewer fund. On that basis, the trial court ruled in

plaintiff's favor concerning the construction water, again reserving its ruling concerning the amount of "damages" and instructing the parties "to crunch the numbers." After further considering the matter, the trial court eventually entered an amended judgment ordering the Township to issue "a refund to Plaintiff and the Class in the amount of" approximately $3.69 million related to "the Township's own water use," which seemingly covered both "lost water" and "construction water."

With regard to plaintiff's non-Headlee claim concerning the disputed county drain charges, the trial court stated no reasoning in support of its holding. Rather, it simply stated: "Storm water drain, judgment, no cause of action."

As to the disputed rent charges, without explaining its reasoning, the trial court ruled in plaintiff's favor with regard to "[l]iability," but it refused to award any "damages[.]" However, as noted earlier, it issued a permanent injunction against the Township, ordering it to explicitly document any in-kind services used to pay such rent charges.

Similarly, with regard to OPEB charges, the trial court ruled in plaintiff's favor with regard to "liability," but it refused to award any "damages[.]" However, the trial court permanently enjoined the Township to "explicitly document the OPEB dollars in setting its water and sewer rates." The trial court reasoned that the Township's commingling of OPEB-charge revenues that had not yet been funded into the OPEB trust with "surplus" funds in the water and sewer fund was improper given that, until such OPEB funds were transferred to trust, they could be utilized by the water and sewer department "for whatever it deems appropriate."

Finally, as to PFP charges, without explaining its reasoning, the trial court ruled "no cause of action in part," and "liability in Plaintiff's favor in part," initially holding that plaintiff "prevail[ed] in a dollar amount equal to the cost of water in fire hoses over the relevant time frame paid by the general fund." After considering the matter further, however, the trial court entered its amended judgment holding that plaintiff and the plaintiff class were entitled to no "refund" in that regard because the Township "already pays" for such water by way of in-kind services. But the trial court issued a permanent injunction ordering the Township to expressly document such in-kind services and their associated valuations, and it also ordered the Township provide "explicit accounting of water in fire hoses to be paid for by the general fund[.]"

Approximately two months after the trial court announced its decision, it held a hearing concerning the proper remedies in this case. While entertaining argument in that respect, the trial court asked plaintiff's counsel whether, in light of the Township's "abstruse, recondite" ratemaking, there was some "legal vehicle" by which the court might award plaintiff "damages" despite its having found both that it was unable to determine whether the disputed rates were actually disproportionate to the associated costs and that the amount of any disproportionality was impossible to determine based on the record evidence. The trial court indicated that it would keep that issue "on the backburner" and allow plaintiff to argue the issue further at a later date.

Less than two weeks later, however, the trial court entered its initial judgment in this case. That initial judgment explicitly indicated that it was not a final order and that the trial court retained jurisdiction "for all purposes[.]" But in a subsequently entered order, the trial court ruled: "[T]he inquiry to plaintiff was and remains this: 'Is there a legal or equitable doctrine which would yield a judicial adjudication in favor of one party because the other party obscured proofs needed for that judicial adjudication?'."

Hence, about three months after the initial judgment was entered, plaintiff filed a motion for relief from judgment under MCR 2.612(C)(1)(f), requesting entry of an amended judgment on the basis that there were, in fact, several legal or equitable doctrine that would yield a judicial adjudication in plaintiff's favor because the Township had obscured proofs. At the ensuing motion hearing, the trial court indicated that plaintiff's motion was "inaptly titled" as a motion for relief from judgment and would, instead, be treated as a motion to "supplement" the initial judgment. The court acknowledged that it "remain[ed] unsure if the [Township] committed the singular wrong of passing a rate disproportionate to costs," explaining that, in the court's estimation, the "wrong" committed by the Township "was wont of clarity" in its "abstruse recondite rates[.]" Based on the caselaw cited by plaintiff, the trial court indicated that it was persuaded that "such wrong of unclarity itself . . . fulfills the element Plaintiff needed to prove that the Defendant's rates were disproportionate to costs in the amount of nonrate revenue and sewer-only receipts[.]"

Thus, the trial court granted plaintiff most of her requested relief, entering an amended judgment awarding plaintiff and the plaintiff class, in sum, approximately $9.58 million (including prejudgment interest) in "refunds," along with the permanent injunctive relief described earlier. The instant appeals ensued.

II. ANALYSIS

A. STANDARDS OF REVIEW

On appeal, the parties raise several distinct claims of error, which we review under varying standards. "This Court . . . reviews de novo the proper interpretation of statutes and ordinances," *Gmoser's Septic Serv, LLC v East Bay Charter Twp*, 299 Mich App 504, 509; 831 NW2d 881 (2013), and the legal question of whether a municipal utility charge constitutes an unlawful exaction under § 31 of the Headlee Amendment, *Mapleview Estates, Inc v City of Brown City*, 258 Mich App 412, 413-414; 671 NW2d 572 (2003). As a general rule, this Court also reviews equitable issues de novo, *Sys Soft Technologies, LLC v Artemis Technologies, Inc*, 301 Mich App 642, 650; 837 NW2d 449 (2013), reviewing any related factual findings by the trial court for clear error, *Canjar v Cole*, 283 Mich App 723, 727; 770 NW2d 449 (2009). "A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *In re AGD*, 327 Mich App 332, 338; 933 NW2d 751 (2019). In reviewing a trial court's factual findings, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

However, a trial court's decision to grant equitable relief in the form of an injunction is generally reviewed for an abuse of discretion. *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 33-34 & n 12; 896 NW2d 39 (2016). "A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes, or when it makes an error of law." *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 320; 900 NW2d 680 (2017) (*Planet Bingo*) (quotation marks and citation omitted).

B. PLAINTIFF'S ASSUMPSIT CLAIMS

The parties disagree whether the trial court's use of its equitable powers was proper here. As appellant, the Township argues that, having found that plaintiff had failed to demonstrate that the disputed rates were disproportionate to the underlying costs, the trial court erred by disregarding the presumption that those rates were reasonable. The Township also argues that the trial court erred by awarding plaintiff and the plaintiff class both the monetary award and permanent injunctive relief that it did. Contrastingly, by way of plaintiff's cross-appeal, she contends that the trial court should have awarded additional refunds related to the disputed OPEB, PFP, and rent charges. We agree with the Township that the trial court erred by failing to apply the presumption that the disputed rates were reasonable and abused its discretion by granting plaintiff permanent injunctive relief despite her failure to demonstrate that doing so was necessary to prevent irreparable harm.[10]

Aside from the claims that plaintiff asserted under the Headlee Amendment—which we analyze later in this opinion—plaintiff's claims in this action were all captioned as claims for "**ASSUMPSIT/MONEY HAD AND RECEIVED**[.]" As our Supreme Court long ago recognized in *Moore v Mandlebaum*, 8 Mich 433, 448 (1860):

> [T]he action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties, and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover. And that, as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action.

[10] Our decision in this regard renders moot the Township's argument that the trial court erred or abused its discretion by amending its initial judgment to award additional "damages." Hence, we decline to decide that issue. See *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016) ("A matter is moot if this Court's ruling cannot for any reason have a practical legal effect on the existing controversy.") (quotation marks and citations omitted).

Accord *Trevor v Fuhrmann*, 338 Mich 219, 224; 61 NW2d 49 (1953), citing *Moore*, 8 Mich at 448. At common law, assumpsit was a proper vehicle for recovering unlawful "fees," "charges," or "exaction[s]"—including unlawful utility charges—that the plaintiff had paid to a municipality under compulsion of local law. See *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 704; 178 NW2d 484 (1970) (quotation marks and citations omitted). Notably, such an action "will not lie against one who has not been personally *enriched* by the transaction" because the fundamental "basis" of the action "is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same." *Trevor*, 338 Mich at 224-225 (quotation marks and citations omitted; emphasis added).

"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[.]" *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013). 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." *Wright v Genesee Co*, 504 Mich 410, 421; 934 NW2d 805 (2019).

In contemporary municipal utility ratemaking cases, a similar focus on principles of "unjust enrichment" is encapsulated within the rebuttable presumption that a municipality's utility rates are reasonable. See generally *Novi*, 433 Mich at 428-429; *Trahey*, 311 Mich App at 594, 597-598. In *Novi*, 433 Mich at 417-418, 428, our Supreme Court was charged with deciding whether MCL 123.141 had abrogated "the longstanding principle of presumptive reasonableness of municipal utility rates," had impacted the applicable burden of proof, or had altered the traditionally circumspect scope of judicial review. Ruling in the context of a *municipality's* wholesale-rate challenge under MCL 123.141(2)—not a *ratepayer's* challenge under MCL 123.141(3)—the Supreme Court held that MCL 123.141 had not meaningfully altered the presumption of reasonableness, burden of proof, or scope of judicial review, reasoning, in part, as follows:

> Historically, this Court has accorded great deference to legislatively authorized rate-making authorities when reviewing the validity of municipal water rates. . . .
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> * * *
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> [R]ate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates.
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> * * *
>
> Michigan courts, as well as those in other jurisdictions, have recognized the longstanding principle of presumptive reasonableness of municipal utility rates. These courts have stressed a policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates. As this Court noted in [*Plymouth v Detroit*, 423 Mich 106, 128-129; 377 NW2d 689 (1985)], the Court

in *Federal Power Comm v Hope Natural Gas Co*, 320 US 591, 602; 64 S Ct 281; 88 L Ed 333 (1944) stated:

> We held in [*Federal Power Commission v Natural Gas Pipeline Co*, 315 US 575, 62 S Ct 736, 86 L Ed 1037 (1942)] that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (Citations omitted.)

* * *

The Michigan Legislature's intention that courts refrain from strictly scrutinizing municipal utility rate-making is reflected in several statutory provisions. . . .

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. The decision of the Court of Appeals, however, superimposes Michigan courts as ultimate rate-making authorities despite the absence of any express statutory language or legislative history that would support such a role in the rate-making process.

* * *

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 [i.e., the public act that last amended MCL 123.141,] 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)[.] [*Novi*, 433 Mich at 425-433 (bracketed alterations added).]

Because *Novi* involved a rate challenge pursued by a municipality under MCL 123.141(2), not a ratepayer challenge pursued under MCL 123.141(3), *Novi*'s statutory analysis focused almost exclusively on MCL 123.141(2). However, in *Trahey*, 311 Mich App at 594, 597-598, this Court expanded the scope of *Novi*'s pertinent holdings, applying them in the context of a resident-ratepayer challenge under MCL 123.141(3). Thus, the presumption of reasonableness was extended to the rates a municipality charges its ratepayers. *Id.* at 594. The plaintiff bears the burden of rebutting the presumption of reasonableness "by a proper showing of evidence." *Id.* "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." *Shaw v Dearborn*, 329 Mich App 640, 654; 944 NW2d 153 (2019),[11] quoting *Trahey*, 311 Mich App at 595 (emphasis in *Shaw*).

As authority for its position aside from *Trahey*, *Shaw*, and *Novi*, the Township relies on, among other things, two unpublished decisions of this Court that were decided together in 2019. Plaintiff argues that this Court should disregard those unpublished decisions because they are not binding and "were wrongly decided." Plaintiff is correct that unpublished decisions of this Court are not precedentially binding under MCR 7.215(C)(1), but she fails to recognize that they may nevertheless be considered as "persuasive or instructive" authority.[12] See *Kern v Kern-Koskela*, 320 Mich App 212, 241; 905 NW2d 453 (2017).

In any event, the heart of the parties' dispute regards the manner in which the rule of law set forth in *Trahey* should be applied. Specifically, citing in support *Trahey*, 311 Mich App at 595 ("[a]bsent 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") (emphasis added),

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[11] The pending application for leave to appeal in *Shaw* has been held in abeyance pending our Supreme Court's decision in *Detroit Alliance Against Rain Tax v City of Detroit*, ___ Mich ___; 937 NW2d 120 (2020). *Shaw v Dearborn*, ___ Mich ___; 944 NW2d 720 (2020).

[12] In the context of similar challenges raised under the Headlee Amendment, this Court has recognized that it "presumes the amount of the fee to be reasonable, unless the contrary appears on the face of the law itself or is established by proper evidence[.]" *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 665-666; 697 NW2d 180 (2005). But because the instant rate challenges are not pursued under the Headlee Amendment, such authority is not dispositive here.

plaintiff argues that in a ratepayer challenge like the one at bar (i.e., one pursued under MCL 123.141(3)), if a plaintiff *does* present clear evidence of either illegal or improper expenses included in a municipal utility's rates, the presumption of reasonableness is no longer a relevant consideration—that is, the plaintiff need not also demonstrate that the rates, viewed as a comprehensive whole, are unreasonable. Put differently, plaintiff argues that *Trahey* stands for the proposition 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.

In stark contrast, the Township argues that, under *Trahey*, even if a *specific* expense that is included in formulating a challenged municipal utility rate is shown to be either illegal or improper, the plaintiff nevertheless bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed as a *whole*. In other words, the Township argues that absent a showing that the disputed rates actually overcharged plaintiff and the plaintiff class for the related water and sewer services, plaintiff's challenge to those rates—and her request for monetary "damages" in particular—is fatally flawed. We agree with the Township.

In our view, the flaw in plaintiff's argument rests less on a textual dissection of *Trahey* than it does on the fundamental nature of plaintiff's equitable "assumpsit" claims. "[E]quity regards and treats as done what in good conscience ought to be done." *Allard v Allard (On Remand)*, 318 Mich App 583, 597; 899 NW2d 420 (2017) (quotation marks and citation omitted). Had plaintiff sought a declaratory judgment that certain costs included in the disputed water and sewer rates were improper or illegal, perhaps she would be correct that the presumption of reasonableness would be irrelevant. Instead, however, by asserting her claims for assumpsit, plaintiff sought "restitution"—in the form of a refund to herself and the plaintiff class—of whatever amount was necessary to "correct for the unfairness flowing from" the Township's "benefit received," i.e., its "unjust retention of a benefit owed to another." See *Wright*, 504 Mich at 417-418, 422-423. 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. See *id.* at 419 ("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 correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded *excessive and unjust benefits* to his or her rightful position.") (emphasis added).

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. Moreover, even assuming, arguendo, that plaintiff is correct concerning this Court's holding in *Trahey*, she fails to recognize that, to the extent that *Trahey* might be read as inconsistent with our Supreme Court's decisions concerning the essential nature of unjust enrichment and restitution in *Wright*, or with *Novi*'s holding regarding the continued viability of the presumption of reasonableness, *Trahey* must be

ignored under the doctrine of vertical stare decisis. See *In re AGD*, 327 Mich at 339 (noting that, under the doctrine of vertical stare decisis, only our Supreme Court has authority to overrule one of its prior decisions, and until that Court does so, its former decisions remain binding on all lower courts); *Allen v Charlevoix Abstract & Engineering Co*, 326 Mich App 658, 665; 929 NW2d 804 (2019) (noting that this Court is "required to ignore" its former published decisions "in favor of any conflicting Supreme Court precedent").

The application of such principles in this case is straightforward. On several occasions, the trial court explicitly found that plaintiff had failed to rebut the presumption of reasonableness or demonstrate that the disputed rates were excessive in comparison to the associated costs of providing the related water and sewer services. On this record, we perceive no basis to disturb those factual findings. On the contrary, without a comprehensive rate study—or some similar evidence demonstrating that the disputed rates excessively compensated the Township for the related utility services—one can at best speculate about whether the disputed rates were proportional to the underlying costs. And several of the testifying experts at trial specifically indicated that, based on a review of the Township's audited financial statements, its cash inflows and outflows over the disputed period were proportional. Therefore, we are not definitely and firmly convinced that the trial court made a mistake when it found that plaintiff had failed to demonstrate disproportionality in the rates.

In light of that finding, however, the trial court erred by nevertheless ordering defendants to refund more than $9 million to plaintiff and the plaintiff class. Given that plaintiff failed to demonstrate that the Township would be excessively (and thus unjustly) enriched by the retention of such funds, the trial court should not have ordered the refund that it did. See *Wright*, 504 Mich at 417-418, 422-423; *Trahey*, 311 Mich App at 594, 597-598.

We also conclude that the trial court abused its discretion by granting plaintiff a permanent injunction requiring the Township to document its ratemaking efforts in a specified fashion. "Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, *and there exists a real and imminent danger of irreparable injury*." *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992) (quotation marks and citation omitted; emphasis added). See also *Royal Oak Sch Dist v State Tenure Comm*, 367 Mich 689, 693; 117 NW2d 181 (1962) ("Equity should not be used to obtain injunctive relief where there is no proof that complainant would suffer irreparable injury."). Moreover, the party seeking injunctive relief has the burden of demonstrating that the requested injunction is appropriate and necessary. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 3; 753 NW2d 595 (2008); *Dutch Cookie Machine Co v Vande Vrede*, 289 Mich 272, 280; 286 NW 612 (1939).

As noted, we find no basis to disturb the trial court's finding that plaintiff failed to demonstrate that the disputed rates were actually disproportionate to the underlying utility costs. Consequently, plaintiff also failed to demonstrate that the injunctive relief ordered by the trial court was necessary to avert irreparable harm. On this record, one cannot tell whether plaintiff or the plaintiff class suffered any harm at all as a result of the disputed rates or ratemaking practices, let

alone an *irreparable* injury or the real and imminent danger of suffering such an injury. By nevertheless granting a permanent injunction against the Township with regard to its ratemaking methodology, the trial court abused its discretion, overstepping the proper bounds of both its injunctive powers and the limited scope of judicial review that is appropriate in ratemaking cases such as this one. See *Dutch Cookie Machine Co*, 289 Mich at 280 (holding that the party seeking an injunction bears the burden of proving that its issuance is warranted); *Novi*, 433 Mich at 428, 431 (discussing "the difficulties inherent in the rate-making process," "the statutory and practical limitations on the scope of judicial review," and the general "policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates").

C. THE REVENUE BOND ACT OF 1933

As cross-appellant, plaintiff contends that the trial court erred by failing to recognize that the disputed PFP charges are unlawful under the Revenue Bond Act of 1933 (RBA), MCL 141.101 *et seq*. In particular, plaintiff argues that those charges are unlawful because they permit the Township to receive "free service" in contravention of MCL 141.118(1), which provides, in pertinent part:

> Except as provided in subsection (2),[13] free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality. The reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both . . . .

Specifically, plaintiff argues that the Township receives "free" PFP services, in contravention of MCL 141.118(1), because the Township's water and sewer fund, not its general fund, pays for those services by incorporating the PFP expenses into the disputed utility rates.

Assuming, without deciding, that the RBA is applicable here, that plaintiff is entitled to pursue a private cause of action seeking damages for violation of the RBA (which is an issue that she has failed to brief), that such a private action constitutes a valid end-around of the presumption-of-reasonableness standard discussed in *Trahey* and *Novi*, and that plaintiff is correct that it *would* violate MCL 141.118(1) if the Township were to fail to pay for its PFP services in the manner alleged, plaintiff's argument is nevertheless unavailing. Plaintiff ignores the fact that, in the trial court's amended judgment, it expressly found that the Township did, in fact, pay for the disputed PFP expenses by way of in-kind remuneration provided to the water and sewer fund. In plaintiff's

[13] The referenced subsection, MCL 141.118(2), is irrelevant here, given that it applies to "[a] public improvement that is a hospital or other health care facility . . . ."

brief as cross-appellant, she fails to explicitly argue that the trial court's finding in that regard was clearly erroneous, and we discern no basis for disturbing it.

There was extensive evidence at trial concerning the in-kind services the Township renders to its water and sewer fund, with Heffernan estimating their annual value at somewhere around $700,000 or $800,000. On the other hand, there was a relative dearth of evidence concerning the proper value for the trial court to ascribe to the PFP services. Plaintiff's own expert, Heid, admitted that the "preferable" method of assessing the value of such services was to perform "a fully allocated cost of service study" and that he had failed to do so, having instead used the "antiquated" Maine Curve methodology. Therefore, we are not persuaded that the trial court clearly erred when it found that the Township's provision of in-kind services constituted sufficient payment for the disputed PFP services. And in light of the finding that the Township *was* paying for those PFP services, we cannot conclude that the trial court erred by failing to hold that the Township was receiving "free" PFP services in contravention of MCL 141.118(1).

D. MCL 123.141(3)

Plaintiff also argues that the trial court erred by failing to recognize that the PFP charges are unlawful under MCL 123.141(3) ("The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed *the actual cost of providing the service*.") (emphasis added). But plaintiff fails to explain how even a *proven* violation MCL 123.141(3), standing alone, exempts her instant claim from the presumption-of-reasonableness standard set forth in *Trahey*, 311 Mich App at 594, 597-598, which regarded a rate challenge pursued under the same statute: MCL 123.141(3). In our estimation, the rule of law set forth in *Trahey* concerning the presumption of reasonableness is binding here and that presumption must be applied. See MCR 7.215(J)(1). And for the reasons explained in part II(B) of this opinion, we conclude that plaintiff's assumpsit claims under MCL 123.141(3) are not viable in light of the presumption of reasonableness discussed in *Trahey* and *Novi*. Hence, we reject plaintiff's instant claim of error.

E. PLAINTIFF'S CLAIMS UNDER HEADLEE § 31

Finally, plaintiff argues that the trial court erred or clearly erred by holding that the disputed OPEB, county drain, and PFP charges were not unlawful exactions under § 31 of the Headlee Amendment. We disagree.

"The Headlee Amendment was adopted by referendum effective December 23, 1978." *Shaw*, 329 Mich App at 652. It was "proposed as part of a nationwide 'taxpayer revolt' in which taxpayers were attempting to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level." *Durant v State Bd of Ed*, 424 Mich 364, 378; 381 NW2d 662 (1985). Such purposes "would be thwarted if a local authority could charge higher utility rates to raise revenue and then use some of the excess funds to finance a public-works project." *Shaw*, 329 Mich App at 643. As enacted, the Headlee Amendment "imposes on

state and local government a fairly complex system of revenue and tax limits." *Durant v Michigan*, 456 Mich 175, 182; 566 NW2d 272 (1997).

Plaintiff's claims here are pursued under § 31 of the Headlee Amendment, which provides, in pertinent part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified 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. . . .
>
> The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment. [Const 1963, art 9, § 31.]

As our Supreme Court observed in *Durant*, 456 Mich at 182-183, "Section 31 prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." "Although the levying of a new tax without voter approval violates the Headlee Amendment, a charge that constitutes a user fee does not," and the party challenging a given municipal utility charge under § 31 "bears the burden of establishing the unconstitutionality of the charge at issue." *Shaw*, 329 Mich App at 653.

As authority in support of plaintiff's position, she primarily relies on *Bolt*, 459 Mich 152, which set forth a three-prong test for determining whether a municipal charge represents a permissible "user fee" or an impermissible "tax" under Headlee § 31. In *Shaw*, 329 Mich App at 653, this Court observed that in *Bolt*, our Supreme Court explained 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. In general, "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 (cleaned up). Under *Bolt*, courts apply three key criteria when distinguishing 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) a user fee is voluntary in that users are "able to refuse or limit their use of the commodity or service." *Id.* at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005) (cleaned up).

Notably, the presumption of reasonableness regarding municipal utility rates is a "pertinent" consideration when considering the second *Bolt* factor. *Shaw*, 329 Mich App at 654.

In *Shaw*, 329 Mich App 650-652, 664-669, this Court recently employed the *Bolt* factors in considering a Headlee challenge somewhat similar to the one now at bar. The *Shaw* Court upheld the challenged water and sewer rates in that case, holding that they were permissible user fees. *Shaw*, 329 Mich App at 669. In part, this Court reasoned:

> [P]laintiff . . . posits that there are embedded taxes within her utility rates, arguing that a charge need not pay for infrastructure to qualify as a disguised tax. . . .
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> * * *
>
> Under the analysis suggested by plaintiff, a city could never use funds obtained from city-wide water or sewer ratepayers to install, repair, or replace any particular pipe or facility that is part of the overall water or sewer system. Take, for example, a water main that runs beneath a major thoroughfare on the west side of any average city. The water main does not transport water to the residential homes, commercial businesses, or industrial factories on the east side of that city. Yet, when the water main ruptures and must be repaired, the city can use funds obtained from the general pool of water ratepayers to make the repairs—without transforming its water rates into an unconstitutional tax. The city is not constrained by the Headlee Amendment to determine which specific homes, businesses, or factories in the city use water that flows through the specific water main that burst, and then use revenues derived from only those users to pay the cost of repairing that burst pipe. *When the city uses funds paid by water ratepayers throughout the entire city to pay for the repairs to the burst water main, that repair does not transform the city's water rates into an illegal tax on the ratepayers who use water that flows through pipes other than the one that burst. Rather, the water rates are used to operate and maintain a viable water-supply system for the entire city and the revenues used to make the repairs serve a regulatory purpose of providing water to all of the city's residents.* [*Shaw*, 329 Mich App at 663-665 (emphasis added).]

Shaw's analysis of the *Bolt* factors strongly supports the propriety of the trial court's Headlee ruling in this case. Addressing the first factor, in *Shaw*, 329 Mich App at 666, this Court held that it was

> beyond dispute that the city's water and sewer rates comprise a valid user fee because the rates serve the regulatory purpose of providing water and sewer service to the city's residents. Although the rates generate funds to pay for the operation and maintenance of the water and sewer systems in their entirety, this by itself does not establish that the rates serve primarily a revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is

> in support of the underlying regulatory purpose." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999). Further, . . . the cost of operating and maintaining the caissons, is part of the cost of providing sewer service to the city's ratepayers. Dearborn must provide sewer service in conformance with state and federal regulatory requirements, and keeping the caissons functional helps ensure that sewage is properly treated before it is released into the environment.

Similarly, in this case, it is undisputed that the contested rates are assessed to fund the operational and capital expenses of the Township's water and sewer system, which serves the primary function of providing water and sewer services to the Township's ratepayers. Moreover, to the extent that those rates result in surpluses during some fiscal years, Domine indicated that the Township's 20-year capital improvement program was, at least in part, necessitated by the entry of an "abatement order" against the Township, which arose out of litigation with the DEQ and regarded the level of water "infiltration" in the Township's sewer system. Categorically, such obligations arising out of administrative-agency regulations serve a regulatory purpose. On the strength of the entire record, we hold that the Township's act of raising a prudent level of both revenue and capital and operational reserves through the disputed rates—including revenue to fund its OPEB obligations, the costs of providing fire protection services to the community, expenses related to the county storm-drain system, and necessary capital improvements—primarily serves valid regulatory purposes.

Nor are we persuaded by plaintiff's contention that, because some who are not ratepayers may benefit from the water and sewer system, the disputed rates must be an improper tax. By way of example, although county storm-sewer systems certainly benefit the general public when viewed on a macro scale—e.g., by preventing roadways from flooding, limiting soil erosion and the pollution of waterways, and decreasing demand on regional wastewater-treatment facilities—the vast majority of governmental enterprises benefit the general public, rather than just one regional subset of the public, when viewed on such a scale. As in *Shaw*, plaintiff's proposed application of the first *Bolt* factor would effectively hamstring municipal utilities, preventing them from raising the funds necessary to comply with mandatory state and federal regulations if doing so will yield any sort of incidental benefit for society at large. In any event, viewing the disputed rates as a whole, we are persuaded that they primarily serve valid regulatory purposes under the first *Bolt* factor, which favors the determination that they are user fees rather than taxes.

In considering the second *Bolt* factor, in *Shaw*, 329 Mich App at 666-668, this Court reasoned, in pertinent part, that the disputed "water and sewer rates" in that case

> constitute[d] a valid user fee because users pa[id] their proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. Mathematic precision is not required when reviewing the reasonable proportionality of a utility fee. "Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component, sewerage

may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax." *Bolt*, 459 Mich at 164-165 (cleaned up).

* * *

Plaintiff reasons that the amount of water that a ratepayer withdraws from the tap bears no relation to the amount of stormwater that enters the combined-sewer system, and she argues that funds derived from water ratepayers therefore cannot be used to pay for the construction, operation, or maintenance of anything related to stormwater without transforming the water and sewer rates into an unconstitutional tax. Plaintiff further argues that the city should design a system of charging property owners, rather than ratepayers, for the removal of stormwater that flows across their property before entering the combined-sewer system or the separated-storm system. Yet, under the Headlee Amendment, it is not this Court's role to determine whether a municipal government has chosen the best, wisest, most efficient, or most fair system for funding a municipal improvement or service. This Court's role, rather, is to determine whether a particular charge imposed by a municipal government is a true user fee or a disguised tax. [Quotation marks and citations partially omitted.]

In this case, on several occasions, the trial court expressly found that plaintiff had failed to demonstrate that the disputed utility rates were disproportionate to the underlying utility costs, and as already explained, we see no basis for disturbing that factual finding. Because plaintiff did not carry her burden of demonstrating disproportionality, it necessarily follows that the second *Bolt* factor militates in favor of the Township's position. See *Shaw*, 329 Mich App at 653 (observing that "the plaintiff bears the burden of establishing the unconstitutionality of the charge at issue").

With regard to the final factor, this Court in *Shaw* ruled as follows:

The third *Bolt* factor also weighs in favor of finding that Dearborn's water and sewer rates constitute a valid user fee. Each individual user decides the amount and frequency of usage, i.e., each user decides how much water to draw from the tap. See *Ripperger v Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585 (1954) (explaining that "[n]o one can be compelled to take water unless he chooses" and that charges for water and sewer services based on water usage do not comprise taxes); *Mapleview Estates, Inc*[, 258 Mich App at 417] (holding that an increased fee for connecting new homes to water and sewer systems was voluntary because, *inter alia*, "those who occupy plaintiff's homes have the ability to choose how much water and sewer they wish to use"). The purported charges at issue in this case are voluntary because each user of the city's water and sewer system can control how much water they use. [*Shaw*, 329 Mich App at 669.]

The instant case is distinguishable from *Shaw* with respect to the third *Bolt* factor. In this case, the parties agree that the disputed water and sewer rates were each comprised of both a

variable rate, which was based on metered water usage, and a fixed rate. Indeed, Theis testified that the fixed portion of the water rate generally represented about 80% of the utility's required revenue stream. Contrastingly, in *Shaw*, it was "uncontested that Dearborn determine[d] its water and sewer rates based on metered-water usage" alone. *Id.* at 667-668 (distinguishing *Bolt* on the basis that the disputed rates in *Bolt* were "flat rates," not variable rates based on "metered-water usage").

On this record, we conclude that use of the Township's water and sewer services cannot be viewed as "voluntary" for purposes of the *Bolt* inquiry. If a charge is "effectively compulsory," it is not voluntary. *Bolt*, 459 Mich at 167. With the exception of those sewer-only customers who have elected not to have a meter installed to track their actual well-water usage, it is technically true that the Township's water and sewer customers can avoid paying the *variable* portion of the disputed rates by refusing to use any water. But the *fixed* portions of those rates constitute flat-rate charges like those in *Bolt*, 459 Mich at 157 n 6, and such flat rates can only be avoided by not being a utility customer in the first instance. To the extent that the Township contends that the fixed rates are nevertheless voluntary because ratepayers can avoid paying them by moving elsewhere, that argument is unavailing. See *id.* at 168 ("The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property."). In light of *Bolt*, 459 Mich at 167-168, we conclude that at least the fixed portion of the disputed rates here—the most sizable portion—is effectively compulsory. Thus, the third *Bolt* factor weighs in favor of plaintiff's position.

On balance, plaintiff has failed to carry her burden of demonstrating that the disputed rates are impermissible taxes, rather than user fees, for purposes of Headlee § 31. The first and second *Bolt* factors clearly favor the conclusion that the disputed charges are proper user fees, and with regard to the third factor, "the 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." See *Wheeler*, 265 Mich App at 666. Therefore, the trial court did not err by entering a no-cause judgment against plaintiff with regard to her Headlee claims.

Affirmed in part, reversed in part, and remanded to the trial court for entry of a judgment of no cause of action in the Township's favor. We do not retain jurisdiction.

/s/ Cynthia Diane Stevens
/s/ Christopher M. Murray
/s/ Deborah A. Servitto

YOUMANS V CHARTER TOWNSHIP OF BLOOMFIELD (DOCKET NO. 348614) - REQUEST FOR PUBLICATION

EXHIBIT B

The Michigan Municipal League and the Michigan Townships Association's Motion for Leave to File Amicus Curiae Brief

STATE OF MICHIGAN

IN THE COURT OF APPEALS

JAMILA YOUMANS, individually and as representative of a class of similarly-situated persons and entities,

Plaintiff-Appellee,

v.

CHARTER TOWNSHIP OF BLOOMFIELD,

Defendant-Appellant.

Court of Appeals Case No. 348614

Oakland County Circuit Court
Case No. 16-152613-CZ

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THE MICHIGAN MUNICIPAL LEAGUE AND THE MICHIGAN TOWNSHIPS ASSOCIATION'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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The Michigan Municipal League and the Michigan Townships Association

The Michigan Municipal League and the Michigan Townships Association move under Michigan Court Rule 7.212(H) for leave to file an amicus curiae brief in this appeal on February 10, 2020 or on any later date as ordered by this Court.

The Michigan Municipal League ("MML") is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 524 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund (the "Legal Defense Fund"). MML operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This amicus curiae brief is authorized by the Legal Defense Fund's Board of Directors, whose membership includes the president and executive director of MML, and the officers and directors of the Michigan Association of Municipal Attorneys: Clyde J. Robinson, city attorney, Kalamazoo; John C. Schrier, city attorney, Muskegon; James J. Murray, city attorney, Boyne City and Petoskey; Thomas R. Schultz, city attorney, Farmington and Novi; Lauren Trible-Laucht, city attorney, Traverse City; Ebony L. Duff, city attorney, Oak Park; Steven D. Mann, city attorney, Milan; Amy Lusk, city attorney, Saginaw; Suzanne Curry Larsen, city attorney, Marquette; Laurie Schmidt, city attorney, St. Joseph; and Christopher Johnson, general counsel of the MML.

The Michigan Townships Association ("MTA") is a Michigan non-profit corporation whose membership consists in excess of 1,230 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws and statute of the State of Michigan. The MTA has authorized and directed this office as attorneys

for the MTA to file this amicus curiae brief in support of the Defendant-Appellant the Charter Township of Bloomfield (the "Township") regarding the issues in this lawsuit.

This lawsuit questions the Township's use of water and sewer fee revenue to pay for services related to the administration, operation and maintenance of its water and sewer systems. All of the governmental entities throughout the state who operate water and sewer utilities have an interest in these issues. This matter could substantially affect these municipal utilities because the decision in this case could (1) change their understanding of when and how they can use fee revenue to cover costs related to their water and sewer systems; (2) alter how and under what circumstances they allocate system component costs to system users; and (3) vitiate the statutorily-conferred authority that municipal legislative bodies have to set utility rates.

Moreover, the Plaintiff in this case seeks to affirm a lower court decision that misconstrues and undermines the presumption afforded to municipal fees, runs afoul of the separation of powers doctrine, and is contrary to this state's approach to municipal utility rate-making. On behalf of their members, amici curiae have a significant interest in ensuring that improper challenges to a municipal utility's individual decisions and/or budget line items do not ultimately impair a municipality's long-recognized right to exercise its discretion as to its own operations. Michigan courts "have stressed a policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates." *City of Novi v City of Detroit*, 433 Mich 414, 428; 446 NW2d 118 (1989). In part, this is because "[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." *Id.* at 430. The lower court in this matter did exactly what the Michigan Supreme Court discouraged in *Novi*: it superimposed its own judgment as the "ultimate rate-making authority" contrary to the legislative intent in this state as reflected in the Revenue Bond Act. *Id.*

If the judiciary can, based on aversion alone, reverse municipal decisions that are recommended by trained municipal employees and consultants, are the product of thoughtful deliberation by officials elected by a majority of voters, and are subject to public debate in open hearings, then the courts will be unilaterally substituting their own will and judgment for those of the people. They will also be subverting the will of the Michigan legislature, which has determined that a municipality's legislative body is in the best position to review utility costs and balance the various considerations relevant to rate-making. And, finally, these courts will be hampering the day-to-day operations and finances of the municipality, which could be potentially crippling depending on the extent and scope of judicial intervention. This should not be the role of the judiciary, especially as it relates to a municipality's legislative functions.

Because of the potential ramifications this matter may have on municipalities throughout the state, MMA and MTA respectfully request that this Court grant them leave to file on February 10, 2020 (or any later date ordered by the Court) an amicus curiae brief in this matter in order to address the issues raised in this appeal.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Sonal Hope Mithani

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Michigan Municipal League and Michigan Townships Association

Dated: January 13, 2020

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, I electronically filed the foregoing document with the Clerk of the Court using the electronic filing system, which will send notification of such filing to all counsel of record.

By: /s/ Sonal Hope Mithani
Sonal Hope Mithani (P51984)

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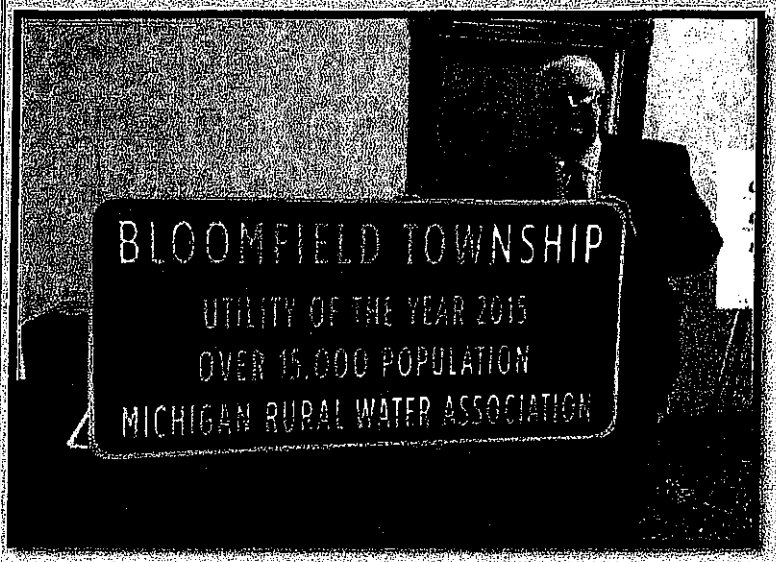
YOUMANS V CHARTER TOWNSHIP OF BLOOMFIELD (DOCKET NO. 348614) - REQUEST FOR PUBLICATION

EXHIBIT C

MRWA Utility of the Year Award

Awards

MRWA Utility of the Year



Wayne Domine accepting the MRWA Utility of the Year award on behalf of Bloomfield Township.

In March, Bloomfield Township was awarded the Michigan Rural Water Association (MRWA) "Utility of the Year – over 15,000 Population" for both water and wastewater. The award was presented at MRWA's Management and Technical conference held in Traverse City. Bloomfield Township's EESD Director, Wayne Domine, was present to accept the award. Bloomfield Township has always put the management and maintenance of its utilities in the forefront of its daily operations and will continue to do so in order to stay ahead of State and Federal required mandates.

EXHIBIT D

Deerhurst Condo. Owners Ass'n v. City of Westland

Court of Appeals of Michigan

January 29, 2019, Decided

No. 339143

Reporter
2019 Mich. App. LEXIS 155 *; 2019 WL 360725

DEERHURST CONDOMINIUM OWNERS ASSOCIATION, INC., and WOODVIEW CONDOMINIUM ASSOCIATION, Individually and as Representatives of a Class of Similarly Situated Persons and Entities, Plaintiffs-Appellants, v CITY OF WESTLAND, Defendant-Appellee.

Subsequent History: Held in Abeyance at *Deerhurst Condo. Owners Ass'n v. City of Westland, 2020 Mich. LEXIS 1444 (Mich., Sept. 8, 2020)*

Prior History: **[*1]** Wayne Circuit Court. LC No. 15-006473-CZ.

Core Terms

rates, water and sewer, user fee, allocated, administrative costs, plaintiffs', trial court, budget, Headlee Amendment, expenses, ratemaking, costs, sewer, summary disposition, property owner, actual cost, proportionate, municipal, users, regulatory purpose, infrastructure, storm

Judges: Before: MURRAY, C.J., and SERVITTO and SHAPIRO, JJ.

Opinion

PER CURIAM.

Plaintiffs brought suit alleging that defendant's water and sewer rates violated several provisions of law including *MCL 123.141(1)* and *Const 1963, art 9, §§ 25-34*, popularly known as the Headlee Amendment. Plaintiffs appeal the trial court's order granting defendant summary disposition. For the reasons set forth below, we affirm.[1]

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[1] Because the trial court considered materials outside the pleadings, we will review the trial court's grant of summary disposition to defendant under *MCR 2.116(C)(10)*. A trial court's decision whether to grant summary disposition is reviewed de novo. *Pace v Edel-Harrelson, 499 Mich 1, 5; 878 NW2d 784 (2016)*.

> In reviewing a motion under *MCR 2.116(C)(10)*, this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. Summary disposition is appropriate 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. [*Bank of America, NA v Fidelity Nat'l Title Ins Co, 316 Mich App 480, 488; 892 NW2d 467 (2016)* (quotation marks and citations

II. BACKGROUND

Defendant City of Westland (the City) operates and maintains a water and sewer system. By law, the rates charged to users of the system must be based on the water and **[*2]** sewer department's (the department) actual costs of providing those services to its inhabitants. Among the department's expenses is the amount it transfers to the City's general fund to cover its proportional share of the City's administrative costs.[2] Plaintiffs agree that the City may make such transfers to the general fund in order to compensate the City's other departments for the goods and services they render to the water and sewer department. However, plaintiffs maintain that the City has "grossly inflated" the costs of those goods and services by allocating a disproportionate amount of the City's administrative costs to the department. Plaintiffs allege that doing so violates the Headlee Amendment as well as MCL 123.141(3), common law ratemaking rules, and the City's Charter. Accordingly, plaintiffs seek a refund of what they deem to be overcharges paid in the previous six years, in addition to declaratory and injunctive relief.

Plaintiffs' claim rests largely on the testimony of their expert witness, James R. Olson, an analyst for MGT of America Consulting Group. MGT specializes in "indirect cost allocation" and primarily works with municipalities to identify "overhead" costs that can be allocated to specific **[*3]** departments. Olson reviewed the City's cost allocation sheet, the deposition testimony of City officials, and the City's balance sheet and budget. He took issue with the City's allocation methodology, asserting that it is not based on "actual cost data." For example, he pointed out that the City allocates 30% of its annual attorney fees to the department, but could not provide documentary support for that allocation. Similarly, Olson opined that the City improperly allocates 50% of the rent for the City's DPS garage to the water and sewer department and that the allocation should instead be based on the building's depreciation expense.

The City responds that Olson's testimony, while criticizing some individual allocations, failed to address, let alone establish, that the final rate charged was inconsistent with the department's *total* expenses. The City points out that Olson conceded that he did not perform a "full cost allocation study," meaning that, while Olson looked at certain individual categories of the City's cost allocation, he did not perform a complete analysis of the goods, services, and facilities provided by the City's general departments to the water and sewer department. **[*4]** Thus, Olson did not have an opinion as to whether the total amount of administrative costs allocated to the water and sewer department was reasonable. Nor did Olson perform a "rate study," which would have required him to identify all the department's expenses and identify the revenue necessary to operate the utility in a sound financial manner. Thus, Olson did not express an opinion on whether the actual rates were unreasonable in relation to the necessary revenue. In addition, he conceded that a 10 to 15% variation between budgeted costs and actual costs is reasonable.

Plaintiffs also claim that the City's calculation of water and sewer rates is improper because it includes an expense of $500,000 per year for future capital improvements and repairs. Plaintiffs do not dispute that the department's budgeting must include amounts to finance *current* capital improvements, but they assert that it is improper for the City to include sums for future, as yet unspecified capital improvements in its revenue requirements.

In the trial court, the parties filed competing motions for summary disposition. The City filed a response to plaintiffs' motion for summary disposition in which the City first **[*5]** disclosed Mark Beauchamp, president of Utility Financial Solutions, as an expert witness. In an affidavit, Beauchamp echoed Olson's conclusion that a full cost allocation study was necessary to verify the reasonableness of the administrative costs the City allocated to water and sewer department. He further averred that he reviewed and approved a revised cost allocation study performed by Deborah Peck, the City's budget director, which concluded that the department's actual administrative costs were always within 10% of the budgeted administrative costs. Plaintiffs then filed a motion in limine to exclude Beauchamp's and Peck's proposed testimony arguing that the City failed to timely disclose Beauchamp as an expert witness and that Peck's testimony was inadmissible because her revised allocation study was not in the record.

In June 2017, the trial court issued an opinion and order granting the City's motion for summary disposition, denying plaintiffs' motions for summary disposition, and denying plaintiffs' motion in limine. The trial court determined that plaintiffs failed to overcome the

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omitted).]

[2] For instance, the City transfers water and sewer funds to the City's general fund to pay for a percentage of the operation of the City's IT Department, which provides services to the department.

presumption that the City's rates were reasonable. The trial court also rejected plaintiffs' **[*6]** argument that the City's rates constituted a tax that was imposed in violation of the Headlee Amendment and MCL 141.91. Further, the trial court ruled that plaintiffs' Headlee Amendment claim was barred by the one-year statute of limitations set forth in MCL 600.308a(3). In denying plaintiffs' motion for in limine, the court stated that plaintiffs could move for an order compelling production of Peck's analysis, which would be a more appropriate remedy than striking the evidence. The court also determined that Beauchamp's analysis was reliable and that his explanation of methods used by the City would assist the trier of fact. The court concluded that both Peck and Beauchamp could serve as rebuttal witnesses to Olson.

III. ANALYSIS

A. REASONABLENESS OF RATES

MCL 123.141, et seq., governs the sale of water outside territorial limits. Because the City purchases its water from the Great Lakes Water Authority,[3] it is a "contractual customer" under MCL 123.141(2). Accordingly, the City's water ratemaking[4] must comply with MCL 123.141(3), which provides that "[t]he retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed the actual cost of providing the service." However,

> MCL 123.141 does not alter the general standard of reasonableness **[*7]** applied by courts when reviewing utility rates. Because of the difficulties inherent in ratemaking and the limitations on judicial review, the phrase "actual cost of providing the service" as used in the statute does not mean exactly equal to the actual costs of providing the service. Accordingly, while a utility fee must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged, mathematic precision is not required. [Trahey v Inkster, 311 Mich App 582, 597; 876 NW2d 582 (2015) (citations omitted).]

"Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable." Id. at 594. In general, "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates." Novi v Detroit, 433 Mich 414, 427; 446 NW2d 118 (1989). "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." Id. at 430. "The determination of 'reasonableness' is generally considered by courts to be a question of fact." Id. at 431. "[T]he presumption of reasonableness may be overcome by a proper showing of evidence." Trahey, 311 Mich App at 594. It is a plaintiff's burden "to show that any given rate **[*8]** or ratemaking practice is unreasonable." *Id.* "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." Id. at 595.

As noted, plaintiffs argue that the City allocated too great a portion of certain administrative costs to the water and sewer department. Viewing the evidence in a light most favorable to plaintiffs, we agree that there is a question of fact regarding those particular allocations. Indeed, the City effectively conceded that there were errors in its cost allocation when it presented proposed testimony regarding a revised cost allocation study.

We disagree with plaintiffs' contention, however, that questions regarding particular administrative costs, by themselves, precludes summary disposition. It is plaintiffs' burden to establish the unreasonableness of the City's rates, and they have failed to present evidence that the City's overall allocation of administrative costs to the water and sewer department is unreasonable. Specifically, Olson testified that he did not prepare a full cost allocation plan in analyzing the

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[3] MCL 123.141(1) provides that "[a] municipal corporation, referred to in this act as a corporation, authorized by law to sell water outside of its territorial limits, may contract for the sale of water with a city, village, township, or authority authorized to provide a water supply for its inhabitants." The City has historically purchased its water from the city of Detroit; the GLWA was formed during the city of Detroit's bankruptcy proceedings.

[4] MCL 123.141 only applies to sale of water and therefore it does not govern the City's sewer ratemaking. However, the City's Charter requires reasonable sewer rates. Specifically, "[t]he City may fix and collect charges for such disposal services, tap-in fees and connection fees, the proceeds of which shall be exclusively used for the purpose of the sewage disposal system." Westland Charter, § 16.10. Further, "The Council shall have the power to fix from time to time such just and reasonable rates and other charges as may be deemed advisable for supplying the inhabitants of the City and others with such public utility services as the City may provide." Westland Charter, § 17.3.

administrative expenses allocated to the water **[*9]** and sewer department. He also admitted that other municipal departments could have provided more services to the water and sewer department than reflected in the budget and that a full cost allocation plan could indicate that the cost allocation should be higher than the amount that the City allocated in its budget. Olson further acknowledged that rates are set prospectively, that such prospective budgeting cannot be conducted with mathematical certainty, and that it would be reasonable if the budgeted amount of a cost allocation was off by about 15%.[5]

Most significantly, plaintiffs failed to analyze the reasonableness of the City's overall rates by conducting a rate study. Olson agreed that if the rates cover the actual revenue requirements of the water and sewer department, then the rates are valid and customers will have suffered no damages. Yet Olson was not asked to review the overall expenditures of the water and sewer department, and he held no opinion overall concerning whether the total expenditures of the water and sewer department were reasonable. Thus, plaintiffs made no attempt to analyze the City's rates in lights of the department's revenue requirements. Nor have plaintiffs **[*10]** explained how incorrect or improper administrative cost allocations in and of themselves renders the City's water and sewer rates unreasonable.

In sum, plaintiffs argue that their claims may proceed solely on the basis of certain selected individual expense components that they have chosen to address without a broader evaluation of whether such allegedly improperly estimated expenses in the City's original budget (1) resulted in an unreasonable variance from the actual overall costs and (2) affected the reasonableness of the rates. Given the lack of a more universal analysis, plaintiffs have failed to provide an evidentiary basis from which to conclude that the amount of the department's administrative costs renders the City's water and sewer rates unreasonable.

Plaintiffs also fail to cite any authority to support what would be a form of active court oversight that would amount to an exacting level of judicial auditing of only those individual expenses of a municipal utility that a plaintiff chooses to challenge without respect to whether the overall cost allocation is reasonably accurate and without respect to whether the actual water and sewer rates are reasonable. Plaintiffs' argument **[*11]** is at odds with the limited role of the judiciary in reviewing municipal utility rates. See *Novi, 433 Mich at 425-426, 428, 430*. Nor have plaintiffs cited any authority for their implicit contention that they are entitled to the correction of every expense allocated to the water and sewer department that was allegedly overestimated.

Plaintiffs also argue that the City's rates are unreasonable because the City uses a portion of its revenue to create a reserve fund for future unspecified infrastructure improvements to its water and sewer systems. Plaintiffs fail to provide any legal authority to establish that this is an improper ratemaking procedure. To the contrary, rate-based public utilities commonly maintain a capital reserve to provide fiscal stability. *Jackson Co v City of Jackson, 302 Mich App 90, 111; 836 NW2d 903 (2013)*. According to the affidavit of Steven Smith, the City's finance director, the City's water and sewer systems are comprised of nearly 674 miles of infrastructure and have a replacement cost of approximately $674 million (i.e., it costs approximately $1 million to rebuild each mile of infrastructure). The City has existed for 50 years, its infrastructure has an expected life of 50 to 70 years, and it experiences an average of 160 water main breaks a year. Given this **[*12]** unrebutted evidence, plaintiffs do not overcome the presumption that a $500,000 annual addition to the City's cash reserves to fund future improvements to the water and sewer system is a reasonable ratemaking practice.

In affirming the trial court, we are not relying on the proposed testimony of Beauchamp or Peck regarding the City's revised allocation study. Even if the trial court properly considered those affidavits, the evidence must be viewed in a light most favorable to plaintiff, and there is clearly a question of fact regarding certain aspects of the City's administrative cost allocation. But Olson's own testimony establishes the necessity of an overarching analysis of the water and sewer department's revenue requirements. In the absence of a complete study of the rate structure and all of its components, it is speculative to suggest that some improper expenses have caused the rates to become excessive or unreasonable. Accordingly, plaintiffs have failed to demonstrate a genuine issue of material fact regarding whether the City's rates were unreasonable. And because we do not rely on Beauchamp's or Peck's proposed testimony, we need not address whether the trial court erred **[*13]** in

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[5] This testimony is consistent with established legal principles, including that "ratemaking is a prospective operation," *Trahey, 311 Mich App at 597*, and that "mathematic precision is not required" when a court assesses whether a utility fee is "reasonably proportionate to the direct and indirect costs of providing the services for which the fee is charged," *id.*

denying plaintiffs' motion in limine. See *B P 7 v Bureau of State Lottery, 231 Mich App 356, 359; 586 NW2d 117 (1998)* ("As a general rule, an appellate court will not decide moot issues.").

B. THE HEADLEE AMENDMENT

The pertinent provision of the Headlee Amendment, *Const 1963, art 9, § 31*, states:

> 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.

The levying of a new tax without voter approval violates this section of the Headlee Amendment. *Jackson Co, 302 Mich App at 99*. However, a charge that constitutes a user fee is not subject to the Headlee Amendment. *Id.* The plaintiff bears the burden of establishing the unconstitutionality of the charge at issue. *Id. at 98*. A court decides, as a question of law, whether a charge is a permissible fee or an illegal tax. *Westlake Transp, Inc v Public Serv Comm, 255 Mich App 589, 611; 662 NW2d 784 (2003)*.

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt v Lansing, 459 Mich 152, 160; 587 NW2d 264 (1998)*. In general, "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 **[*14]** benefit. A tax, on the other hand, is designed to raise revenue." *Id. at 161* (quotation marks and citations omitted). In *Bolt*, our Supreme Court identified three key criteria to use in distinguishing between a user fee and a tax: (1) a user fee serves a regulatory purpose rather than a revenue-raising purpose; (2) a user fee is proportionate to the necessary costs of the service; and (3) a user fee is voluntary in that property owners are able to refuse or limit their use of the service. *Id. at 161-162*. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp, 265 Mich App 657, 665; 697 NW2d 180 (2005)* (brackets, quotation marks, and citations omitted).

Water and sewer rates are generally considered user fees rather than taxes because they represent a fee paid in exchange for a service. See *Bolt, 459 Mich at 162*.

> The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water. [*Bolt, 459 Mich at 162*, quoting *Ripperger v Grand Rapids, 338 Mich 682, 686; 62 NW2d 585 (1954)*.]

Water and sewer rates are not always considered user fees, however, because they must **[*15]** be proportionate to the cost of the service. See *Bolt, 338 Mich at 162 n 12*. That said, plaintiffs have presented no evidence that the rates themselves are unreasonable given the deficiencies in their proofs discussed above, particularly Olson's concession that he had not performed a rate study and that he held no opinion concerning the reasonableness of the rates. Considering that plaintiffs fail to overcome the presumption that the City's rates are reasonable, we find no basis from which to conclude that the rates are not proportionate to the cost of service. Instead, the rates constitute a valid user fee because users pay their proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. See Westland Ordinances, § 102-61.[6] The trial court aptly noted: "Those who use water and sewer services derive a benefit from paying the rates imposed. Moreover, the rates correlate directly with the amount and frequency of use by each particular user."

Consideration of the other *Bolt* criteria does not alter the conclusion that the City's water and sewer rates constitute a user fee rather than a tax. The first *Bolt* factor indicates that the rates comprise a valid user fee because the rates serve a regulatory purpose of providing water and sewer services to the City's residents. Although the rates generate funds to pay for the operation and maintenance of the water and sewer system, this by itself does not establish that the rates serve a primary revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also

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[6] Westland Ordinances, § 102-61 provides, in relevant part:

> The amount of the rates and charges shall be reviewed annually and revised when necessary to ensure system expenses are met and that all users pay their proportionate share of operation, maintenance and equipment replacement expenses. **[*16]**

raise money as long as it is in support of the underlying regulatory purpose." *Graham v Kochville Twp, 236 Mich App 141, 151; 599 NW2d 793 (1999)*.

Plaintiffs, relying on *Bolt, 459 Mich 152; 587 N.W.2d 264*, contend that it is impermissible for the City to incorporate costs in its water and sewer rates which will be used to fund future capital improvements. In *Bolt*, the City of Lansing imposed a "storm water service charge" on property owners to fund the separation of the remaining portion of its combined sanitary and storm systems. *Id. at 155*. The Supreme Court determined that the storm water service charge failed to satisfy the first and second criteria because the charge did not correspond to the benefits **[*17]** conferred. *Id. at 165*. 75% of the property owners in Lansing were already served by a separate storm and sanitary sewer system, but those property owners would be charged the same amount as the 25% who would most benefit from the construction. *Id.* Further, the cost of this project was $176 million over 30 years. *Id. at 155*. The Court noted that the charge was "an investment in infrastructure that will substantially outlast the current 'mortgage' that the storm water charge requires property owners to amortize. At the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter." *Id. at 164* (citation omitted).

Bolt is primarily distinguishable because it involved a rate increase to fund a completely new alteration to the existing sewer system that benefitted only 25% of the property owners. Here, the City's reserve fund will be used for future capital projects that will benefits all users of the water and sewer services. Those users contribute to wear and tear of the water and sewer system and, by including the cost of future capital projects into its rates, the City ensures that the users will pay a fee proportionate to the necessary costs of service. **[*18]** And in order for the sewer system to serve its regulatory purpose, it must be maintained and periodically replaced and updated. For those reasons, we conclude that the first two *Bolt* criteria establish that the City's water and sewer rates constitute a user fee rather than a tax.

As for the third *Bolt* factor, plaintiffs contend that the City's water and sewer services are not voluntary under statute and the City's ordinances. Even assuming that the water or sewer charges were deemed effectively compulsory in this case, "the 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, 265 Mich App at 666*. We are unconvinced, in the absence of showing that the water and sewer rates are unreasonable, that those rates should be considered a tax as opposed to a user fee. Considering the *Bolt* criteria in totality, we conclude that plaintiffs have not established that the City has imposed an unconstitutional tax.

Accordingly, plaintiffs have not demonstrated a genuine issue of material fact in support of their claims alleging violations of the Headlee Amendment and *MCL 141.91*.[7] Therefore, the trial court properly granted summary disposition to the City pursuant **[*19]** to *MCR 2.116(C)(10)*. Given our ruling, we decline to address whether plaintiffs' claims are barred by the applicable statute of limitations.

Affirmed.

/s/ Christopher M. Murray

/s/ Deborah A. Servitto

/s/ Douglas B. Shapiro

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[7] *MCL 141.91* provides:

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

EXHIBIT E

Bohn v. City of Taylor

Court of Appeals of Michigan

January 29, 2019, Decided

No. 339306

Reporter
2019 Mich. App. LEXIS 161 *; 2019 WL 360730

LEONARD S. BOHN, Individually and as Representative of a Class of Similarly Situated Persons and Entities, Plaintiff-Appellant, v CITY OF TAYLOR, 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: Appeal granted by *Bohn v. City of Taylor, 924 N.W.2d 593, 2019 Mich. LEXIS 586, 2019 WL 1504445 (Mich., Apr. 5, 2019)*

Held in Abeyance at *Bohn v. City of Taylor, 2020 Mich. LEXIS 1472 (Mich., Sept. 8, 2020)*

Prior History: **[*1]** Wayne Circuit Court. LC No. 15-013727-CZ.

Bohn v. City of Taylor, 2018 Mich. App. LEXIS 1912 (Mich. Ct. App., Apr. 26, 2018)

Core Terms

rates, sewer, depreciation, costs, user fee, replacement, reserve fund, sewer system, ratemaking, expenses, fire protection, funds, water and sewer, ordinance, property owner, infrastructure, repair, users, Headlee Amendment, proportionate, cash-basis, renewal, capital improvement, regulatory purpose, fire hydrant, violates, Charter, charges, storm

Judges: Before: MURRAY, C.J., and SERVITTO and SHAPIRO, JJ.

Opinion

PER CURIAM.

Plaintiffs brought suit alleging that defendant's water and sewer rates were unreasonable and that they constituted disguised taxes in violation of the *Const 1963, art 9, §§ 25-34*, popularly known as the Headlee Amendment. Plaintiffs appeal the trial court's order granting defendant summary disposition under *MCR 2.116(C)(10)*. For the reasons set forth below, we affirm.[1]

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[1] A trial court's decision whether to grant summary disposition is reviewed de novo. *Pace v Edel-Harrelson, 499 Mich 1, 5; 878 NW2d 784 (2016)*.

> In reviewing a motion under *MCR 2.116(C)(10)*, this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. Summary disposition is appropriate 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

I. BACKGROUND

Defendant City of Taylor (the City) operates and maintains a water and sewer system. Plaintiffs brought suit alleging numerous improprieties **[*2]** in the City's water and sewer ratemaking. On appeal, plaintiffs challenge only the computation of the City's sewer rates as well as the fact that the City no longer directly pays for public fire protection costs.

Specifically, plaintiffs raise two issues relating to the determination of the City's sewer rates. The parties agree that the first step of ratemaking is to determine the utility's revenue requirements. The parties also agree that, as a general matter, a utility may recover depreciation expenses through its rates. However, plaintiffs maintain through their expert, Kerry Heid, that it is improper for the City to include depreciation as an expense when it uses the cash-basis approach to determining its revenue requirements. The City admits that it is improper to include depreciation when calculating cash-basis revenue requirements. But the City, relying on its expert, Eric Rothstein, contends that the term "depreciation" was improperly used in its calculations and that the term was merely used as a "proxy" to provide funding to calculate its capital expenditures.

Plaintiffs also take issue with the accumulation of a reserve fund which will be used to fund maintenance, repairs, **[*3]** and improvements to the City's sewer system. Plaintiffs contend that the sewer reserve fund, which now totals over $10,000,000, shows that the City's sewer rates are in excess of the City's actual costs. Plaintiffs also maintain that it is improper for the City to use funds received from sewer rates to pay for future capital improvements to the sewer system. However, plaintiffs concede that it is appropriate for the City to maintain a reserve fund for the purposes of maintaining and repairing its sewer system, and the City argues that plaintiffs failed to establish that the amount in the City's fund is unreasonable. The City also contends that the reserve fund is properly maintained to address near-term needs and therefore does not raise concerns of "intergenerational inequity."

Lastly, plaintiffs claim that it is improper for the City to incorporate the cost of public fire protection into its service rates. Plaintiffs assert that the City should pay for those costs out of its general fund and that it is violating a City ordinance by failing to do so. Yet plaintiffs have not produced evidence that the City actually includes fire protection costs in its service rates. Further, the City **[*4]** contends that it is appropriate to pass the cost of public fire protection directly to consumers.

The parties filed competing motions for summary disposition. In a written opinion and order, the trial court determined that plaintiffs failed to establish a genuine issue of material fact as to whether the sewer rates constitute an unlawful tax and whether the rates were unreasonable. The trial court also determined that plaintiffs failed to establish that the City includes the cost of fire protection in its water rates.

II. ANALYSIS

A. REASONABLENESS OF SEWER RATES

The City's Charter provides that the city council "shall have the power to fix from time to time such just and reasonable rates and other charges as may be deemed advisable for supplying the inhabitants of the City and others with such public services as the City may provide. . . ." Taylor Charter, § 17.3. The Charter does not provide any standards for determining "just and reasonable rates." But Taylor Ordinance, § 50-25(c), provides:

> The rates and charges hereby established shall be based upon a methodology which complies with applicable federal and state statutes and regulations. The amount of the rates and charges shall be sufficient to provide **[*5]** for debt service and for the expenses of operation, maintenance and replacement of the system as necessary to preserve the same in good repair and working order. The amount of the rates and charges shall be reviewed annually and revised when necessary to ensure system expenses are met and that all users pay their proportionate share of operation, maintenance and equipment replacement expenses.

It is well established that municipal utility rates are presumptively reasonable. *Trahey v Inkster, 311 Mich App 582, 594; 876 NW2d 582 (2015)*. "The determination of 'reasonableness' is generally considered by courts to be a question of fact." *Novi v Detroit, 433 Mich 414, 431; 446 NW2d 118 (1989)*. "[T]he presumption of reasonableness may be

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reasonable minds might differ. [*Bank of America, NA v Fidelity Nat'l Title Ins Co, 316 Mich App 480, 488; 892 NW2d 467 (2016)* (quotation marks and citations omitted).]

overcome by a proper showing of evidence." *Trahey, 311 Mich App at 594*. It is a plaintiff's burden "to show that any given rate or ratemaking practice is unreasonable." *Id.* "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." *Id. at 595*.

Under the cash-basis method of utility ratemaking, a municipality first determines "the cash needs of the utility for a given period, *i.e.*, the dollars needed to pay the expense of operation, meet debt obligations, and make such capital improvements **[*6]** as would not require bond financing, *e.g.*, limited new plant construction, plus recurring replacements, renovation and extensions of existing plant." *Plymouth v Detroit, 423 Mich 106, 115; 377 NW2d 689 (1985)*. Plaintiffs first argue that the City improperly includes depreciation when it calculates its expenses under the cash-basis method of ratemaking. Plaintiffs' expert, Heid, reached this conclusion by relying on ratemaking manuals which provide that depreciation is not to be included when determining cash-needs revenue requirements. The City's expert, Rothstein, agrees that depreciation, which is a non-cash expense, should not count as an expense under a cash-basis ratemaking approach. But Rothstein opined that the City had simply used the label of "depreciation expense" as a proxy for properly included costs, i.e., for investment in infrastructure renewal and rehabilitation.

To begin, we note that the City is not required by law or ordinance to adhere to any ratemaking approach. Nor must the City abide by any particular ratemaking manual or guideline. Thus, we decline to hold that the City's failure to strictly follow the cash-basis approach renders its rates unreasonable or that the inclusion of depreciation in its rates is illegal or **[*7]** improper. To the contrary, it is common for utilities to set rates to cover the costs of depreciation. See *64 Am Jur 2d, Public Utilities, § 125*, p 516. Further, it is permissible to include a capital investment component in utility rates. See *Bolt v Lansing, 459 Mich 152, 160, 164-165; 587 NW2d 264 (1998)*.

That said, we agree with plaintiffs that the City should not be allowed to accomplish a "double recovery" by counting a single expense twice in determining its revenue requirements. However, plaintiffs have not provided evidence showing that the City has engaged in such a practice. While plaintiffs note that the City has included debt service payments as a budgeted expense in its sewer rates analysis, plaintiffs have not proffered any evidence that those payments are related to the depreciated items. Indeed, Heid admitted that he did not identify any specific items in defendant's budget that were funded through debt, that he did not identify any specific instances in which defendant collected for the same amount twice, and that he could not be aware of any such instances without going through each individual item of defendant's budget.

Thus, while plaintiffs argue that the City may have obtained a double recovery by including depreciated expenses in its sewer rates, they have failed **[*8]** to provide any supporting evidence on that matter. By contrast, Rothstein consulted with the City officials and determined that the City did not include depreciation expense and capital expenditure projections separately but rather used depreciation expense to inform its estimate of required capital expenditures. Heid also acknowledged that it is sometimes appropriate for utilities to use depreciation as a proxy for other expenses. Although the evidence must be viewed in a light most favorable to plaintiffs, they have failed to offer specific evidence that would give rise to a factual dispute regarding the depreciated expenses. Therefore, plaintiffs have failed to present clear evidence that the inclusion of depreciation costs in the City's sewer rates was improper or that this practice renders those rates unreasonable.

Next, plaintiffs challenge what they deem to be an excessive sewer reserve fund. Taylor Ordinances, § 50-24, provides that "[a]ll funds, including surplus funds, if any, shall be kept in separate accounts for the benefit of the bondholders, the operation and maintenance of the water and sewer divisions, and for no other purpose." Heid agreed that the City should be allowed **[*9]** to maintain a reserve fund for maintenance and repair of the sewer system. Indeed, rate-based public utilities commonly maintain a capital reserve to provide fiscal stability. *Jackson Co v City of Jackson, 302 Mich App 90, 111; 836 NW2d 903 (2013)*. Plaintiffs have not proffered any evidence as to how much money should actually be in the City's sewer fund. Heid testified that he does not know what work needs to be done to the City's sewer system and does not know how much the City needs in reserves for sewer replacements. Accordingly, plaintiffs have not shown that the amount of the City's sewer reserve fund is unreasonable per se.

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. Setting that aside, we note that numerous witnesses testified that the City has undertaken or initiated actions and processes to assess its aging sewer system and to prepare and pursue a plan to repair and rehabilitate that system. There was also testimony that the City's reserves are insufficient to meet its infrastructure **[*10]** renewal needs.

Plaintiffs counter that this a "post-hoc" justification and the City did not accumulate the reserve pursuant to any kind of capital improvement plan. For purposes of this appeal, we assume that to be true. However, we do not see how the lack of a capital improvement plan renders the accumulation of a reserve fund improper. First, there can be no plan to address the City's *unexpected* maintenance and repairs costs, which is one of the purposes of the fund. Second, Heid opined that the size of the reserve fund is largely due to the City's inclusion of depreciated expenses in its rates. Thus, the reserve fund is inherently aimed toward the replacement and renewal of the sewer system. In other words, by including depreciation expenses in its rates, the City is saving for the day when the depreciated items will need to be replaced. This does not mean, however, that the City must at all times have a plan in place for infrastructure replacements. Presumably, large improvement projects are not continuously planned and executed. Rather, such projects occur periodically as the pipes and other infrastructure decays. The evidence shows that the City is currently inspecting its system **[*11]** and planning infrastructure improvements, for which it will use the reserve fund. Plaintiffs fail to explain why the City must constantly have a capital improvement plan to justify the accumulation of funds that will eventually be used to fund the renewal and replacement of the sewer system.

In sum, plaintiffs fail to establish that any of the City's ratemaking practices are improper or unreasonable. Nor have plaintiffs proffered any evidence that the City's sewer rates are unreasonable. Heid admitted that he does not know what a reasonable rate is without performing a full cost of service study and that he would not be testifying concerning the amount of a reasonable rate. In general, "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates." *Novi, 433 Mich at 427*. "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." *Id. at 430*. In the absence of a complete study of the rate structure and all of its components, it is speculative to suggest that the City's sewer rates are unreasonable. Accordingly, plaintiffs **[*12]** have failed to demonstrate a genuine issue of material fact on that matter, and the trial court correctly granted summary disposition under *MCR 2.116(C)(10)*.

B. THE HEADLEE AMENDMENT

The pertinent provision of the Headlee Amendment, *Const 1963, art 9, § 31*, states:

> 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.

The levying of a new tax without voter approval violates this section of the Headlee Amendment. *Jackson Co, 302 Mich App at 99*. However, a charge that constitutes a user fee is not subject to the Headlee Amendment. *Id.* The plaintiff bears the burden of establishing the unconstitutionality of the charge at issue. *Id. at 98*. A court decides, as a question of law, whether a charge is a permissible fee or an illegal tax. *Westlake Transp, Inc v Public Serv Comm, 255 Mich App 589, 611; 662 NW2d 784 (2003)*.

"There 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*. In general, "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 **[*13]** the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id. at 161* (quotation marks and citations omitted). In *Bolt*, our Supreme Court identified three key criteria to use in distinguishing between a user fee and a tax: (1) a user fee serves a regulatory purpose rather than a revenue-raising purpose; (2) a user fee is proportionate to the necessary costs of the service; and (3) a user fee is voluntary in that property owners are able to refuse or limit their use of the service. *Id. at 161-162*. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp, 265 Mich App 657, 665; 697 NW2d 180 (2005)* (brackets, quotation marks, and citations omitted).

Water and sewer rates are generally considered user fees rather than taxes because they represent a fee paid in exchange for a service. See Bolt, 459 Mich at 162. Water and sewer rates are not always considered user fees, however, because they must be proportionate to the cost of the service. See Bolt, 338 Mich at 162 n 12. That said, as discussed above, plaintiffs have not presented evidence that the City's sewer rates themselves are unreasonable particularly in light of Heid's concession that he had **[*14]** not performed a rate study and that he held no opinion concerning the reasonableness of the rates. Considering that plaintiffs fail to overcome the presumption that the City's rates are reasonable, we find no basis from which to conclude that the those rates are not proportionate to the cost of service. Instead, the rates constitute a valid user fee because users pay their proportionate share of the expenses associated with the operation and maintenance of the sewer systems. See Taylor Ordinances, § 50-25(c).

Consideration of the other Bolt criteria does not alter the conclusion that the City's sewer rates constitute a user fee rather than a tax. The first *Bolt* factor indicates that the rates comprise a valid user fee because the rates serve a regulatory purpose of providing sewer services to the City's residents. Although the rates generate funds to pay for the operation and maintenance of the sewer system, this by itself does not establish that the rates serve a primary revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." Graham v Kochville Twp, 236 Mich App 141, 151; 599 NW2d 793 (1999).

Plaintiffs, relying on Bolt, 459 Mich 152; 587 N.W.2d 264, contend that it is impermissible **[*15]** for the City to incorporate costs in its sewer rates which will be used to fund future capital improvements. In *Bolt*, the City of Lansing imposed a "storm water service charge" on property owners to fund the separation of the remaining portion of its combined sanitary and storm systems. Id. at 155. The Supreme Court determined that the storm water service charge failed to satisfy the first and second criteria because the charge did not correspond to the benefits conferred. Id. at 165. 75% of the property owners in Lansing were already served by a separate storm and sanitary sewer system, but those property owners would be charged the same amount as the 25% who would benefit most from the construction. *Id.* Further, the cost of this project was $176 million over 30 years. Id. at 155. The Court noted that the charge was "an investment in infrastructure that will substantially outlast the current 'mortgage' that the storm water charge requires property owners to amortize. At the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter." Id. at 164 (citation omitted).

Bolt is primarily distinguishable because it involved a rate increase to fund a completely **[*16]** new alteration to the existing sewer system that benefitted only 25% of the property owners. In this case, as discussed, the reserve fund is being used for maintenance and repairs of the existing system, and will be used to fund a large-scale project to replace and update much of that system which will benefit all users of the City's sewer services. Further, if one accepts the premise—as plaintiffs do—that the City may incorporate replacement costs into its rates, then we see no reason why surplus funds cannot be used to replace aging infrastructure. As for concerns that the City's ratepayers are funding improvements for future generations, we find Rothstein's reasoning on this point persuasive:

> The practical reality is that Taylor's current customers, like all utility customers, benefit from prior customers' investments that put in place a (depreciating) system to which they can connect and receive service. Equitably, current users are asked to pay to renew and replace these assets, as well as pay their share of system upgrades. Future users are asked to pay for their shares of system capacity and will likewise be responsible to pay for asserts renewals and replacements.

The users of **[*17]** the City's sewer system contribute to that system's wear and tear, an expense that the City recoups by including depreciation as a revenue requirement in its rate analysis. Accordingly, the users pay a fee proportionate to the necessary costs of the service. And in order for the sewer system to serve its regulatory purpose, it must be maintained and periodically replaced and updated. For those reasons, we conclude that the first two *Bolt* criteria establish that the City's sewer rates constitute a user fee rather than a tax.

As for the third *Bolt* factor, plaintiffs contend that the City's sewer services are not voluntary under statute and the City's ordinances. Even assuming that the sewer charges were deemed effectively compulsory in this case, "the 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, 265 Mich App at 666. We are unconvinced, in the absence of showing that the sewer rates are

unreasonable, that those rates should be considered a tax as opposed to a user fee. Considering the *Bolt* criteria in totality, we conclude that plaintiffs have not established that the City has imposed an unconstitutional **[*18]** tax.

Accordingly, plaintiffs have not demonstrated a genuine issue of material fact in support of their claims alleging violations of the Headlee Amendment and MCL 141.91.[2] Therefore, the trial court properly granted summary disposition to the City pursuant to MCR 2.116(C)(10).

C. FIRE PROTECTION

Plaintiffs claim that the City violated an ordinance by incorporating the costs of public fire protection into its service rates. Specifically, the water department, in addition to its primary task of providing potable water, maintains equipment and operations sufficient to assure necessary pressure for the functioning of fire hydrants. The cost paid to the water department for this service is known as "fire hydrant rental." As a general matter, the experts agreed that it is appropriate for a municipality to recover this cost through water rates. Plaintiffs argue that this practice is nevertheless improper here because it violates Taylor Ordinance, § 50-25(g), which provides **[*19]** in relevant part:

> The reasonable cost and value of all water and sewer service rendered to the city and its various departments by the water and sewer system, including rentals for fire hydrant service for each fire hydrant connected to the system, during all or any part of the fiscal year, shall be charged against the city and will be paid for as the service accrues for the city's current funds, including the proceeds of taxes which will be levied in an amount sufficient for that purpose.

It is undisputed that the City no longer pays $44,000 a year in rental fees for all of the fire hydrants on public property as it did until 2010. However, plaintiffs have not provided any evidence that public fire protection costs are improperly passed on to plaintiffs through the City's water rates. Tellingly, Heid testified that "there is nothing to suggest that the customers are actually paying any amount for those public fire protection services." Nor could Heid determine the amount of such a charge in the absence of a rate study. Further, Heid agreed that, at the end of the day, residents will pay for public fire protection either on their water bills or on their tax bills. Given this testimony, **[*20]** plaintiffs have failed to produce evidence demonstrating a genuine issue of material fact concerning whether the costs for public fire protection are improperly included in defendant's water rates or the amount of any such charge. For the same reasons, plaintiffs fail to establish that the City is receiving "free service" from the water and sewer department in contravention of MCL 141.118(1)[3] by not paying for public fire protection costs.

Affirmed.

/s/ Christopher M. Murray

/s/ Deborah A. Servitto

/s/ Douglas B. Shapiro

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[2] MCL 141.91 provides:

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

[3] MCL 141.118(1) provides:

> Except as provided in subsection (2) [which is inapplicable here], free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality. The reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both, and those charges, when so paid, shall be accounted for in the same manner as other revenues of the public improvement. **[*21]**