STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

DALE L. DUVERNEY, MARY J. DUVERNEY, LINDA MARIE SMITH, CAMMIE PENNINGTON, CHARLOTTE F. AVERY, LYLE RICHARD ELLIS, DOROTHY E. OWEN, DALE E. NEFF, TONI OWEN ANDERSON, ELMER M. SHEPHARD, CRAIG ROBIN CRANDELL, KAREN SUE SMITH, ELIZABETH JEAN SEATON, SHARON BARNETT, JAY P. BARNETT, CLETIS J. BISHOP, WALTER H. BRUSCH, JR., GENE RAYMOND HOY, JODY MANUEL SHEPARD, SARAH Y. WATSON, EDWIN A. BROWN, JILL ANN LANEY, GLENN MCDANIEL, ROGER ALLAN OTT II, ETTA NASH, HAROLD SPROWL and CORA GORDAN, individual Michigan taxpayers and property owners subject to the jurisdiction of BIG CREEK-MENTOR UTILITY AUTHORITY, and TOWNSHIP OF MENTOR, MICHIGAN, and TOWNSHIP OF BIG CREEK, MICHIGAN,
Plaintiffs/Appellants,

123163
Supl

v

Supreme Court No. 123163
Court of Appeals No. 243866

BIG CREEK-MENTOR UTILITY AUTHORITY, a Michigan Municipal Corporation, and TOWNSHIP OF MENTOR, MICHIGAN, and TOWNSHIP OF BIG CREEK, MICHIGAN,
Defendants/Appellees.
_____/

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DEFENDANTS/APPELLEES' SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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SUPPLEMENTAL QUESTIONS INVOLVED

1. Did plaintiffs meet the minimal pleading requirements for an action claiming relief pursuant to the Headlee Amendment, Const. 1963, Art 9, § 31, as construed by ***Bolt v City of Lansing***, 459 Mich 152; 587 NW2d 264 (1998)?

Plaintiffs answer: Yes

Defendant answers: No

2. Did the complaint filed in this case in the Michigan Court of Appeals meet those requirements?

Plaintiffs answer: Yes

Defendant answers: No

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DEFENDANTS/APPELLEES' SUPPLEMENTAL STATEMENT

MATERIAL PROCEEDINGS AND FACTS

Defendants/Appellees will rely on the initial statement filed herein.

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SUPPLEMENTAL ARGUMENT

This Court by order dated December 30, 2003 requested supplemental briefs addressing at a minimum the two procedural issues raised in the order.

Procedurally, the January 10, 2003 Court of Appeals Order denied the complaint for relief pursuant to MCR 7.206(D) for failure to state a cause of action where plaintiffs failed to plead specific facts in support of their claimed violation of the Headlee Amendment, Constitution 1963, Art. 9, § 31. Further, the Court of Appeals determined the documentation supplied by the plaintiffs was insufficient to establish that a colorable claim exists. The Court of Appeals found that the complaint and supporting documentation was wholly insufficient to persuade the Court that the challenged charges constitute a tax.

The Plaintiffs appealed this Order to the Supreme Court and the Supreme Court has now directed the Clerk to schedule oral argument on whether to grant the application or take other action permitted and has requested that the parties file a supplemental brief which includes "a discussion of (1) the minimal pleading requirements for an action claiming relief pursuant to the Headlee Amendment, Const. 1963, Art. 9, § 31, as construed by ***Bolt v City of Lansing***, 459 Mich 152; 587 NW2d 264 (1998); and (2) whether the complaint in this case meets those requirements.

Minimal Pleading Requirements

The Court of Appeals cites the case of ***Kramer v Dearborn Heights***, 197 Mich App 723, 725; 496 NW2d 301 (1993), as support for denying the complaint for failure to state a cause of action. See Also ***Pursell v Wolverine-Pentronix, Inc.***, 44 Mich App 416 (1973) and ***Koebke v Labuda***, 339 Mich 569 (1954). In ***Kramer***, the Court of Appeals held that:

> "The mere statement of the pleader's conclusions, unsupported by allegations of fact on which they may be based, will not suffice to state a cause of action." ***Kramer*** at 725.

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The above quote by the Court in ***Kramer*** was in response to "Plaintiffs claim that they stated a cause of action simply by pleading that the Water Resources Commissions' Order constituted a 'new state mandated activity.' " ***Kramer*** at 725. The case at bar is similar in that, the Plaintiffs/Appellants' complaint speaks in terms of legal conclusions throughout but does not allege sufficient specific facts upon which the conclusions are based.

The complaint must contain allegations of fact which in this case would support the claim for relief pursuant to the Headlee Amendment as construed by ***Bolt***. The Supreme Court in ***Bolt*** articulated a three part test for determining whether a charge is validly characterized as a fee and therefore not a tax imposed in violation of the Headlee Amendment. In ***Graham v Kochville***, 236 Mich App 141; 599 NW2d 793 (1999) at 150-151, the Court provided that:

> "According to ***Bolt***, 459 Mich at 161-162, the three criteria of a fee are as follows: (1) a fee must serve a regulatory purpose, (2) a fee must be proportionate to the necessary costs of the service, and (3) a fee is voluntary. We note that the Supreme Court cautioned that these criteria are not be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee. 459 Mich at 167, n16."

It is not enough to just recite the ***Bolt*** criteria, which are legal conclusions, but rather the pleadings must contain specific facts to support these legal conclusions. At a minimum, for an action claiming relief pursuant to the Headlee Amendment as construed by ***Bolt***, the Plaintiffs/Appellants' pleadings must contain specific facts that would support the conclusions that: (1) the fee does not serve a regulatory purpose; (2) the fee is not proportionate to the cost of service; and (3) the fee is involuntary. As will be shown in the following analysis, the Plaintiffs/Appellants' pleadings do not contain these required specific facts in support of their claim for relief pursuant to the Headlee Amendment and, therefore, the Court of Appeals was not clearly erroneous in its determination to deny the Plaintiffs/Appellants' complaint for relief on such grounds.

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Plaintiffs/Appellants' Complaint in this Case Does Not Meet the Minimal Pleading Requirements

In making their claim for relief pursuant to the Headlee Amendment, the Plaintiffs/Appellants filed a complaint as provided for in MCR 7.206 (D)(1)(a). The complaint does not reference or incorporate any supporting documents or affidavits. The Plaintiffs/Appellants did file a brief with exhibits. However, a brief is argument and does not constitute pleadings (MCR 2.110(A)). Even if this Court accepted the Plaintiffs/Appellants' exhibits as supporting documents, as referenced in MCR 7.206(D)(1)(a), which does not appear to be consistent with court rule, then along with the complaint, the Court would have the sewer ordinance, copies of statutory and constitutional provisions and a letter to a property owner in each township regarding connection to the sewer.

The Court of Appeals determined that Plaintiffs' pleadings were insufficient, primarily it is believed, because the complaint did not set forth sufficient facts but only conclusions that the Defendants/Appellees were applying a tax as opposed to the user fee.

The only factual allegation in the complaint that would appear to violate the criteria set forth in ***Bolt v City of Lansing***, 459 Mich 152; 587 NW2d 264 (1998) would be the lack of voluntariness regarding a connection fee if the property is within 200 feet of the sewer line. This would be only one of the criteria contained in ***Bolt*** and therefore the pleadings would still be insufficient to set out an actionable claim.

The Plaintiffs/Appellants submitted no facts that the user fees are not proportionate to the necessary costs of the service and they only state conclusions that the purpose of the fee is revenue raising. The fact that some of the fee may include debt service and other capitalization charges does not factually support the conclusions that the charges are revenue raising (non-regulatory) or not proportionate. The Plaintiffs/Appellants' pleadings provide no specific factual detail from which the Court could reasonably determine that a colorable claim exists.

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RELIEF REQUESTED

Defendants/Appellees respectfully request based on the facts and pleadings in this case and the foregoing analysis that this Honorable Court simply deny Plaintiffs/Appellants' Application for Leave to Appeal.

There are not sufficient grounds pursuant to MCR 7.302(B) to grant leave nor are the pleadings sufficient to support a colorable claim. Defendants/Appellees would also request an award of actual costs and attorney fees.

Respectfully submitted,

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Dated: 22 January 2004

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