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STATE OF MICHIGAN
IN THE SUPREME COURT

MIDWEST VALVE & FITTING COMPANY,
a Michigan corporation,
individually and on behalf of
a class of similarly situated persons
and entities,

Plaintiff/Appellant,

v.

CITY OF DETROIT, a municipal corporation,

Defendant/Appellee.

Supreme Court Case No. _____

COA Case No. 358868
Circuit Court Case No. 18-014337-CZ
Hon. Edward Ewell

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PLAINTIFF/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

RECEIVED by MSC 6/5/2023 2:19:34 PM

TABLE OF CONTENTS

RECEIVED by MSC 6/5/2023 2:19:34 PM

RECEIVED by MSC 6/5/2023 2:19:34 PM

INDEX OF AUTHORITIES

Cases

RECEIVED by MSC 6/5/2023 2:19:34 PM

Statutes

Other Authorities

Rules

Treatises

RECEIVED by MSC 6/5/2023 2:19:34 PM

STATEMENT IDENTIFYING THE ORDERS APPEALED FROM

Plaintiff/Appellant Midwest Valve & Fitting Company ("Plaintiff" or "Midwest") seeks leave to appeal the published Opinion of the Court of Appeals dated March 9, 2023, and approved for publication on June 1, 2023 ("COA Opinion," Exhibit A hereto).[1] The appeal to the Michigan Court of Appeals was taken from the Findings of Fact and Conclusions of Law (the "Circuit Court Judgment") dated October 1, 2021 of the Wayne County Circuit Court. *See* App. Ex. 1.

On March 9, 2023, the Court of Appeals issued its Opinion and Order affirming the Circuit Court. On March 30, 2023, Plaintiff/Appellant filed a timely motion for reconsideration of the Court of Appeals' March 9, 2023 Opinion pursuant to MCR 7.215(I). On April 24, 2023, the Court of Appeals denied Plaintiff/Appellant's motion for reconsideration. *See* Order Denying Plaintiff/Appellant's Motion for Reconsideration, Exhibit B hereto.[2]

This Application for Leave to Appeal to this Court is timely because it has been filed within 42 days after the Court of Appeals' April 24, 2023 Order denying Plaintiff/Appellant's Motion for Reconsideration. *See* MCR 7.305 (C)(2)(c).

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[1] Exhibits to this Application are cited as "Exhibit __ hereto" and are designated with letters. Exhibits that were part of Plaintiff's Appendix on Appeal are cited as "App. Ex. ___" and are designated with numbers. Exhibits that were part of Defendant's Appendix on Appeal are cited as "Appellee Appx. ___" and are also designated with numbers. The parties' Appendices on Appeal were filed in the Court of Appeals and are thus part of the record in this case.

[2] Plaintiff also appealed the Circuit Court's November 24, 2020 Amended Opinion denying Plaintiff's motion for partial summary disposition and granting the City's request for partial summary disposition under MCR 2.116(I)(2) (the "SD Opinion," App. Ex. 2).

RECEIVED by MSC 6/5/2023 2:19:34 PM

STATEMENT OF QUESTIONS PRESENTED

This case pertains to annual charges the Defendant/Appellee City of Detroit (the "City") imposes on owners of property other than single-family residential property, which Plaintiff characterizes in its Complaint as a "Fire Inspection Charge." During trial, the Circuit Court made a factual finding that the charges are "permit fees" and not "inspection fees." In other words, the City collects the so called "permit fees" from property owners in exchange for a "permit to operate"—not in exchange for an inspection of the subject premises. Throughout this Application, Plaintiff will refer to the fees at issue as the "Charges." The Court of Appeals' published Opinion raises the following questions of vital importance to Michigan citizens:

1. Does a local government's practice of imposing a Charge it calls a "permit fee" upon only a select few of its citizens that is: (a) untethered to any cost the municipality may incur in relation to the citizen's property or business; and (b) which may be used for any purpose the local government chooses, constitute a tax imposed in violation of the Headlee Amendment to the Michigan Constitution?

2. Do the City's Charges constitute taxes imposed in violation of Section 31 of the Headlee Amendment and MCR 141.91 because they (1) are motivated primarily by a revenue-raising, as opposed to a regulatory purpose, (2) are not proportionate to the costs the City incurs in issuing "permits," and (3) are not voluntarily paid by landowners in the City?

3. Does a local government violate Section 31 of the Headlee Amendment by conditioning a citizen's right to operate a business on the citizen's payment of a mandatory Charge that is used to finance a core public safety function which provides no particularized benefit to the citizen or their business?

4. May a local government finance a core public safety function that benefits the entire community – fire prevention – through Charges that it characterizes as "permit fees" imposed on only a select few of its citizens?

RECEIVED by MSC 6/5/2023 2:19:34 PM

5. Are the "permit fees" designed to raise revenue (a hallmark of taxes), rather than being exchanged for a service rendered or a benefit received, with some reasonable relationship existing between the amount of the fee and the value of the service or benefit (a hallmark of user fees)?

6. Do the "permit fees" have any regulatory component as applied to properties that are not actually inspected, such that the "permit fees" channel or direct a person's behavior?

7. The Charges have been imposed for decades but the City Council never approved the Charges prior to June 2021, as required by the City's Charter and Ordinances. The Court of Appeals nonetheless held that the City could retroactively impose the Charges back to July 2013, the beginning of the claimed "class period." The Court concluded that retroactive application of the belated approval was warranted because Plaintiff had been paying the Charges without complaint for years and therefore retroactivity did not impair any "vested right." Did the Court of Appeals err?

8. Can a local government retroactively authorize mandatory charges previously imposed on its citizens that admittedly were *ultra vires* at the time they were imposed and collected?

RECEIVED by MSC 6/5/2023 2:19:34 PM

STATEMENT OF FACTS

I. NATURE OF THE CASE.

This Application for Leave to Appeal broadly asks the Court to vindicate the fundamental purpose underlying the Headlee Amendment—to wit: to limit the taxation authority of local governments by requiring new taxes imposed by those governments to be approved by the citizens required to pay the new taxes. Specifically, this Application asks the Court to address the following pivotal question: Does a local government's practice of imposing a Charge that it characterizes as a "permit fee" upon only a select few of its citizens that is: (a) untethered to any cost the municipality may incur in relation to the citizen's property or business; and (b) which may be used for any purpose the local government chooses, violate the fundamental taxation principles and limitations set forth in the Headlee Amendment?

Well-established Michigan law prohibits financing activities which confer a public benefit through so called "user fees." Nonetheless, the Circuit Court and the Court of Appeals both authorized this impermissible funding mechanism. This application thus seeks to vindicate the principles which underlie the Headlee Amendment and, at the same time, remedy a gross injustice that the Court of Appeals has visited upon a disfavored class of citizens of the City. Indeed, this may be the most important application the Court reviews this year, presenting at least two legal questions of vital importance to Michigan citizens: (1) does a local government violate Section 31 of the Headlee Amendment by conditioning a citizen's right to operate a business on the citizen's payment of a mandatory charge that is used to finance a core public safety function which provides no individualized benefit to the citizen or their business, and (2) can a local government retroactively authorize mandatory charges previously imposed on its citizens that admittedly were *ultra vires* at the time they were imposed and collected?

This case challenges annual charges (the "Charges") imposed by the Defendant City of Detroit (the "City") on owners of property, other than single-family residential property, which Plaintiff

RECEIVED by MSC 6/5/2023 2:19:34 PM

characterizes in its Complaint as a "Fire Inspection Charge." *See, e.g.,* Complaint, ¶ 1 (Exhibit A to Plaintiff's Motion for Partial Summary Disposition, App. Ex. 4). Plaintiff alleged that the City purportedly imposes the Charges to pay the cost of annual fire safety inspections which are supposed to be performed in exchange for the payment of the Charge. The City asserted that the Charges were "permit fees"—fees imposed for permits to operate and/or occupy—not payments for inspections. The Circuit Court and Court of Appeals ultimately agreed with the City's characterization of the Charges.[3] Regardless of which nomenclature is used, Plaintiff challenges the rulings related to the legal impact of the finding that the Charges were "permit fees."

Indeed, Plaintiff does not need to quibble over the label applied to the Charges because the Charges are unlawful regardless of what they are called. *See Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 558, 98 N.W.2d 753 (1959) (courts must "look through forms and behind labels to substance") (citation omitted). It is undisputed that the City uses the revenue from the Charges to finance a service that benefits the public at large—the fire prevention activities of the Fire Marshal Division of its Fire Department. It also is undisputed that the City does not actually inspect the vast majority of the properties which incur the Charge. In fact, Plaintiff's experts determined that, between July 1, 2013 and June 30, 2018, the City billed properties in the City for 57,380 inspections that it did not actually conduct. *See* Exhibit B to App. Ex. 4.

Despite these undisputed facts, both the Circuit Court and the Court of Appeals held the Charges were not unlawful taxes, but a regulatory "permit fee." These holdings not only contravene, but do significant violence to, well-established, fundamental precedent—including the long-standing limitations this Court has imposed on regulatory fees imposed by Michigan municipalities as stated in such cases as *Bolt v. City of Lansing,* 459 Mich 152; 587 NW2d 264 (1998); *North Star Line, Inc. v. City of*

[3] Plaintiff sought to represent the class of persons and entities who/which have incurred and/or paid the Fire Inspection Charges but who/which did not receive fire safety inspections. For the purpose of this application for leave to appeal, the Court should consider the Charges to be labeled "permit fees," not "inspection fees."

RECEIVED by MSC 6/5/2023 2:19:34 PM

Grand Rapids, 259 Mich 654; 244 NW2d 192 (1932); and *Vernor v. Secretary of State*, 179 Mich. 157 (1915). This Court should grant Plaintiff's Application for Leave to Appeal to correct the significant, fundamental errors contained in the lower courts' holdings and protect this Court's long-standing precedent in this area of the law.

II. THE FACTS SUPPORTING SUMMARY DISPOSITION IN PLAINTIFF'S FAVOR ON THE TAX-BASED CLAIMS.

The following undisputed facts were submitted in support of Plaintiff's motion for summary disposition on its Tax-Based Claims.[4]

A. THE BASIS FOR THE CHARGES.

The City asserted in its discovery responses and its Second Amended Answer ("SAA") (Exhibit C to App. Ex. 4) that the Charge is actually a "permit fee." The City claimed that owners of nonresidential properties and some owners of residential properties must pay the "permit fee" each year in order to obtain a permit to operate from the Fire Marshal. The City further claimed that the "permit fees" are "imposed in order to reimburse the City for all of the direct and indirect costs of the Fire Marshal's fire protection program" and, therefore, the permit fees are properly charged to even those properties that do not receive fire inspections. City's Answers to Plaintiff's Third Set of Interrogatories, Interrogatory No. 5 (Exhibit D to App. Ex. 4).

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[4] In its Complaint (Exhibit A to App. Ex. 4), Plaintiff pleaded the following claims:

Count I: Violation of the Headlee Amendment;
Count II: Assumpsit/Money Had and Received - Unreasonable Charges;
Count III: Unjust Enrichment - Unreasonable Charges;
Count IV: Assumpsit/Money Had and Received - Violation of MCL 141.91;
Count V: Unjust Enrichment - Violation of MCL 141.91;
Count VI: Assumpsit/Money Had and Received - Violation of City Ordinance Section 19-1-22, Subsection 1.4.1.1;
Count VII: Unjust Enrichment - Violation of City Ordinance Section 19-1-22, Subsection 1.4.1.1; and
Count VIII: Violation of Equal Protection Guarantees Stated in the Michigan Constitution of 1963, Article I, Section 2.

Plaintiff's "Tax Based Claims" are Counts I, IV, and V, which were dismissed on summary disposition and were part of Plaintiff's claims on appeal. *See* Joint Final Pretrial Order ("JFPO"), App. Ex. 5, p. 13. Counts II, III, VI, VII, and VIII proceeded to trial.

RECEIVED by MSC 6/5/2023 2:19:34 PM

Through its ordinances, the City has adopted an amended version of the National Fire Protection Association's ("NFPA") Fire Code. City Ordinance § 18-1-22 (Exhibit E to App. Ex. 4) amends and adopts NFPA Code § 1.6.2 as follows:

> 1.6.2 In accordance with Section 9-507 of the Charter, the Fire Commissioner is authorized to establish necessary fees, with the approval of the City Council, for the cost of:
>
> (1) Inspection and consultation;
>
> (2) Issuance of permits and certificates . . .

The City initially adopted Ordinance § 18-1-22 in 1984. *See* Exhibit E to App. Ex. 4, p. 8. *See also* City's Brief in Opposition to Plaintiff's Motion for Class Certification at p. 5 (Exhibit F to App. Ex. 4).

In its SAA, the City admits it does not impose the Charges on the public at large. Complaint at ¶ 22; SAA at ¶ 22. Instead, as the City further acknowledges, it pays the cost of its overall Fire Protection Program by imposing the Charges on owners of non-residential property and multi-family residential property. Complaint at ¶ 23; SAA at ¶ 23.

B. THE FIRE PREVENTION ACTIVITIES FINANCED WITH THE CHARGES.

According to the City, the Charges are intended to finance "all of the direct and indirect costs of the Fire Marshall's fire protection programs." City's Answer to Plaintiff's Third Set of Interrogatories at p. 6 (Exhibit D to App. Ex. 4). The activities associated with these costs are described generally at p. 6 of Exhibit D to App. Ex. 4, and more particularly described by the City's Fire Marshal, Shawn Battle as follows:[5]

1. Training

The Charges cover the cost of training fire inspectors, arson investigators and plan reviewers, which are the "section that reviews all new construction plans, renovations and – any plans submitted to the City that have to do with life safety or new construction." Battle Dep. II at pp. 9-10. Training extends to "anybody who works in for the fire marshal division in an inspection capacity." *Id.* at p. 10.

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[5] *See* "Battle Dep. II" Exhibit G to App. Ex. 4.

RECEIVED by MSC 6/5/2023 2:19:34 PM

2. Public Education

Battle also confirmed that the Charges are used to finance the public education activities of the Fire Marshal Division: "Actually training of the public when businesses – it could be fire training at businesses, it could be fire extinguishing training at businesses, it could be going out and speaking to different city entities, it could just be a public service announcement." *Id.* at p. 12.

3. Inspection Activities And Emergency Response Activities

The Charges also cover the costs of annual fire safety inspections and other activities conducted by fire safety inspectors employed by the Fire Marshall Division. The City admits that "it has employed between 12 and 15 full-time employees (Fire Prevention Inspectors and Fire Senior Fire Prevention Inspectors) to perform services related to its fire safety programs, which may include inspections of multi-family and non-residential properties in the City, but which also include numerous other functions, …" SAA, ¶ 12.

As suggested by the City's Answer, the responsibilities of the fire safety inspectors are broad and varied. The City describes those duties as including the following:

1. Inspects residential, assembly, educational, industrial and other occupancies.
2. Inspects premises where hazardous materials are stored, handled, used or sold.
3. Inspects and witness testing of fire protection/detection systems.
4. Maintains records and reports on conditions found.
5. Inspects fire escapes and other emergency exit passages.
6. Provides instructions and advice to owners and occupants of buildings.
7. Conducts inspections including but not limited to census tract district inspections, performing inspections for fire hazards, observing condition of fire extinguishers, fire hose and sprinkler systems, standpipe systems, fire alarm systems, clearance of aisles and exits, condition of fire escapes, fire doors and exits, and arrangement of materials and equipment.
8. Instructs schools, churches and other groups on fire prevention methods and hazards, as required.
9. Conducts post fire inspections and investigations.
10. Assists in the gathering of evidence in cases involving violations of law.
11. Testifies in court, as required [and]
12. As a sworn court officer, issues misdemeanor court citations to violators of the Fire Prevention Code [Exhibit H to App. Ex. 4].

RECEIVED by MSC 6/5/2023 2:19:34 PM

4. General Operations And Maintenance Expenses of the Fire Marshall Division's Facility

Finally, the Charges cover "any cost incurred as far as the facility itself; it could be anything from utilities, cleaning, rearranging of the office areas." Battle Dep. II at p. 11. As Battle testified, "[i]t can cover a lot of different areas." *Id.*

C. THE CITY ADMITS THE CHARGES PROVIDE A PUBLIC BENEFIT.

In light of the activities and expenses described above, the City has repeatedly admitted that the Charges do not provide a particularized benefit only to the payers of the Charges, but rather benefit the public generally. **First**, the Mission Statement of the City's Fire Marshal Division makes clear that the activities of that Division are performed on behalf of the general public:

> The mission of the Detroit Fire Department Fire Marshall Division is to provide the **citizens and visitors** of Detroit with the highest level of fire prevention using standards and guidelines set forth by the Michigan Building Code, City Ordinance and NFPA for the purpose of fire prevention inspections, code enforcement, plan review, investigation and public education, all delivered with quality and outstanding customer service. [Exhibit I to App. Ex. 4 (emphasis added)].

In his second deposition, the City's Fire Marshal confirmed that the mission of his Division is to confer public benefits:

> Q. One of the things it says is: The mission is to provide citizens and visitors of Detroit with fire prevention. Do you see that?
> A. Yes, I do.
> Q. So you understand that the activities of the fire marshal division confer benefits on people who don't even pay taxes in the City of Detroit, correct?
> A. Correct [Battle Dep. II at p. 24]

See also Id. ("Our safety guidelines is (*sic*) to make sure citizens are safe when they're coming to public buildings or they're coming to partake in any kind of events or coming into the city or coming into this building for any type of business activities. Like I say, any special events that are going on in the city, that's what we are referring to when we want to keep people safe, **every citizen and visitor**") (emphasis added).

Second, Mr. Battle further admitted that the overall goal of the Fire Protection Program – *i.e.*,

RECEIVED by MSC 6/5/2023 2:19:34 PM

minimizing or diminishing the number of fires that occur – is one designed to benefit the entire community:

> Q. And would it be fair for me – this may be simplistic, but the overall goal of the Fire Protection Program is to minimize or diminish the number of fires that actually occur, correct?
> A. Correct.
> Q. And when a fire occurs, it can present dangers and possible harm beyond the structure that it is actually in, correct?
> A. Correct.
> Q. **And so if you're preventing fires – if, for example, you had a thousand fires one year and you were able through your efforts to reduce that to 500 fires, that is something that benefits everybody, correct**?
> A. **Yes, it does**, but when it comes to our fire safety program, ours is more focused on the business owner. We have another department or division that focuses on the city and civilians and single dwellings and things like that.
> Q. Right
> A. That falls under their purview.
> Q. And I'm not really even talking –
> A. Their safety program. Our safety program is more designed for the businesses **and for people coming to partake in what the businesses offer and events and everything that goes on in the city**. Our community relations, that division, they are the ones that focus on the individual homeowners and things like that.
> Q. And again, maybe we are getting too down in the weeds about homeowners versus commercial. I'm talking about when you prevent a fire, if there's a fire in this building, people who are visiting here could get killed, right?
> A. Correct.
> Q. **So anytime you can reduce fire risk, you're providing a benefit not only to this building but also to the people who visit this building and people who may be affected if there is a fire in this building**?
> A. **Correct**. [Battle Dep. II at pp. 21-22 (emphasis added).]

Third, the City again admitted in its Responses to Plaintiff's Third Interrogatories (Exhibit D to App. Ex. 4) that the Charges pay for services of a general public nature. In response to Interrogatory No. 3, the City said:

> More generally, all those who pay the Fire Marshal's annual permit fee receive the benefit of the fire protection program (training of staff, maintenance of Fire Marshal's physical facility, public education, provision of information related to properties subject to the Fire Marshal's programs, maintenance of information, capacity to continue provision of services, including but not limited to inspections, etc.) even if they do not receive a physical inspection in a given year. [*Id.*, Ans. to Int. No. 2 (emphasis added).]

Fourth, even if the City's fire inspection activities confer *some* benefit on the properties actually

RECEIVED by MSC 6/5/2023 2:19:34 PM

inspected, the City concedes that such benefits are **not** received by properties, like those owned by Plaintiff and the Class, that are not actually inspected. In this regard, Mr. Battle testified as follows:

> Q. And when you inspect a property, do you feel that that is a benefit to the property owner?
> A. Of course.
> Q. And when you inspect the property – so if there's a property you don't inspect versus a property you do inspect, the owner of the property you do inspect receives a benefit that isn't necessarily shared by someone who doesn't receive an inspection?
> A. One part of that safety program, yes. [Battle Dep. II at p. 32].

Thus, by its own admissions, the City's fire inspection activities and "fire protection program" provide a benefit to the general public and not to individual property owners.

III. THE FACTS ADDUCED AT TRIAL

A. BACKGROUND FACTS.

The parties stipulated to the following facts in the Joint Pretrial Order and/or at the beginning of trial:

1. The City imposes annual Charges on owners of non-residential real property and did so prior to July 18, 2013. [JFPO, App. Ex. 5, p. 25.]
2. At some time, an unknown City of Detroit employee prepared Plaintiff's Trial Exhibit 1 (App. Ex. 20), which is entitled "Detroit Fire Department, Fire Marshall Division, 2013-2014" and which speaks for itself. [JFPO, p. 25.]
3. The City has collected Charges from thousands of property owners in the amounts set forth in the City's MobileEyes system. These amounts generally correspond to the figures contained in Plaintiff's Trial Exhibit 1. [*Id.*]
4. The City has collected Charges from thousands of property owners whose property **did not** receive an inspection in the year in which the City imposed the Charges. [*Id.*]
5. Since prior to July 18, 2013, the City's Fire Marshal Division has used a computerized database called MobileEyes to generate bills and track payments received. [*Id.*]
6. From 2013 to the present, the MobileEyes system has generated annual invoices to Plaintiff concerning the Charges which state on their face that they relate to an "Industrial/Bus/Merc Occupancy Permit." [*Id.*]
7. From 2013 to the present, the City's Finance Department has mailed out annual invoices to Plaintiff concerning the Charges which state on their face that they relate to an "Industrial/Bus/Merc Occupancy Permit." [*Id.*]
8. From 2013 to the present, for each year in which Plaintiff has paid the Charges, the City has issued Plaintiff a document entitled "Industrial/Business/Mercantile Occupancy Permit." [*Id.*]

RECEIVED by MSC 6/5/2023 2:19:34 PM

9. The City was not able to locate any documents confirming that the City Council approved the Charges at any time prior to May 2021. [Trial Trans., App. Ex. 6, pp. 7-8.]

The City imposes an annual Charge on owners of property other than single-family residential property and did so prior to July 18, 2013. *See* Trial Trans., p. 6 (Stipulated Fact No. 1). The City has collected Charges from thousands of property owners whose property **did not** receive an inspection in the year in which the City imposed the Charge. *Id.*, p. 6 (Stip. Fact No. 4). The amounts of the Charges in 2012-13 and 2013-14 through the present are set forth on Plaintiff's Trial Exhibit 1. *Id.*, p. 6 (Stip. Fact No. 2, 3); pp. 25-28 (testifying that the schedule of Charges on Exhibit 1 is accurate and has remained in place since 2013-14). The amounts of the Charges are based on the "size and relative fire risk of the property, both of which affect the time it takes to complete an inspection…" *Id.* p. 40. The City bills the Charges through a computerized system called "MobileEyes." *Id.*, pp. 6-7 (Stip. Fact No. 3, 5, 6); p. 27 (Fire Marshal Shawn Battle testifying that "We use the MobileEyes System for our – for billing purposes."). Plaintiff's principal, Ron Fry, testified that his property did not receive a fire safety inspection at any time between 2013 and the date of trial. *Id.*, pp. 116-121; pp. 126-27. The City presented no evidence that Plaintiff's property received an inspection.

B. THE CITY COUNCIL DID NOT AUTHORIZE THE CHARGES BEFORE MAY 2021.

The City's Charter and ordinances authorize the City to collect charges **only** if they are approved by the City Council. City Ordinance Section 19-1-22, Subsection 1.4.1.1, provides that the City's "Fire Commissioner is authorized to establish **necessary** fees, with the approval of the City Council, for the cost of (1) inspection and consultation . . ." (emphasis added). Fire Marshal Battle confirmed at trial that the Charges must be authorized by the City's Charter and must be approved by the City Council. Trial Tr., App. Ex. 6, p. 31. The City's own ordinances do not even purport to authorize the Charges for at least two reasons.

First, the only "permit fees" authorized by the ordinance are fees to cover the "cost of the … **issuance** of permits and certificates." [Emphasis added]. Thus, the ordinance provision limits the City's

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cost recovery to the administrative costs associated with issuing the permits. It most assuredly does not authorize the City to recover "all of the direct and indirect costs of the Fire Marshall's fire protection programs" (City's Answer to Plaintiff's Third Set of Interrogatories, App. Ex. 7, p. 6), through the so-called "permit fees." Fire Marshal Battle admitted at trial that there is nothing in the Ordinance that authorizes the Fire Commissioner to "establish necessary fees for the cost of the entire Fire Prevention Program of its Fire Marshal Division." Trial Tr., App. Ex. 6, p. 32. Battle further admitted that Ordinance "does not explicitly authorize the charging of permit fees to cover inspections." *Id.*

Second, the ordinance requires any fees to be imposed "in accordance with Section 9-507 of the [City's] Charter," which requires the City to actually render a service to the payer of any fee imposed by the City. In this regard, Section 9-507, titled "Service Fees," provides: "Any agency of the City may, with the approval of the City Council, charge an admission or **service fee** to any facility operated, or **for any service provided**, by an agency. **The approval of the City Council shall also be required for any change in any such admission or service fee**." [Emphasis added.]

The Fire Inspection Charges were not authorized by the City Council during almost all of the class period, so they are ultra vires. The City was not able to locate any documents confirming that the City Council approved the Charges at any time prior to May 2021. Trial Trans., App. Ex. 6, pp. 7-8 (final stipulation of fact). During trial, Fire Marshal Battle confirmed that there is **no evidence** the City Council approved the Charges before May 2021:

> Q. All right. And I think you, you were here for the stipulation but you're – there's no – you don't have any evidence that the City Council approved the, the charges that are at issue here at any time prior to last month, correct?
>
> A. No, I don't. [*Id.*, p. 34.]

Section 3.5-102 of the City's Charter (App. Ex. 8) requires the City Clerk to "keep a record of all its ordinances, resolutions and other proceedings and perform other such duties as it may provide." Section 4-118 of the Charter (App. Ex. 9) further requires the Clerk to "authenticate by signature and record all ordinances and resolutions in a properly indexed book kept for that purpose."

RECEIVED by MSC 6/5/2023 2:19:34 PM

Notwithstanding these dictates, there was no evidence presented at trial that a record exists memorializing the City Council's approval of the Charges at any time prior to May 2021.[6] The Circuit Court incorrectly found that "[t]he Detroit City Council approved the Charges, described as permit fees, rather than inspection fees, on May 13, 2021, retroactive to January 1, 2013."

C. PLAINTIFF "FAITHFULLY" PAID THE CHARGES.

Using the MobileEyes system, the City generated and mailed an invoice to Plaintiff in each year from 2013 to the present concerning the Charges. Trial Trans., App. Ex. 6, pp. 6-7 (Stip. Fact No. 6, 7). Plaintiff "faithfully" paid the Charges, at least through 2020. *Id.*, pp. 81-82 (admission by Battle). For each year in which Plaintiff paid the Charges, the City issued Plaintiff a document titled "Industrial/Business/Mercantile Occupancy Permit." *Id.* (Stip. Fact No. 8). Plaintiff has paid the Charges since at least 2013. Trial Trans., App. Ex. 6, p. 113.

D. THE CITY'S DECISION ABOUT WHICH PROPERTIES TO INSPECT WAS ARBITRARY AND CAPRICIOUS.

In its First Amended Answer, ¶ 24 (App. Ex. 10) and confirmed by the trial testimony of Fire Marshal Battle, the "City justified, at least in this Answer, varying charges based upon the size of the property and the relative fire risk, both of which affect the time it takes to complete an inspection." App. Ex. 6., p. 40. The City did not, however, assess relative fire risk when deciding which properties to inspect. *Id.*, pp. 43-44 (Fire Marshal Battle testifying: "Q. So it's kind of **serendipitous** as to who gets an inspection and not gets an inspection because you know you can only do so many per year and that's gonna leave out so many properties, and **so some properties get lucky and get one and some properties don't, correct? A. Correct**.") (emphasis added). Even the Circuit Court found that the City's decisions about which properties to inspect and which not to inspect were arbitrary and capricious, as opposed to "intentional and deliberate." *See* Circuit Court Judgment, p. 5 ("Although the

[6] As discussed herein, the City Council's attempted retroactive approval of the Charges is ineffective; the Charges were never properly authorized by the City Council at any time before May 2021. The Charges were thus ultra vires.

RECEIVED by MSC 6/5/2023 2:19:34 PM

Fire Marshal did not inspect all commercial properties under its jurisdiction each year, this was because the Fire Marshal lacked the funding, staffing, and resources to do so, not because the fire Marshal made an **intentional and deliberate** decision to treat Plaintiff's property and others differently.") (Emphasis added).

E. THE CITY GENERATES A LARGE AMOUNT OF REVENUE FROM THE CHARGES.

David Whitaker, Director of the City's Legislative Policy Division, reported in his memo to the City Council (App. Ex. 11) that in fiscal year 2016, the Fire Department "had $4.8 million of general fund revenues for 'Fire Safety Inspections'" and testified that "[t]his was the highest amount of inspection revenue for the general fund." Trial Tr., p. 101. Whitaker informed the Council that "[t]he amount of revenue from Fire Safety Inspections have greatly increased since fiscal year 2010." *Id.* (referring to the City Council memo, App. Ex. 11).

F. PERSONS AND ENTITIES WHO RECEIVE FIRE SAFETY INSPECTIONS RECEIVE A BENEFIT THAT PERSONS AND ENTITIES WHO DO NOT RECEIVE A FIRE SAFETY INSPECTIONS DO NOT RECEIVE.

Mr. Battle testified: "Q. Right. But the property that received the inspection, you would agree that they would receive a benefit from getting that inspection, correct? A. Yes." Trial Trans, App. Ex. 6, p. 28. He elaborated as follows:

> Q. All right. And the – when you, when you don't inspect a property and you have all of these hundreds of thousands of properties that don't receive inspections you're not in any way providing a service to those properties, are you?
>
> A. Well, they're still falling – if they're commercial properties and multi-residential properties they still are falling under our Life Safety Program, yeah.
>
> Q. No, I understand that they, that they're within your program but if they don't – we already, I think, established that there's a specific service that gets provided to a property that gets inspected, you said that, because there's a benefit and you can find things that were, you know, fire hazards, that sort of thing. Do you remember that testimony?
>
> A. Yes.
>
> Q. All right, there's not a similar specific service provided to somebody who pays a permit fee and doesn't receive an inspection, correct?
>
> A. Not that part of it, correct. [*Id.*, pp. 35-36.]

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G. PLAINTIFF DID NOT RECEIVE A FIRE SAFETY INSPECTION IN ANY YEAR BETWEEN 2013 AND THE PRESENT.

Although Plaintiff's principal, Ron Fry, is in the office every weekday (and some employee is always present), and Plaintiff keeps strict control over entry onto its business premises, no employee of Plaintiff observed anyone from the City performing a fire safety inspection at any time between 2013 and the present. App. Ex. 6, pp. 116-121; pp. 126-27. Fire Marshal Battle admitted that during at least some years, Plaintiff did not receive a fire safety inspection. *Id.*, p. 82.

H. THE CITY COLLECTS FAR MORE MONEY FROM THE FIRE INSPECTION CHARGES THAN IT SPENDS PERFORMING FIRE INSPECTIONS, IN VIOLATION OF ITS ORDINANCES.

The City's witness, Mr. Whitaker, confirmed that Plaintiff's Trial Exhibit 10, App. Ex. 11, p. 16, correctly states that the Fire Department had $4.8 million of general fund revenue from Fire Safety Inspections in FY 2016. *See* Trial Trans., p. 101. Mr. Whitaker issued his memo on July 7, 2017, which was before Plaintiff filed its Complaint in this action.[7] Similarly, Plaintiff's Trial Exhibit 11, (App. Ex. 12), a memo by Mr. Whitaker dated February 22, 2018 reflects "Safety Inspection Charges" of more than $4 million. *See* App. Ex. 6, pp. 104-05. The total of all "Licenses/Permits/Inspection Chgs" is the exact same amount as the "Safety Inspection Charges" - $4,019,432 (App. Ex. 12) – which strongly suggests that **all** of the revenue for both inspections **and** permits was derived from inspection fees, notwithstanding Mr. Whitaker's attempts to avoid that conclusion. Indeed, Mr. Whitaker admitted that when he sent his memos. According to the City, no one has ever calculated the amount of revenue that would be necessary for the City to actually perform an annual inspection of every property that is subject to Fire Inspection Charges. *See* App. Ex. 6, p. 65 ("THE COURT: And if you were to inspect all of the properties how much would that cost? …So no one's ever done an analysis of how much you would need to do that? THE WITNESS: No, not that I know of.").

[7] Thus, Mr. Whitaker's memo is a highly reliable source about the revenue the Fire Inspection Charges generated, because it was created before this lawsuit and was not subject to the pressures of litigation.

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IV. THE PROCEEDINGS IN THE CIRCUIT COURT

A. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION ON ITS TAX CLAIMS.

On July 14, 2020, Plaintiff filed a motion for partial summary disposition as to liability under MCR 2.116(C)(10) with respect to the unlawful tax claims set forth in Count I (Violation of Headlee Amendment) and Counts IV and V (Violation of MCL 141.91) of its Complaint (App. Ex. 4). The City responded and requested partial summary disposition in its favor on the same counts under MCR 2.116(I)(2) (App. Ex. 13). Plaintiff filed a reply brief in support of its motion (App. Ex. 14).

The Court denied Plaintiff's motion for partial summary disposition and granted the City's request for judgment in its favor under MCR 2.116(I)(2) as to Plaintiff's tax claims. The Circuit Court found that the Charges did not violate the Headlee Amendment because they served a regulatory purpose and were proportionate to the costs of service. SD Opinion, App. Ex. 2, pp. 6-9. As described below, these rulings were patently erroneous. The Court correctly found that the Charges were not voluntary but found that the lack of volition alone was not enough to make the Charges a tax. *Id.*, p. 9. The Court further found that because Plaintiff had not established the *Bolt* factors under the Headlee Amendment, Plaintiff could not as a matter of law prevail on its unlawful tax claim under MCL 141.91. *Id.*, p. 10.

B. TRIAL ON PLAINTIFF'S CLAIMS REGARDING UNREASONABLE RATES, VIOLATION OF THE CITY'S CHARTER, AND VIOLATION OF MICHIGAN STATE EQUAL PROTECTION GUARANTEES.

After dismissing Plaintiff's tax claims, the Court conducted a bench trial on Plaintiff's remaining claims set forth in Counts II and III (common law unreasonable rates), VI and VII (ordinance violation), and VIII (equal protection) of the Complaint.[8] The Court began its opinion by finding as a matter of fact that the Charges were annual permit fees, not inspection fees. App. Ex. 1, p. 1. Plaintiff

[8] The Circuit Court bifurcated this case into a liability phase and a damages phase, and the June 2021 trial addressed only liability. *See* JFPO, p. 1 ("Because the Court has bifurcated the trial into separate phases for liability and damages,

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did not dispute that finding in its appeal to the Court of Appeals. Instead, Plaintiff disagreed with the legal conclusions the Circuit Court drew from its findings, as described below. The Circuit Court found as follows on Plaintiff's claims:

Count II, Unreasonable Charges, Assumpsit/Money Had and Received. There is no independent cause of action for assumpsit. *Id.*, p. 6. Assumpsit is a remedy for other independent causes of action. *Id.*, p. 7. Plaintiff did not succeed on any other independent causes of action, so it had no right to assumpsit. *Id.*

Count III, Unjust Enrichment, Unreasonable Charges. Plaintiff maintains that the City's ordinances only authorize the Fire Marshal to charge a fee for the cost of issuing permits, not the entire cost of his fire prevention program. But municipalities may charge permit fees "to recover all of their direct and indirect costs relating to the regulation of those who are charged the fee." *Id.*, p. 8. Here, the cost of issuing permits was the entire cost of the fire prevention program, so the fees were lawful. *Id.*, p. 9. In addition, Plaintiff's argument that the Charges were ultra vires fails because the City's retroactive legislation did not impair Plaintiff's vested rights, but merely corrected a procedural violation relating to the authorization of the Charges, so the City had not been unjustly enriched. *Id.*, pp. 10-11. Further, the City's retroactive approval of the Charges "served a rational and legitimate purpose, because it allowed the City to recover permit fees which funded its needed fire protection programs, which were focused on those who paid the fee and received permits." *Id.*, p. 11. Another "rational purpose" for retroactive authorization was to avoid "a massive and unexpected shortfall in the Fire Marshal's budget" which would jeopardize future programs. *Id.* Forcing the City to disgorge millions of dollars that it collected through the Charges and spent on fire prevention programs would be inequitable to the City. *Id.*, p. 12.

Plaintiff will address only its theories as to liability."). The Circuit Court Judgment found no liability, so the parties never reached the issue of damages.

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Count VI, Assumpsit/Money Had and Received, Ordinance Violation. The Circuit Court dismissed this claim for the same reason as Count II, described above. *See* App. Ex. 1, p. 12.

Count VII, Unjust Enrichment, Violation of Ordinance. Retroactive approval of the Charges was lawful for the same reasons described in connection with Count III. *Id.*, pp. 12-13.

Count VIII, Violation of Equal Protection Guarantees. Plaintiff has not met any of the requirements under the rational basis standard. The City "did not single out Plaintiff or others based on certain characteristics or as part of some identifiable group." *Id.*, p. 15. The City "did not ***intentionally or purposefully*** choose to treat Plaintiff (or other commercial property owners in a disparate manner." *Id.*, p. 16 (emphasis in original). According to the Court, the Fire Marshal's random and "serendipitous" choice to inspect certain properties due to "lack of funding and resources" – without any consideration of which properties had the greatest need of an inspection – did not mean that the City had "knowingly and purposefully established a system which treated different categories of property owners differently." The Court dismissed Plaintiff's equal protection claim.

V. THE COURT OF APPEALS' OPINION

In its March 9, 2023 Opinion, the Court of Appeals rejected all of Plaintiff's arguments for having "no merit" and affirmed the circuit court's ruling that "the charges are legal." Exhibit A, hereto at p. 1. The Court of Appeals relied heavily on the Circuit Court's finding that the "Charges" were "permit fees" and not "inspection fees." Exhibit A, p. 3. The Court of Appeals noted: "Although appellant initially claimed that the charges were 'fire inspection charges,' appellant on appeal has acquiesced to the trial court's and defendant's position that they are "permit fees." Exhibit A, p.1.[9] In further support, the Court of Appeals cited to testimony of City Fire Marshal Shawn Battle:

> [Battle] testified…the fees were exclusively for permits, which allow businesses to operate, and have no relation to inspections. Although it was the department's goal to inspect every commercial property every year, Battle stated this was not feasible because

[9] Of course, this statement ignores Plaintiff's position that it does not matter what the fees are called—that Plaintiff still challenges the ***legal impact*** of these fees.

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> of a lack of manpower. Battle also testified that his department did not utilize any of the documents appellant relied on [by Plaintiff] and instead it used a system called MobileEyes, which identifies the charges as being for "permits." [*Id.* p. 2.]

The Court of Appeals then affirmed that there was no requirement to actually conduct fire inspections to impose the fee because "the charges are not for inspections, but are for permits:"

> There is no question of fact that the charges at issue here were for the acquisition of permits, not inspections. Although appellant took the position below that the charges were "fire inspection charges" or "fire inspection fees," it submitted no evidence to show that the charges were paid in consideration for receiving an inspection. Instead, the evidence showed that the charges were for obtaining occupancy permits. Thus, appellant's arguments that rely on the charges being fees for receiving inspection services are misplaced and are without merit. [Exhibit A, pp. 3, 4.]

A. RULINGS AS TO PLAINTIFF'S "TAX BASED CLAIMS."

In addressing Plaintiff's "tax based claims" under the Headlee Amendment and MCL 141.91, the Court of Appeals, using the three-pronged *Bolt* analysis, ruled the "permit fee" was regulatory:

> Appellant argues that the Fire Protection Program serves a public purpose, but ignores the primary benefit to a property owner who pays the charge—a permit, allowing the owner to operate on its premises. Undoubtedly, the public also benefits from the Fire Protection Program, but as this Court recognized in *Westlake Trans, Inc v Pub Serv Comm*, 255 Mich App 589, 613; 662 NW2d 784 (2003), fees that benefit the general public still can maintain their regulatory nature. [Exhibit A, p. 5.]

In support of its ruling that the "permit fees" were regulatory, the Court of Appeals noted again that fees at issue "provides the property owner with a permit, which allows the owner to operate in Detroit." Exhibit A pp. 4-5. And further that:

> those who pay the charge, and who do not receive an inspection, still receive the benefit of defendant's Fire Protection Program, which includes the "training of [the fire marshal] staff, maintenance of Fire Marshal's physical facility, public education, provision of information related to properties subject to the Fire Marshal's programs, maintenance of information, capacity to continue provision of services, including but not limited to inspections, etc." [Exhibit A, p. 5].

The Court of Appeals summarized: "appellant received "a direct benefit" from paying the charge. The fact that the general public also benefits from the Fire Protection Program does not negate the charge's regulatory nature… the first of the factors we must consider weighs in favor of the charge being a fee and not a tax" *Id.*

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The Court of Appeals next ruled that the "permit fee" was proportional stating:

> Secondly, the city's charge appears to be proportionate to the necessary costs of the service it is providing. Courts are to presume that the amount of the fee is reasonable. Appellant's position is that the costs are not proportionate because, by not receiving any inspections, appellant received nothing different from anyone else in the city who was not required to pay the charges.
>
> We disagree with this argument because the main benefit of the city's charge was the receipt of a permit, not an inspection. Thus, those who paid the charge did receive a benefit distinct from someone who did not pay the fee—the right to occupy the premises as a business.
>
> Furthermore, these charges funded the year-to-year operations of the Fire Marshal Department. This is an important distinction from *Bolt*, in which our Supreme Court noted that the purpose of the charge, which it found to be a tax, was to finance a multiyear construction of a large infrastructure project. There, the benefit gained—new infrastructure—would substantially outlast the time period for which the charge was to be in place. *Bolt*, 459 Mich at 163-164. Exhibit A, pp. 5-6.

Finally, under the third *Bolt* prong, the Court of Appeals "agreed" that the "permit fees" were "not voluntary," but then determined that this "fact alone was not sufficient to overcome the other two factors" that Plaintiff "received a benefit and that the fee is proportional." *Id.* p. 6.

In sum, the Court of Appeals held: "the trial court ruled the charge was a fee, not a tax. We agree with the trial court's analysis and find it did not err." p. 6.

B. RULINGS AS TO PLAINTIFF'S CHARTER AND ORDINANCE VIOLATION CHALLENGE.

Regarding Plaintiff's challenge that the City did not properly impose the "permit fees" because they had never been approved by the City's council as required by the City's Charter and Ordinances, the Court of Appeals determined that, despite the fact that there was "no evidence" of the City's council approving the "permit fees" at any time before May 2021—as stipulated to by the parties—the "permit fees" were still properly imposed because, simply, "the city council later retroactively approved the charges." p. 8. The Court of Appeals noted without citation to any authority that: "There is no per se prohibition on retroactive application of legislation" and then held that "retroactive ratification of the charges was a rational means to further a legitimate legislative purpose"—to maintain the Fire Protection Program *Id.* p. 8-9. Moreover, according to the Court of Appeals a "strictly literal

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interpretation of [the ordinance] lends support to the suggestion that a charge is allowable only for the "act" of "giving out" the permit. However, the concept of a "permit" encompasses much more than a physical piece of paper. The more reasonable interpretation is that the cost of the issuance of a permit includes all the work involved with a particular program which that permit represents." *Id.* p. 10. The Court of Appeals then held: "The trial court correctly ruled in favor of defendant on all counts. We affirm." *Id.* p. 11

On March 30, 2023, Plaintiff filed a motion for reconsideration of the Court of Appeals March 9, 2023 Opinion, asserting that the Court's ruling on Plaintiff's Headlee Amendment claims was contrary to established binding precedent. Among other errors Plaintiff noted, the Court of Appeals failed to heed the long-standing limitation this Court has imposed on regulatory fees imposed by Michigan municipalities. Specifically, Plaintiff argued that by holding that the so-called "permit fees" in this case were not unlawful taxes, the Court of Appeals failed to require the City to tether those fees to some cost the City allegedly incurred relating specifically to Plaintiff's property or business. By ignoring this important limitation on municipal power in its Opinion, the Court of Appeals blasted a giant hole in the Headlee Amendment. On April 24, 2023, in a one-line order, the Court of Appeals denied Plaintiff's motion for reconsideration. *See* Exhibit B, hereto.

ARGUMENT

I. THIS IS ONE OF THE MOST IMPORTANT CASES THE COURT WILL CONSIDER THIS YEAR, AND IT MEETS EVERY CRITERIA FOR THIS COURT'S REVIEW.

This Application for Leave to Appeal asks this Court to accept this case so that it can answer at least two legal questions of vital importance to Michigan citizens: (1) does a local government violate Section 31 of the Headlee Amendment by conditioning a citizen's right to operate a business on the citizen's payment of a mandatory charge that is used to finance a core public safety function which provides no individualized benefit to the citizen or their business, and (2) can a local government

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retroactively authorize mandatory charges previously imposed on its citizens that admittedly were *ultra vires* at the time they were imposed and collected?

We summarize the background relating to these issues below.

A. THE HEADLEE AMENDMENT ISSUE.

Since its ratification in December 1978, this Court has been a staunch defender of the Headlee Amendment to the Michigan Constitution. In the Court's seminal 1998 decision in *Bolt v. City of Lansing*, 459 Mich. 152, 587 N.W.2d 264 (1998), the Court struck down certain stormwater utility charges imposed by the City of Lansing to finance a large infrastructure project that would separate portions of that city's "combined" sewer system. In doing so, the Court observed that the "Headlee Amendment 'grew out of the spirit of tax revolt and was designed to place specific limitations on state and local revenues." *See* 459 Mich. at 160. Further, this Court explained:

> 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." [459 Mich. at 161 (quoting *Airlines Parking, Inc. v. Wayne Co.*, 452 Mich. 527, 532, 550 N.W.2d 490 (1996)).]

In ratifying the Headlee Amendment, it was clear that voters "'were…concerned with ensuring control of local funding and taxation by the people most affected, the local taxpayers. **The Headlee Amendment is the voters' effort to link funding, taxes, and control**.'" *Macomb Co. Taxpayers Ass'n v. L'Anse Creuse Pub. Sch*, 455 Mich. 1, 7, 564 N.W.2d 457 (1997) (emphasis added), quoting *Durant v. State Bd of Ed*, 424 Mich. 364, 383, 381 N.W.2d 662 (1985). The Mackinac Center for Public Policy has aptly described the purpose of the Amendment as follows:

> "Local government exists to serve residents, not the other way around. **Popular control of local tax policy ensures that local government fiscal policies have voter support**. Local officials who want more revenue can get it if they convince their residents that what they want is worth it." [Michigan Capital Confidential, Report: Give Local Governments More Money, But Don't Ask Taxpayers (Exhibit C hereto) (emphasis added).]

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In contrast to this Court, the Court of Appeals simply does not like the Headlee Amendment. In fact, one could say that, with this latest published Opinion, the Court of Appeals is at open war with this vital constitutional provision. Greater vigilance by this Court is clearly warranted because Michigan municipalities have been endlessly creative in their evasions of the tax limitations Headlee imposes upon them. In this case, however, the Court of Appeals blessed the City's imposition of the type of "disguised" tax that the Headlee Amendment was designed to prevent and that *Bolt* instructed the lower courts to strike down. Indeed, the Court of Appeals' published opinion in this case did so in a way that eviscerates Headlee and will embolden municipalities in Michigan to fashion other creative attempts to evade Headlee.

The relevant and material facts are either undisputed or indisputable. The Charges at issue are annually imposed on non-residential properties and some residential properties in the City. The amount of the Charges to each property is based on the "size and relative fire risk of the property, both of which affect the time it takes to complete an inspection…" Battle Tr. Test. At p. 40. The Charges generate in excess of $4 million in annual revenues for the City. The City claims it uses those revenues to finance the fire prevention activities of the Fire Marshal Division of its Fire Department, which include fire safety inspections. The problem is that the City does not actually inspect the vast majority of the properties which incur the Charges. Plaintiff's experts have determined that, between July 1, 2013 and June 30, 2018, the City billed properties in the City for 57,380 inspections that it did not actually conduct. *See* Exhibit B to App. Ex. 4. With respect to properties that the City does not actually inspect, the City has never identified any particular "service" provided to the payers of the Charges – which it characterizes as "permit" fees – in exchange for such payments.

Neither the Circuit Court nor the Court of Appeals saw this transparent scheme for what it was: the City, under the guise of "permit" fees, has for decades successfully financed a core public safety function through Charges involuntarily extracted from a limited subset of its citizenry. The Court of Appeals failed to appreciate that persons who paid the fees but did not receive a fire safety inspection

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received no particular benefit from the Fire Marshal's fire inspection activities financed by the Charges. The Court of Appeals also failed to appreciate that, even if the inspections had been performed, the inspections benefit the citizenry as a whole and bestowed no particular benefit on the fee payors. Instead, the Court of Appeals simply concluded that the Plaintiff "received a 'direct benefit' from paying the charge…by being allowed to operate its business in Detroit." By its Opinion, the Court of Appeals effectively has authorized municipalities to impose unlimited charges on their citizens, because, under its reasoning, governmental charges (1) need not be tethered to any specific service or benefit provided to, or costs incurred with respect to, those citizens, and (2) can be used for any purpose the municipality chooses, so long as the municipality grants the burdened citizens the right to operate their businesses in exchange for payment of the charges. This Court, however, has long recognized the potential municipal shenanigans associated with license or permit fees and therefore has required that such fees must be reasonably related to the costs the municipality incurs in actually supervising or regulating the business that pays the fees – *i.e.*, a municipality must reasonably tether the amount of the fee to the value or cost of the regulation applied to the specific business:

> As has been held, **the amount of such fee must be gauged by the expenses incurred by the municipality incident to issuing the license and supervising the business the licensee carries on thereunder**, if supervision is required. A license fee may not be imposed as a tax measure in disguise. [*North Star Line, Inc. v. City of Grand Rapids*, 259 Mich. 654, 663, 244 N.W.2d 192 (1932) (emphasis added) (citing *Vernor v. Secretary of State*, 179 Mich. 157 (1915).]

Here, with respect to properties that pay the Charges but don't receive an inspection, there is no regulation at all. The City merely provides pieces of paper (permits) in exchange for millions of dollars that it then uses to fund an activity (fire inspection) that provides a benefit to the general public.

Even worse, the Charges at issue are in addition to a separate fee that Plaintiff must pay in order to receive its actual annual "business license." Thus, the Court of Appeals' approval of the City's ability to generate unlimited revenues by conditioning a citizen's right to do business on payment of a

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myriad of assorted fees and charges seems to authorize an easy solution to all municipal financing difficulties.

If left undisturbed by this Court, the Court of Appeals' now published Opinion will likely be construed by the lower Michigan courts as effectively invalidating Section 31 of the Headlee Amendment by judicial fiat, which obviously would have far-reaching implications in Headlee Amendment cases. Indeed, such a practice would pose the very same serious threat Judge (later Justice) Markman envisioned at the time of *Bolt*:

> Finally, I note a troubling logical implication of the majority opinion. Nothing in the majority's reasoning would prevent municipalities from supplementing existing tax revenues with police, fire, or a myriad of other "fees" on the ground that such services are disproportionately utilized by property owners. Such a characterization of new taxes as police "fees" or **fire "fees**" or park "fees" could erode altogether the Headlee Amendment. [221 Mich. App. at 98 (emphasis added)].[10]

Under the Court of Appeals' reasoning, a municipality could impose any charge in any amount so long the municipality deigns to allow the person paying it to pursue his or her livelihood in exchange. To illustrate the perverse outcome authorized by the Court of Appeals, consider the following: If members of organized crime had showed up at its business and told Midwest Valve they would burn its business to the ground if it didn't start paying them $1000 per month for "protection," that would be properly characterized as "racketeering" and "extortion." Here, however, when the City of Detroit essentially does the same thing, the exaction is judicially blessed as a "permit fee." The Court should strike down the City's pernicious practice of conditioning its citizens' right to earn a livelihood on payment of a fee that funds an activity that provides a general public benefit and confers no particularized benefit on those citizens.

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[10] This quoted passage is from Judge (later Justice) Markman's dissent in the 1997 *Bolt* Court of Appeals' decision. His dissented is noted in this Brief because the Supreme Court ultimately adopted it in substantial part in the majority opinion in *Bolt*.

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B. THE RETROACTIVITY ISSUE.

Worse, not only do the Charges violate Headlee, but the City had no legal authorization to impose the Charges until June 2021. Indeed, the Charges have been imposed for decades but the City Council never approved the Charges prior to June 2021, as required by the City's Charter and Ordinances.

Remarkably, the Court of Appeals nonetheless held that the City could retroactively impose the Charges back to July 2013, the beginning of the claimed "class period." The Court concluded that retroactive application of the belated approval was warranted because Plaintiff had been paying the Charges without complaint for years and therefore retroactivity did not impair any "vested right." In other words, the Court of Appeals nonsensically concluded that the longevity of illegality of the Charges somehow justified retroactive application of the City Council's belated authorization. The Court's decision also rests on the patently-absurd proposition that citizens would voluntarily pay a fee even if they knew it was unlawful. Also lost on the Court of Appeals was the impact of its earlier conclusion – applying the *Bolt* factors – that payment of the Charges was "not voluntary."

Under the Court of Appeals' reasoning, any local government caught imposing unapproved but mandatory fees on their citizens (even after decades) can merely retroactively approve those fees, even if there is no evidence that the prior leaders of the local government ever intended to prospectively authorize the fees. This is an unprecedented expansion of the circumstances under which retroactive legislation is authorized, which should not be countenanced by this Court.

For the foregoing reasons, the outcome of this case will directly affect the rights of tens of thousands of Michigan citizens and will indirectly affect the rights of virtually every other Michigan citizen. It is worthy of this Court's review.

The City and the Court of Appeals apparently agree. On March 27, 2023, the City submitted a publication request to the Court of Appeals (Exhibit D hereto). In that request, the City contended that the Court of Appeals' ruling that the Charges at issue are not taxes imposed in violation of the

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Headlee Amendment "is very significant for all municipalities in the state." The City alleges that the "opinion should be published because it involves a legal issue of significant public interest." *Id.* (citing MCR 7.215(B)(5)).

The City's publication request effectively argued that the Court of Appeals' Headlee Amendment ruling imposes a new and unprecedented limitation on plaintiffs' rights under the Headlee Amendment. If the Court's Opinion merely applied existing precedent, surely the City would not need to request publication on the grounds that the Opinion "is very significant for all municipalities in the state." The Court of Appeals apparently agreed with the City and on June 1, 2023—over two months after the City filed its publication request—chose to publish its Opinion. *See* Exhibit A. In deciding to publish, the Court of Appeals, following MCR 7.215(B), presumably decided that its Opinion met the high bar for publication—particularly, that it: "alters, modifies, or reverses an existing rule of law," and/or involves a legal issue of significant public interest." MCR 7.215(B)(3).[11] In this regard, the Court of Appeals is right. This published Opinion alters the landscape of Headlee Amendment jurisprudence, which potentially significantly impacts millions of Michigan residents. The Court of Appeals' published Opinion needs to not only be reviewed but reversed by this Court.

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 7.305(B)(2); (2) the issues presented involve "legal principles of major significance to the state's jurisprudence," MCR 7.305(B)(3), and (3) the Court of Appeals decision "is clearly erroneous and will cause material injustice" to tens of

[11] MCR 7.215 (B) establishes the standards for publication states in pertinent part: A court opinion must be published if it: (1) establishes a new rule of law; (2) construes as a matter of first impression a provision of a constitution, statute, regulation, ordinance, or court rule; (3) **alters, modifies, or reverses an existing rule of law;** (4) reaffirms a principle of law or construction of a constitution, statute, regulation, ordinance, or court rule not applied in a reported decision since November 1, 1990; (5) **involves a legal issue of significant public interest**; (6) **criticizes existing law**; (7) resolves a conflict among unpublished Court of Appeals opinions brought to the Court's attention; or (8) decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid.

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thousands of property owners in the City. MCR 7.305 (B)(5). For the reasons discussed more fully below, the Court should grant Plaintiff's Application for Leave to Appeal.

II. THE COURT OF APPEALS OPINION ON PLAINTIFF'S TAX CLAIMS CONTRAVENED FUNDAMENTAL HEADLEE AMENDMENT PRECEDENT.

The Court of Appeals' ruling on Plaintiff's Headlee Amendment and MCL 141.91 "tax based claims" was contrary to established, binding precedent established by this Court. Among other errors, the Court of Appeals failed to heed the long-standing limitation this Court has imposed on regulatory fees imposed by Michigan municipalities. *See North Star Line, Inc., supra*, "**the amount of such fee must be gauged by the expenses incurred by the municipality incident to issuing the license and supervising the business the licensee carries on thereunder**…A license fee may not be imposed as a tax measure in disguise." 259 Mich. at 663 (emphasis added).

In affirming the Circuit Court and holding that the so-called "permit fees" in this case were not unlawful taxes, the Court of Appeals failed to require the City to tether those fees to some cost the City allegedly incurred relating specifically to Plaintiff's property or business. By ignoring this important limitation on municipal power the Court of Appeals blasted a giant hole in the Headlee Amendment—effectively invalidating (or at the very least significantly weakening) Section 31 of the Headlee Amendment by judicial fiat. Indeed, by this published Opinion, the Court of Appeals has authorized municipalities to impose unlimited charges on their citizens that: (1) need not be tethered to any specific service or benefit provided to, or costs incurred with respect to, those citizens, and (2) can be used for any purpose the municipality chooses, so long as the municipality grants the burdened citizens the right to operate their businesses in exchange for payment of the charges.

Given that the Charges constitute taxes, they are unlawful under at least two independent legal theories. First, the Charges were not approved by the City's voters in violation of the Headlee Amendment to the Michigan Constitution. *See* Complaint, Count I. That constitutional provision, Art. 9, § 31, provides:

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

Second, the Charges are not ad valorem taxes and were not being imposed by the City as of January 1, 1964 and therefore violate Michigan's Prohibited Taxes by Cities and Villages Act, MCL 141.91. That statute provides:

> Sec. 1. 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.

Additional support demonstrating that the Charges are unlawful taxes is discussed more fully below.

A. THE TAX VS. USER FEE DISTINCTION MADE UNDER THE HEADLEE AMENDMENT.

An application of § 31 of Headlee is triggered by the levying of a tax. *Bolt,* 459 Mich. at 158-159. "Section 31 prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." *Durant v Michigan,* 456 Mich 175, 183; 566 NW2d 272 (1997). Thus, a tax imposed without voter approval "unquestionably violates" § 31. *Bolt v. City of Lansing,* 459 Mich 152, 158 (1998). However, a charge that is a user fee "is not affected by the Headlee Amendment." *Id.* at 159.

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Id.* at 160. "Generally, 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 (quotation marks and citations omitted).

The City's fire inspection activities and "fire protection program" funded with the Charges provide a **benefit to the general public and not to individual property owners,** so a fee or permit-based method of financing those activities from a subset of the citizenry is impermissible. Where the

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government imposes a charge that forces **one group of its citizens** to finance an activity that **benefits all citizens**, the charge is a tax. *See, e.g.*, *Graham v. Township of Kochville*, 236 Mich. App. 141, 151, 599 N.W.2d 793 (1999) (holding that a true user fee "confers benefits **only** upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee.") (emphasis added).

B. THE "*BOLT* FACTORS."

In *Bolt,* this 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. [*Bolt*, 459 Mich. at pp. 161-62.]

"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." *Graham v. Kochville Twp.*, 236 Mich. App. 141, 151, 599 N.W.2d 793 (1999). Under this standard, the Charges constitute taxes in violation of the Headlee Amendment to the Michigan Constitution and MCL 141.91.[12]

1. The "Permit Fee" is not Regulatory Because Plaintiff Does Not Receive A Direct or Individualized Benefit via Payment of the "Permit Fees."

The Court of Appeals' analysis of the three *Bolt* factors was driven almost entirely by its conclusion that Plaintiff received a direct benefit from his payment of the "permit fees" because in

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[12] Here, the Court of Appeals' Opinion reflects an unnecessary preoccupation with the label attached to the Charges. *See Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 558, 98 N.W.2d 753 (1959) (courts must "look through forms and behind labels to substance") (citation omitted). The Court's Opinion here notes the following:

> There is no question of fact that the charges at issue here were for the acquisition of permits, not inspections. Although appellant took the position below that the charges were "fire inspection charges" or "fire inspection fees," it submitted no evidence to show that the charges were paid in consideration for receiving an inspection. Instead, the evidence showed that the charges were for obtaining occupancy permits. Thus, appellant's arguments that rely on the charges being fees for receiving inspection services are misplaced and are without merit. [Opinion at p. 4].

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exchange for the payment it received a permit "allowing" it to operate its business. Here, the Court concluded that the Charges served a regulatory purpose, and not a revenue-raising purpose, because payment of the Charges provides a "primary benefit" to a property owner – namely, "a permit, allowing the owner to operate on its premises." Exhibit A at p. 5. *See also Id.* (Plaintiff "received a 'direct benefit' from paying the charge…by being allowed to operate its business in Detroit").

In reaching this conclusion, the Court of Appeals relied on *Westlake Trans, Inc. v. Pub. Serv. Comm*, 255 Mich. App. 589, 613, 662 N.W.2d 784 (2003) and *Jackson Co. v. City of Jackson*, 302 Mich. App. 90, 108, 836 N.W.2d 903 (2013). The Court of Appeals held that *Westlake* was "analogous to the circumstances before us" because "[l]ike the plaintiffs in *Westlake*, who received the right to operate trucks in Michigan, appellant in the instant case receives a benefit from being allowed to operate its business in Detroit." Exhibit A at p. 5. But the Court of Appeals' Opinion fails to acknowledge that **the challenged fees in *Westlake* did not confer only the right to operate** trucks, they funded activities to help relieve traffic congestion, protect and conserve the highways, and provided a host of other specific benefits to the payers that this Court listed in its opinion. *Id.* at 612 (listing fourteen different benefits).[13]

Here, in contrast, the Charges paid by properties that do not receive the fire safety inspections financed by the Charges are a payment merely for the right to operate, and they therefore necessarily bear no relation to the cost of providing any service or benefit to Plaintiff, because simply allowing a

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But at the end of the day, it does not matter what label is applied to the Charges because the Charges clearly are taxes even if they are called "permit fees."

[13] The Court of Appeals' reliance upon *Jackson Co.* is even more curious. It cites *Jackson Co* for the proposition that "[A] regulatory fee may confer a benefit on both the general public and the particular individuals who pay the fee and still maintain its regulatory character . …" Opinion at p. 5. But the Opinion inexplicably truncates the referenced sentence of the *Jackson Co.* opinion, which states in full: "Although a regulatory fee may confer a benefit on both the general public and the particular individuals who pay the fee and still maintain its regulatory character, **a charge is not a regulatory fee in the first instance unless it is designed to confer a particularized benefit on the property owners who must pay the fee**." *Jackson Co.*, 302 Mich. App. at 108 (emphasis added). The Charges here are not "designed to confer a particularized benefit on property owners who must pay the fee" if those property owners do not receive an inspection. *Jackson Co.* ultimately concluded that the stormwater charges in that case did not confer a particularized benefit on the payers of those fees

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business to operate costs the City nothing.

The Court of Appeals may be correct that an incidental "public benefit" would not by itself make the Charges taxes, but the purported benefit here – fire safety – is **primarily and indisputably** a public benefit. As then-Judge Markman observed in his *Bolt* dissent in the Court of Appeals that was adopted in substantial part by this Court's majority:

> **What properly characterizes most public safety functions, such as core police and fire services, as being beyond the purview of governmental activity that might be subject to a user fee is that the benefits derived from these functions benefit the entire community generally. … The preservation of public safety is a quintessential function that government provides to the community as a whole**. [*Bolt v. City of Lansing*, 221 Mich. App. 79, 98-99, 561 N.W.2d 423, 431-32 (1997) (Judge Markman, *dissenting* (emphasis added).]

Indeed, under Michigan law, fire prevention activities of a municipal fire department are performed pursuant to a duty owed solely to the general public, and not to individual landowners. *See, e.g., Jones v. Wilcox*, 190 Mich. App. 564, 476 N.W.2d 473 (Mich. App. 1991). As the *Jones* Court recognized in defining the duty of municipal employees in this context:

> In sum, we hold that the duties placed upon the individual city employee defendants either to inspect buildings for code violations, to inspect fire hydrants, or combat fires are duties owed to the general public and not the individual plaintiffs. [*Id.* at 569.]

When it comes to fire safety inspections, courts and distinguished commentators agree that such inspections are not a "service" provided to any particular citizen or property owner, but rather constitute activities that provide a general public benefit through enhanced fire prevention. "Building codes, building permits and building inspections are devices for the protection of the general public and are not for the specific benefit of an individual." *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 293 Minn. 220, 199 N.W.2d 158 (1972) (Exhibit J to App. Ex. 4). As McQuillin, the foremost authority on municipal law, observes:

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because the charges financed the City's efforts to comply with federal environmental laws which conferred benefits primarily on the general public.

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> Indeed, since the general purpose of building codes, building permits and building inspections is to protect the public, a building inspector is held to act exclusively for the benefit of the public. [McQuillin, Municipal Corporations (3rd Ed. 1993), 53.112 (Exhibit K to App. Ex. 4).][14]

At least one Court has held that fees that finance fire inspection activities are taxes even if the persons who must pay those fees actually receive inspections. In *Building Owners & Managers Ass'n v. City of Kansas City*, 231 S.W. 208 (Mo. App. 2007) (Exhibit L to App. Ex. 4), the Court addressed the legality of a city's fire inspection fees under Missouri's Hancock Amendment, which is a constitutional amendment analogous to the Headlee Amendment and which forbids a municipality from imposing any new taxes without voter approval. Kansas City had imposed fire inspection fees "as a means of enforcing the fire code." *Id.* at 213. The city had at first charged a fee of up to $100, based on the square footage of the building being inspected, for a "Certificate of Compliance." *Id.* at 210-11. The city later eliminated "Certificates of Compliance" and "instead, *required* businesses and multifamily dwellings to obtain an annual 'fire inspection certificate' at a fee not to exceed $100." *Id.* at 211 The new ordinance "allowed the building owners to retain private engineers to conduct the annual inspection. If that alternative was exercised, building owners would pay the City $10.00 for the fire inspection certificate." *Id.* In concluding that the fees were unlawful taxes, the *Building Owners* court relied heavily on its finding that the inspections did not constitute a service provided to any landowners:

> The circuit court determined that this factor [whether the city was providing a service or good] favored the Plaintiffs because the City did not provide fire inspections as a service to businesses and multifamily dwellings, but rather as a means to enforce the fire code. We agree . . .
>
> * * *

[14] *See also Duran v. Tucson*, 20 Ariz. App. 22, 509 P.2d 1059 (Ariz. App. 1973) ("The inspections mandated by the fire code are not a service to the owner or occupier of the premises."); *Cracraft v. St. Louis Park*, 279 N.W.2d 801, 805 (Minn. 1979) ("such inspections are required for the purpose of protecting the interests of the municipality as a whole against the fire hazards of the person inspected"); *Parks v. Klamath Falls*, 82 Ore. App. 576, 728 P.2d 934 (Or. App. 1986) ("The public benefit from administrative inspections for fire hazards is obvious. Their purpose is to prevent loss of life and property from unsafe conditions that might cause or exacerbate a fire").

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> The history of the fire inspection program indicates the City was not delivering a good or service when it took steps to enforce the fire code. With the passage of the three ordinances, the City sought to convert this enforcement activity into a service by requiring annual inspections and charging a fee for an inspection certificate. **These revenue-driven policy changes did not alter the fundamental purpose of the inspection program and the nature of the City's duty to ensure compliance with the fire code. Because the inspection program does not constitute a service to property owners, the fees related thereto are likely a violation of the Hancock Amendment.** [*Building Owners*, 231 S.W.2d at 214 (emphasis added).]

See also Lowenberg v. City of Dallas, 261 S.W.3d 54, 59 (Tex. 2008) (finding a "fire registration fee" to be an unlawful tax where "the City acknowledges that the fee was also intended to raise enough revenue to cover all costs of fire prevention in commercial buildings, shifting that burden off the taxpayers. Further, as noted above, the City concedes that the fee was to benefit the general public by improving fire protection for everyone.").

Like the inspection program in *Building Owners*, the City's fire inspection activities are designed to ensure compliance with the Fire Code. *See* Battle Dep. II, p. 23 (acknowledging Fire Marshal's mission statement to use "standards and guidelines set forth by the Michigan Building Code"). But unlike the property owners in *Building Owners*, Plaintiff did not receive an inspection in exchange for its payment of the Charges. Like the registration fee program in *Lowenberg*, the Charges are intended to pay the pay the entire cost of the Fire Marshal's prevention program. *Building Owners* and *Lowenberg* are not binding, but this Court should find them very persuasive.

2. As Applied To Plaintiff and the Class, the Charges Are Motivated By A Revenue Raising Purpose, Which Substantially Outweighs Any Regulatory Purpose.

Michigan courts hold that a governmental fee is motivated by a revenue-raising purpose where the revenues from the fee confer benefits on the general public or citizens who were not subject to the fee. For example, in *Bray v. Department of State*, 418 Mich. 149, 341 N.W.2d 92 (1983), this Court held that a license fee that financed compensation payments to persons injured by uninsured motorist constituted a tax. In reaching that result, the Court observed:

> We find the fee paid by plaintiffs to be in the nature of a tax.

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> A tax is designed to raise revenue. *Merrelli v. St. Clair Shores*, 355 Mich. 575, 96 N.W.2d 144 (1959). As we explained in *Dukesherer Farms, Inc. v. Dep't of Agriculture (After Remand)*, 405 Mich 1, 15-16; 273 NW2d 877 (1979):
>
> "Exactions which are imposed primarily for public rather than private purposes are taxes. *See People ex rel the Detroit & H R Co., v. Salem Twp. Board*, 20 Mich. 452, 474, 4 Am Rep. 400 (1870). **Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed**. *Knott v. Flint*, 363 Mich. 483, 499, 109 N.W.2d 908 (1961); *Fluckey v. Plymouth*, 358 Mich. 477, 451, 100 N.W.2d 486 (1960)."
>
> **The MVACA was obviously designed to raise revenue. As we have previously explained, the revenue raised by the MVACA did not inure to the benefit of the group assessed**. The fund existed for the public purpose of providing certain compensation to all those persons injured by uninsured motorists. [418 Mich. at 162 (emphasis added).]

Everyone who pays the Charges (and even citizens who do not own property that is subject to the Charges) benefits from additional training, fire facility maintenance, and so on.

Furthermore, there is no corresponding element of regulation here. There can be no doubt that the conduct of fire inspections constitutes a regulatory activity—but that is beside the point. The regulatory purpose factor is concerned with whether the method of charging serves a regulatory purpose, not whether the activity being financed is itself "regulatory." *Bolt*, 459 Mich. at 164 ("The dissent makes much of the fact that the ordinance does not raise revenue for the general revenue fund. However, this does not preclude us from determining that the purpose of the storm water charge is to generate revenue."). In other words, is the City's manner of financing this regulatory activity serving a regulatory purpose? The answer is unequivocally: No. Indeed, in *Bolt* and *County of Jackson*, it was clear that the charges at issue were imposed to finance compliance with regulatory requirements, yet both courts found that the charges had a revenue-raising purpose and not a regulatory purpose.

Regulation, by definition, concerns affecting, channeling and/or directing a person's behavior. The power to regulate has been defined as meaning: "**To adjust by rule, method or established mode; to direct by rule or restriction; to subject to governing principles or laws**…**the very essence of regulation is the existence of something to be regulated**." *Churchill v. Common Council*,

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153 Mich. 93, 95 (Mich. 1908) (emphasis added). Here, as applied to Plaintiff and the Class, the Charges do not serve a regulatory purpose because, as to properties it does not actually inspect, the City is not "regulating" anything.

3. The "Permit Fee" is not Proportional Because Plaintiff Does Not Receive A Direct, Individualized Benefit via Payment of the "Permit Fees."

The Charges also fail the "proportionality" requirement of *Bolt*. The Michigan courts have repeatedly recognized that a charge is not "proportionate" unless the payors of the fee receive a "particularized benefit" and those benefits do not extend to persons who do not pay the fee. *See Graham v. Township of Kochville*, 236 Mich. App. 141, 151, 599 N.W.2d 793 (1999) (holding that a true user fee "confers benefits **only** upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee.") (emphasis added) (citing *Bolt,* 459 Mich. at 164-165). Said another way, a true fee is "**paid only by those who use the service in question**." *A&E Parking v. Detroit Metropolitan Wayne County Airport Authority*, 271 Mich. App. 641, 644, 723 N.W.2d 223 (2006) (emphasis added). Moreover, the *Bolt* Court quoted the Headlee Blue Ribbon Commission's definition of "user fee" as follows: "**A "fee for service' or 'user fee' is a payment made for the voluntary receipt of a measured service, in which the revenue from the fees are [sic] used only for the service provided.**" *Bolt*, 459 Mich. at 168 n.16 (emphasis added). Here, simply, the Charges as are not "proportionate to the necessary costs of the service," a matter of law because no "service" is being provided directly to Plaintiff. Indeed, Plaintiff (and the putative Class) paid the Charges but did not receive any "service." Thus, the Charges are not made in exchange for the "voluntary receipt of a measured service." Accordingly, the Charges fail to satisfy the proportionality factor.[15]

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[15] *See also People v. Cameron*, 319 Mich. App. 215, 900 N.W.2d 658 (2017), a case in which the Court of Appeals held that certain court costs imposed by a state statute upon criminal defendants constituted taxes. In reaching that result, the *Cameron* court reiterated that charges which finance activities that benefit the general public fail to satisfy the proportionality factor: "**Defendant further argues that the costs are "not proportionate to the 'service,' because the courts confer benefit[s] to the public (justice, fairness, order) not the particular person on whom the costs are imposed." This argument has merit**. …" (Emphasis added.)

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The Court of Appeals tethered its proportionality analysis to the purported benefits of the "permits." The Court concluded that the Charges were "proportionate" because "those who paid the charge did receive a benefit distinct from someone who did not pay the fee – the right to occupy the premises as a business." Exhibit A at p. 5. *See also Id.* ("the main benefit of the city's charge was the receipt of a permit, not an inspection").

With all due respect, the Court of Appeals' tax analysis was fatally flawed because it viewed the mere issuance of the permits as a sufficient justification for the imposition of the Charges. In doing so, the Court of Appeals failed to apply the proper legal standard and ignored long-standing precedent that holds that **the government cannot condition its grant of a license or permit on a citizen's payment of a fee that is not tethered to the costs the government incurs to regulate or supervise <u>that citizen's</u> activities**. Under the Court of Appeals' rationale, municipalities will be free to finance **any** function and the related expenses of their governments through so-called "permit fees."

A permit fee is functionally indistinguishable from a license fee because both constitute an authorization to perform a regulated activity. The Michigan courts have long recognized that a purported "license" fee is a disguised tax where, as here, the government provides no service or benefit in exchange for the fee. Indeed, this Court has long recognized that license and permit fees could be abused by municipalities. It has therefore limited the amounts of such fees to the amounts necessary to reimburse municipalities for the cost of regulating the persons and entities subject to the fees.

Michigan courts have long recognized that a purported "license" fee is a disguised tax where, as here, the government provides little or no particularized service or benefit in exchange for the fee. *See North Star Line, Inc. supra,* ("the amount of such fee must be gauged by the expenses incurred by the municipality incident to issuing the license and supervising the business the licensee carries on thereunder…"). In *North Star Line*, the Court invalidated a $15 license fee imposed upon certain common carriers because the municipality provided "almost negligible" supervision. *Id.* As a result, the $15 fee was a disguised tax because only a "practically nominal" fee would be proper, and in 1932,

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$15 was more than "nominal." *Id.* at 665. Here, with respect to members of the putative Class (i.e., property owners who incurred the Permit Fees but did not actually receive an inspection), the City has incurred no expense "supervising the business the licensee carries on thereunder" because the only conceivable expense would be with the cost of an actual inspection, which the City did not perform. In exchange for Plaintiff's payment of the substantial annual "permit fee," all the City did was print and mail a single piece of paper to Plaintiff.

Numerous other Michigan cases recognize that license fees must be based upon the necessary expenses associated with the governmental activity for which the fees are charged. The most-cited of these cases is *Vernor v. Secretary of State*, 179 Mich. 157, 146 N.W.338 (1914). In *Vernor*, plaintiffs challenged certain vehicle license fees on the grounds that the fees were excessive because they were disproportionate to the costs of issuing the licenses and enforcing applicable regulations. In invalidating the license fees, the Supreme Court recognized that the costs incurred for which a license fee is charged must relate directly to the regulation of the person or property on which it is imposed:

> To be sustained, the act we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate **to the cost of issuing the license, and the regulation of the business to which it applies**. …
>
> Anything in excess of an amount which will defray such necessary expense cannot be imposed under the police power, because it then becomes a revenue measure. [179 Mich. at 167 (citations omitted).]

See also Fletcher Oil Co. v. Bay City, 247 Mich. 572, 576-577, 226 N.W. 248 (1929) ("The imposition of license fees as a condition to issuing a license, when plainly intended as police regulations, will be upheld if the revenue derived therefrom is not disproportionate **to the cost of issuing the license and the regulation of the business licensed**. … If upon investigation the fee is found to be only sufficient to pay the expense that may reasonably be presumed to arise in the supervision and regulation **of the business licensed**, its disposition should not have the effect of converting it into a tax") (emphasis added); *TCG Detroit v. Dearborn*, 261 Mich. App. 69, 93-94, 680 N.W.2d 24 (2004) (observing

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that, "if the city charges a fee, that fee must be based on the expense to the city of issuing a license and of supervising the activity, if supervision is required.").

In its Brief on Appeal, Plaintiff addressed each of the foregoing cases. However, the Court of Appeals completely failed to consider these longstanding, fundamental requirements and did not address any of the case law identified above. The Court of Appeals instead assumed that the permit fees were primarily regulatory and "proportionate" simply because of a purported "benefit" to the payers – the ability to operate their businesses in the City – which clearly is not a sufficiently particularized benefit to support a regulatory fee. The Court of Appeals' failure to address these authorities is fatal to its holding on the tax issue. What these authorities confirm is that a permit or license must be issued in exchange for a service provided directly to the payer of the associated fee.

The process that culminates in the issuance of a permit involves a government entity having to actually do something (i.e., incur some cost) relating to the permit itself, *e.g.*. the issuance of a building permit. To issue a building permit, at a minimum, a municipality has to review specific plans and determine applicable codes prior to issuing the building permit—all of which cost the municipality money. A reasonable permit fee is fully justified under those circumstances.

In contrast, to the extent the City collects a "permit" fee and does not actually conduct a fire inspection of the subject property, what has the City done that is directly related to the fee? The beefed-up fire department benefits everyone, including single-family homeowners and even visitors to the City, who are safer because of the City's use of the Charges to fund its general fire prevention efforts. The Court of Appeals' finding that the ability to operate a business in exchange for payment of a "permit fee" constitutes a specific benefit to Plaintiff is even more indefensible when one considers that, in addition to the Charges at issue in this case, Plaintiff is required to pay a variety of other annual fees to the City, including a separate fee to obtain a "business license" from the City. *See* App. Ex. 6 at pp. 114-115.

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4. As In Bolt, the Charges Are Not Voluntary, But Rather Are "Effectively Compulsory."

Notably, both the Court of Appeals and the Circuit Court necessarily had to find that that the "permit fees" were not voluntary—acknowledging that Plaintiff met at least the third prong of the *Bolt* test. *See* Exhibit A at p. 6; App. Ex. 1, p. 9.

In sum, because the Charges are completely untethered from any specific service provided to Plaintiff and the Class, they cannot be proper "permit fees" but rather must be characterized as unlawful taxes. Plaintiff requests that this Court grant this Application for Leave to Appeal to remedy the Court of Appeals' unprecedented rulings, which threaten the continued viability of the municipal tax limitations enshrined in the Headlee Amendment. Alternatively, Plaintiff requests that this Court summarily reverse the Court of Appeals concerning the tax-based claims, find that the Court of Appeals erred in affirming the Circuit Court for the reasons stated herein, find that the Charges are taxes in violation of the Headlee Amendment and MCL 141.91, and order that the City must refund the Charges it wrongfully collected during the relevant Class periods.

III. THE CITY COUNCIL'S RETROACTIVE APPROVAL OF THE CHARGES IN 2021 WAS A NULLITY.

Further, not only are the Charges unlawful taxes, but the Charges also were *ultra vires* prior to 2021 and therefore were unlawfully imposed for this separate and independent reason. The City Council tried to fix this problem by approving a resolution in 2021 that purported to retroactively authorize the Charges back to July 2013. The Court of Appeals blessed this tactic, but, in doing so, it failed to enforce this Court's clear restrictions on retroactive legislation.

First, even if the City's Charter and ordinance theoretically authorized the **type** of Charges imposed here, the City's Charter and ordinances authorize the City to collect the Charges **only** if they are approved by the City Council. *See* Charter Section 9-507 ("Any agency of the City may, **with the approval of the City Council**, charge an admission or service fee to any facility operated, or for any service provided, by an agency") (emphasis added); City Ordinance Section 19-1-22, Subsection 1.4.1.1

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(the City's "Fire Commissioner is authorized to establish necessary fees, **with the approval of the City Council**, for the cost of (1) inspection and consultation . . ." (emphasis added)).

Fire Marshal Battle confirmed at trial that the Charges must be authorized by the City's Charter and must be approved by the City Council. Trial Tr., p. 31. The Fire Inspection Charges were not authorized by the City Council during almost all of the class period, so they are *ultra vires*. The City was not able to locate any documents confirming that the City Council approved the Charges at any time prior to May 2021. *Id.*, pp. 7-8 (final stipulation of fact). During trial, Fire Marshal Battle confirmed that there is **no evidence** the City Council approved the Charges before May 2021:

> Q. All right. And I think you, you were here for the stipulation but you're -- there's no -- you don't have any evidence that the City Council approved the, the charges that are at issue here at any time prior to last month, correct?
>
> A. No, I don't. [*Id.*, p. 34.]

Section 3.5-102 of the City's Charter requires the City Clerk to "keep a record of all its ordinances, resolutions and other proceedings and perform other such duties as it may provide." See Plaintiff's Trial Exhibit 20. Section 4-118 of the Charter further requires the Clerk to "authenticate by signature and record all ordinances and resolutions in a properly indexed book kept for that purpose." See Plaintiff's Trial Exhibit 21. Notwithstanding these dictates, there was no evidence presented at trial that a record exists memorializing the City Council's approval of the Charges at any time prior to May 2021. In May 2021, the City purported to remedy this defect by having the City Council hastily approve a "resolution" which purported to retroactively apply all of the Charges back to 2013. For the reasons discussed below, however, the City Council's resolution was legally insufficient to retroactively authorize the Charges for at least two independently dispositive reasons.

A. THE CITY'S CHARTER AND ORDINANCES PROHIBIT CHARGES FOR "PERMIT" FEES, SO THE RESOLUTION PURPORTING TO RETROACTIVELY APPROVE THE PAST CHARGES WAS OF NO EFFECT.

On this point, we start with the Ordinance relied upon by the City to justify the Charges. The relevant section (18-1-22) provides in pertinent part as follows:

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> 1.6.2 **In accordance with Section 9-507 of the Charter**, the Fire Commissioner is authorized to establish **necessary** fees, **with the approval of the City Council**, for the **cost of**:
>
> (1) **Inspection and consultation**;
>
> (2) **Issuance** of permits and certificates . . . [emphasis added].

This provision establishes four important limitations on the Fire Commissioner's power to impose charges on the Detroit citizenry:

1. The fees **must** be imposed "in accordance with Section 9-507 of the Charter;"
2. The fees **must** be "necessary;"
3. The Fire Commissioner may impose fees for the costs of "inspections and consultations," and
4. The Fire Commissioner may impose fees for the costs of **only** the "issuance of permits and certificates."

The Ordinance – as it must – expressly provides that any fees imposed under the Ordinance must comply with the Section 9-507 of the City's Charter. In this regard, Section 9-507, titled "Service Fees," simply provides:

> Any agency of the City may, with the approval of the City Council, charge an admission or **service fee** to any facility operated, or **for any service provided**, by an agency. **The approval of the City Council shall also be required for any change in any such admission or service fee**. [emphasis added]

As a result, the City Council was legally unable to retroactively authorize the "permit fees," as applied to Plaintiff and other property owners who did not receive fire safety inspections. It is beyond question that an ordinance or resolution cannot conflict with a city Charter provision and, if it does, it is a nullity. In *Bivens v. City of Grand Rapids*, 443 Mich. 391, 505 N.W.2d 431 (1993), this Court summarized these well-established legal principles as follows:

> **[A] city may not validly enact an ordinance that contradicts limitations expressly provided in the city's charter**. The charter of a city stands as its "constitution"; it is "the definition of [a city's] rights and obligations as a municipal entity, so far as they are not otherwise legally granted or imposed." *Jackson Common Council v. Harrington*, 160 Mich. 550, 552, 125 N.W.383 (1910); *see also Sykes v. Battle Creek*, 288 Mich. 660, 662-663; 286 N.W. 117 (1939). Moreover, once adopted by a vote of the electors, a city's charter may be amended only by a vote of the electors. In short,
>
> **an ordinance must conform to, be subordinate to, not conflict with, and not exceed the charter**, and can no more change or limit the effect of

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> the charter than a legislative act can modify or supersede a provision of the constitution of the state. …
>
> To permit otherwise, and allow a city commission to enact an ordinance contrary to the charter, would enable the commission to effectively amend the charter without subjecting the amendment to the scrutiny and approval of the local electorate. *See, e.g., Thiesen, supra*, 320 Mich. 453. [443 Mich. at 400-401, quoting 5 McQuillin, Municipal Corporations (3d ed), § 15.19, p 98.]

The City here attempted to retroactively approve the Charges through a mere resolution. While *Bivens* dealt with an ordinance which conflicted with a municipal charter, it is clear that a resolution – an action by the City Council of even less legal significance than the enactment of an ordinance – was similarly ineffective to "trump" the Charter provision. Accordingly, the Court should find that the City's retroactive attempt in May 2021 to authorize the Charges was a legal nullity.[16]

B. Even If The City Council Could Approve The Charges Through A Resolution, The City's Attempt To Retroactively Impose The Charges Must Fail

This Court needs to reverse the Court of Appeals' approval of the City's retroactive application of the Charges because, simply, the circumstances that must be present before legislation can be applied retroactively clearly have not been met here.

Indeed, despite the fact that there was admittedly "no evidence" of the City's Council approving the "permit fees" at any time before May 2021—as stipulated to by the parties—the Court of Appeals ruled that the "permit fees" were still properly imposed because simply: "the city council later retroactively approved the charges." Exhibit A, p. 8. The Court of Appeals noted without citation to any authority that: "There is no per se prohibition on retroactive application of legislation" and then held that "retroactive ratification of the charges was a rational means to further a legitimate legislative purpose."

This ruling is patently erroneous as a matter of law.

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Recently, in *Buhl v. City of Oak Park*, 507 Mich 236, 246; 968 NW2d 348 (2021)(App. Ex. 16), this Court noted that "a statute or amendment may not be applied retroactively if doing so would 'take[] away or impair[] vested rights acquired under existing laws, or create[] a new obligation and impose[] a new duty, or attach[] a new disability with respect to transactions or considerations already past.' *In re Certified Questions*, 416 Mich at 571 (quotation marks and citation omitted)." The court declined to retroactively apply a statute that would have relieved the defendant of the legal duty it owed to the plaintiff at the time the injury occurred, because "the retroactive application of MCL 691.1402a(5) would effectively rewrite history as to the duty defendant owed plaintiff by absolving defendant of its duty to maintain public sidewalks in reasonable repair. This is precisely what the third factor disallows when it rejects laws that create new obligations, impose new duties, or attach new disabilities with respect to transactions or considerations already past." *Id.* at *11.

This Court's decision in *Downriver Plaza Grp. v. City of Southgate,* 444 Mich. 656, 657; 513 N.W.2d 807 (1994), relied upon by the City, which upheld a municipality's retroactive imposition of certain fees and charges under the Michigan Drain Code is inapposite and distinguishable from the case at bar.

In *Downriver Plaza*, the City Council clearly authorized the fees at issue by resolution in 1988 (which provided that user charges would be levied on the next tax roll) but did not adopt a specific fee schedule until 1990. Plaintiffs were assessed charges on their 1987 and 1988 tax bills. When it adopted the fee schedule in 1990, the Council retroactively approved user charges for fiscal years 1987-1991. In holding that the retroactive application of the fee schedule was permissible, the Supreme Court viewed the City's failure to enact a specific fee schedule as a technical violation of the City's Charter that was made in "good faith." *See Downriver Plaza*, 444 Mich. at 664 (Section 162 of the City Charter "required the Southgate City Council to explicitly set forth the individual user rates in one of its resolutions.

---

[16] The 2021 resolution is also a nullity because the Ordinance only authorizes the Fire Marshal's Division to recover the costs associated with the "issuance" of permits and not the entire cost of the Fire Marshal's fire prevention program. Yet the resolution impermissibly purports to retroactively approve fees which recovered all of those costs.

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Undoubtedly, the Southgate City Council attempted in good faith to comply with Section 162's direction. Nonetheless, the efforts **technically fell short** because the individual formula, while repeatedly discussed, was never expressly incorporated into a resolution.") (emphasis added). *See also Id.* at 670 ("We also find that retroactive application of the January 3, 1990 resolution, **curing a procedural irregularity** regarding prior charges, comports with notions of due process.")

Further, it was important to this Court that the plaintiffs had no vested right to not pay the fees, because their "obligation to pay user fees had been in place since 1975." **Here, in contrast, there is no "procedural irregularity."** This is not a situation where the City can point to evidence that the City Council intended to approve "permit fees" but, due to a procedural irregularity, never took formal action to cement that approval. There is **no** evidence that the Detroit City Council ever intended to authorize the "permit fees" at issue prior to May 2021.

Moreover, unlike the plaintiff in *Downriver Plaza*, this is not a situation where Plaintiff had an "obligation" to pay the "permit fees" that had been in place at any time prior to the City Council's retroactive approval of the fee schedule in 2021. *See Buhl,* 2021 Mich. LEXIS 1042, at *10 ("a statute or amendment may not be applied retroactively if doing so would 'take[] away or impair[] vested rights acquired under existing laws, or create[] a new obligation and impose[] a new duty, or attach[] a new disability with respect to transactions or considerations already past"). The City's retroactive application of the resolution clearly impaired Plaintiff's vested rights under existing laws and created a new obligation that Plaintiff simply did not have prior to May 2021. Until May 2021, Plaintiff had no actual legal obligation to pay the Charges, even though the City imposed the Charges prior to that time. That is why, in assessing the application of *Downriver Plaza* to this case, the evidence of the city council's intent to impose fees all along in *Downriver Plaza* is absolutely crucial.

In sum, *Downriver Plaza* has no application here. Unlike the city in *Downriver Plaza*, there is no evidence that the City Council ever authorized *any* of the alleged "permit fees" imposed by the City here at any time prior to May 2021. This was not a mere clerical or procedural error, but a substantive

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failure to approve the subject Charges at all, as required by the Charter and Ordinances.

The Court of Appeals authorized the retroactive application of the Charges allegedly because Plaintiff "thought the charges were legally due and paid them" and thus, "had no expectation" not to have to pay the charges:

> Notably, appellant during the preceding years thought that the charges were legally due and paid them to defendant. This is significant because the reason vested rights are not to be affected by retroactive legislation is that "it can deprive citizens of legitimate expectations and upset settled transactions." LaFontaine, 496 Mich at 38 (quotation marks and citations omitted). Because appellant had no expectation to be free from paying the permit fee, the retroactive authorization of that very same permit fee did not affect appellant. In other words, the retroactive imposition of the charge did not affect appellant as it incurred no new obligations to defendant after the passing of the resolution. [Exhibit A at p. 8.]

This Court should reject this justification for approving the retroactive application of the Charges, however, because it is based on a false premise – namely, that Plaintiff's historical payment of the Charges means that Plaintiff had an "obligation" to pay the Charges before they were approved by the City Council.

CONCLUSION AND REQUEST FOR RELIEF

For all of the foregoing reasons, this Court should grant Plaintiff's Application for Leave to Appeal and vacate the Court of Appeals Opinion in its entirety.

Alternatively, in lieu of granting this Application, Plaintiff requests that the Court summarily find that the City's "Permit Fee" is a tax and further hold that summary disposition is proper in favor of Plaintiff on its tax-based claims. Plaintiff requests that the Court remand this matter for proper review and consideration of class certification. Plaintiff further requests all other relief that this Court deems appropriate and just in this matter.

KICKHAM HANLEY PLLC

/s/ Gregory D. Hanley
Gregory D. Hanley (P51204)
Attorneys for Plaintiff and the Class

Date: June 5, 2023

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STATEMENT OF WORD COUNT

Pursuant to MCR 7.212(B)(3), Plaintiff's counsel states that Plaintiff's application for leave to appeal contains **15928** "countable words" as defined under MCR 7.212(B). Counsel relies on the word count function of its word processing system, as permitted under MCR 7.212(B)(3).

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2023, I served the foregoing document on all counsel of record using the Court's electronic filing system.

/s/ Kim Plets
Kim Plets

4885-4320-7016, v. 1

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EXHIBIT A

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

MIDWEST VALVE & FITTING COMPANY, and all others similarly situated,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
March 9, 2023

No. 358868
Wayne Circuit Court
LC No. 18-014337-CZ

Before: RICK, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

Plaintiff-appellant, Midwest Valve & Fitting Company, appeals as of right the trial court's order that, after a bench trial, dismissed its remaining claims related to the legality of certain fees charged by defendant, City of Detroit. The appeal also involves the trial court's earlier opinion and order granting summary disposition in favor of defendant on appellant's other claims.

This case involves appellant's challenge to the legality of certain annual charges that are imposed by defendant. The trial court determined that the charges are legal and dismissed appellant's claims, some in a pretrial motion for summary disposition and the remainder after a bench trial. Because its arguments have no merit, we affirm.

I. FACTS

Defendant imposes an annual charge on owners of commercial real property and multiunit residential real property located in Detroit. Although appellant initially claimed that the charges were "fire inspection charges," appellant on appeal has acquiesced to the trial court's and defendant's position that they are "permit fees."

Appellant received bills from defendant for these charges since at least 2013 and paid them. However, appellant maintained that it never received any fire safety inspection during this time.

Appellant filed a complaint, alleging numerous claims against defendant: Count I—violation of the Headlee Amendment, Count II—assumpsit/unreasonable charges, Count III—

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unjust enrichment/unreasonable charges, Count IV—assumpsit/violation of MCL 141.91, Count V—unjust enrichment/violation of MCL 141.91, Count VI—assumpsit/violation of city ordinance, Count VII—unjust enrichment/violation of city ordinance, and Count VIII—violation of equal protection.

Appellant moved for summary disposition under MCR 2.116(C)(10) on Counts I, IV, and V. It argued that the charges constituted taxes, which were imposed in violation of § 31 of the Headlee Amendment[1] and MCL 141.91.[2] After analyzing the characteristics of the charges, the trial court ruled that the charges were fees, not taxes, and granted summary disposition in favor of defendant on Counts I, IV, and V.

The trial court conducted a one-day bench trial on the remaining counts. In support of its position that the charges at issue were inspection fees, appellant primarily relied on (1) a fire marshal web page indicating that inspections get scheduled after payment of the fee, and (2) some internal city documents[3] that used terminology, such as "safety inspection charges" or "fire permit safety inspection," while referencing these charges. But, Fire Marshal Shawn Battle testified that those representations were factually incorrect because the fees were exclusively for permits, which allow businesses to operate, and have no relation to inspections.[4] Although it was the department's goal to inspect every commercial property every year, Battle stated this was not feasible because of a lack of manpower. Battle also testified that his department did not utilize any of the documents appellant relied on and instead it used a system called MobileEyes, which identifies the charges as being for "permits." Further, the actual invoices and permits relating to these charges were admitted into evidence via stipulation. Those documents specifically reference "industrial/business/mercantile occupancy permit[s]," with no mention of inspections.

Although defendant was unable to verify that the city council had approved the charges any time before May 2021, the council later approved them retroactively back to 2013.

In its closing argument, appellant argued that even if the charges were "permit fees," they would be illegal because the city council never approved them, which was required by the city charter and ordinances. Appellant claimed that the city council's attempt to retroactively approve the charges was a legal nullity. Regarding its equal-protection claim, appellant argued that, with

[1] Const 1963, art 9, § 31.

[2] As will be discussed in greater detail below, § 31 of the Headlee Amendment "prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate," *Durant v Mich*, 456 Mich 175, 183; 566 NW2d 272 (1997), and MCL 141.91 prohibits cities from imposing taxes other than ad valorem property taxes.

[3] The parties stipulated that these documents were created by an unknown city employee at some unknown time.

[4] Battle also testified that 10 months before trial started, someone had put in a request to Detroit's Information Technology Department to have that information removed from the website, but apparently, the information was still present as of a few days before trial.

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it not receiving any inspections, as opposed to other commercial property owners, it had not been treated objectively and reasonably.

The trial court found that the charges at issue are annual permit fees and not inspection fees. The trial court also noted that the burden was on appellant to prove that any fee or charge was unreasonable or otherwise unlawful. Further, the trial court ruled that Counts II and VI were not viable because Michigan does not recognize an independent cause of action for assumpsit.

The trial court dismissed appellant's unjust enrichment claims in Counts III and VII. The court noted that Count III was premised on the allegation that the charges were for fire inspections when no inspections had taken place. The trial court rejected this claim because the charges are not for inspections, but are for permits. The trial court also ruled two additional arguments appellant raised relating to the claims of unjust enrichment were unpersuasive. First, the trial court rejected appellant's contention that the charges were in violation of the city ordinance because they were in excess of the cost of the "issuance" of permits. The trial court noted that cities are allowed to recover all of their direct and indirect costs related to the regulation of those who are charged the fee and that courts are to give deference to a city's interpretation of its own ordinances. Second, the court rejected appellant's contention that defendant was unjustly enriched because the charges were never approved by the city council. The trial court then ruled that the city council's retroactive approval of the charges was permissible as a matter of law.

Finally, the trial court ruled that appellant failed to prove any of the essential elements of its equal-protection claim, including that defendant made a classification identifying a particular group, that defendant intentionally or purposefully treated that group differently from similarly situated individuals, and that there is no rational basis for defendant's disparate treatment.

II. HEADLEE AMENDMENT AND MCL 141.91

Appellant argues that the trial court erred when it granted summary disposition in favor of defendant on Counts I, IV, and V of its complaint. We disagree.

Whether a municipal charge is a "tax" is a question of law, which this Court reviews de novo. *Mapleview Estates, Inc v Brown City*, 258 Mich App 412, 413-414; 671 NW2d 572 (2003). This Court also reviews a trial court's decision on a motion for summary disposition de novo. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A motion under (C)(10) is properly granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

In Counts I, IV, and V, appellant alleges violations of § 31 of the Headlee Amendment and MCL 141.91. Section 31 of the Headlee Amendment states, 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, without the approval of a

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majority of the qualified electors of that unit of Local Government voting thereon. [Const 1963, art 9, § 31 (emphasis added).]

This section "prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." *Durant v Mich*, 456 Mich 175, 183; 566 NW2d 272 (1997).

MCL 141.91 states:

> 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. [Emphasis added.]

In concert, these provisions restrain a local government's ability to assess taxes. If the charges levied are not taxes, the Headlee Amendment is not implicated and appellant's claims here, based on violations of the Headlee Amendment and MCL 141.91, would necessarily fail. See *Bolt v City of Lansing*, 459 Mich 152, 158-159; 587 NW2d 264 (1998) (stating that user fees are not taxes and are not affected by the Headlee Amendment).[5]

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Id*. at 160. Three primary factors are considered in determining whether a charge is a fee or a tax. "The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose." *Id*. at 161. "A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service." *Id*. at 161-162. A third criterion is voluntariness: fees generally are voluntary, while taxes are not. *Id*. at 162. "[T]hese 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." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

There is no question of fact that the charges at issue here were for the acquisition of permits, not inspections. Although appellant took the position below that the charges were "fire inspection charges" or "fire inspection fees," it submitted no evidence to show that the charges were paid in consideration for receiving an inspection. Instead, the evidence showed that the charges were for obtaining occupancy permits. Thus, appellant's arguments that rely on the charges being fees for receiving inspection services are misplaced and are without merit.

Considering the first *Bolt* factor, whether the charge serves a regulatory purpose rather than a revenue-raising purpose, it is understood that a fee can raise money as long as it is in support of the underlying purpose. *Merrilli v St Clair Shores*, 355 Mich 575, 583; 96 NW2d 144 (1959). Indeed, in *Merrilli*, our Supreme Court held that permit fees, as opposed to taxes, are regulatory in nature. *Id*. at 582. Fire Marshal Battle testified in his deposition that the charge at issue provides

[5] Although *Bolt* only concerned whether a particular charge was a "tax" for the purposes of the Headlee Amendment, we find it equally relevant for determining whether a particular charge is a "tax" for the purposes of MCL 141.91 as well.

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the property owner with a permit, which allows the owner to operate in Detroit. Further, in a response to appellant's third set of interrogatories, defendant averred that those who pay the charge, and who do not receive an inspection, still receive the benefit of defendant's Fire Protection Program, which includes the "training of [the fire marshal] staff, maintenance of Fire Marshal's physical facility, public education, provision of information related to properties subject to the Fire Marshal's programs, maintenance of information, capacity to continue provision of services, including but not limited to inspections, etc."

Appellant argues that the Fire Protection Program serves a public purpose, but ignores the primary benefit to a property owner who pays the charge—a permit, allowing the owner to operate on its premises. Undoubtedly, the public also benefits from the Fire Protection Program, but as this Court recognized in *Westlake Trans, Inc v Pub Serv Comm*, 255 Mich App 589, 613; 662 NW2d 784 (2003), fees that benefit the general public still can maintain their regulatory nature.

In *Westlake*, the plaintiffs argued, in part, that fees assessed to trucking companies were an impermissible tax. *Id*. at 611. This Court stated:

> [I]n exchange for the fees, a motor carrier receives the right to operate its trucks in Michigan, and the fees are used to enforce the provisions of the act that carry out the above-listed purposes. Thus, there is a direct benefit to the one who pays the fees. We recognize that promoting and regulating safe use of the highways benefits the general public as well. However, a regulatory fee can have dual purposes and still maintain its regulatory characterization. As long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose, and use benefit the general public. [*Id*. at 613 (citation omitted).]

The situation in *Westlake* is analogous to the circumstances before us. Like the plaintiffs in *Westlake*, who received the right to operate trucks in Michigan, appellant in the instant case receives a benefit by being allowed to operate its business in Detroit. Thus, appellant received "a direct benefit" from paying the charge. The fact that the general public also benefits from the Fire Protection Program does not negate the charge's regulatory nature. See also *Jackson Co v City of Jackson*, 302 Mich App 90, 108; 836 NW2d 903 (2013) ("[A] regulatory fee may confer a benefit on both the general public and the particular individuals who pay the fee and still maintain its regulatory character . . . ."). Therefore, the first of the factors we must consider weighs in favor of the charge being a fee and not a tax.

Secondly, the city's charge appears to be proportionate to the necessary costs of the service it is providing. Courts are to presume that the amount of the fee is reasonable. *Id.* at 109. Appellant's position is that the costs are not proportionate because, by not receiving any inspections, appellant received nothing different from anyone else in the city who was not required to pay the charges. We disagree with this argument because the main benefit of the city's charge was the receipt of a permit, not an inspection. Thus, those who paid the charge did receive a benefit distinct from someone who did not pay the fee—the right to occupy the premises as a business. Furthermore, these charges funded the year-to-year operations of the Fire Marshal Department. This is an important distinction from *Bolt*, in which our Supreme Court noted that the purpose of the charge, which it found to be a tax, was to finance a multiyear construction of a large

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infrastructure project. There, the benefit gained—new infrastructure—would substantially outlast the time period for which the charge was to be in place. *Bolt*, 459 Mich at 163-164. Further, the amounts collected from the charges in the case before us historically were significantly less than the program's costs. Consequently, the charge is reasonably proportional.

As to the third factor, we must consider whether the city's charge was voluntary. The trial court did not explicitly rule on this factor and instead simply assumed that the charge was not voluntary. We agree that the charge was not voluntary. Although, while technically, the charge is voluntary because a business could decline to pay and simply opt to not operate in Detroit, that option is highly impractical for a business. Indeed, our Supreme Court in *Bolt* rejected the argument that a charge was voluntary because property owners could relinquish their rights of ownership. *Id.* at 168.

After weighing these same factors, the trial court ruled the charge was a fee, not a tax. We agree with the trial court's analysis and find it did not err. Significantly, this Court has recognized that "the lack of volition does not render the charge a tax, particular where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler v Shelby Twp*, 265 Mich App 657, 666; 697 NW2d 180 (2005). Thus, even with the charge at issue being involuntary, that fact alone is not sufficient to overcome the other two factors that appellant received a benefit and that the fee is proportional.

Because the charge at issue is a fee, not a tax, appellant is precluded from succeeding on its claims alleging violations of the Headlee Amendment and MCL 141.91. As a result, the trial court properly granted summary disposition in favor of defendant on Counts I, IV, and V.

III. VIOLATION OF CITY CHARTER AND ORDINANCES

Appellant argues that the trial court erred by finding no cause of action for its claims related to the violation of the city charter and ordinances. We disagree.

A trial court's findings of fact in a bench trial are reviewed for clear error, while its conclusions of law are reviewed de novo. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Id*. A trial court's interpretation of a municipal charter is a question of law that this Court reviews de novo. *Save Our Downtown v Traverse City*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 359536); slip op at 5.

Initially, it should be recognized that after the trial court's grant of summary disposition in favor of defendant on some of appellant's counts, trial proceeded with respect to only Counts II, III, VI, VII, and VIII. The trial court dismissed Counts II and VI, which alleges independent causes of action of assumpsit. This was not erroneous because Michigan no longer recognizes an

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independent cause of action for assumpsit.[6] *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013). Notably, appellant does not challenge the dismissal of those counts. Instead, appellant focuses on its allegations that the charges were unlawful because they were imposed in violation of the city charter and ordinances. Thus, only appellant's claims pertaining to the alleged violations of the city charter and ordinances are before this Court.[7]

In Count VII, appellant asserted a claim of unjust enrichment premised on a violation of Detroit Ordinances, § 19-1-22, Subsection 1.4.11, which stated at the time, in pertinent part:[8]

> In accordance with Section 9-507 of the 1997 Detroit City Charter, the Fire Commissioner is authorized to establish necessary fees, with the approval of the City Council, for the cost of:
>
> (1) Inspection and consultation;
>
> (2) Issuance of permits and certificates;
>
> (3) Administrative appeals;
>
> (4) Issuance of reports; and
>
> (5) Copying of records.

Appellant alleges in its complaint that this ordinance was violated because the charges could not be considered "necessary" when a property owner does not receive a fire inspection. This position again is premised on the assertion that the charges were paid in consideration for

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[6] Although no independent cause of action for assumpsit exists, "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). In this instance, appellant's counts of assumpsit essentially were covered by its claims of unjust enrichment.

[7] In Count III, appellant alleges that defendant unjustly enriched itself by collecting charges pertaining to fire inspections, while not providing such fire inspections. However, the trial court found that the charges at issue were fees for permits, not inspections. That finding, precluding unjust enrichment, is not clearly erroneous. Fire Marshal Battle testified at trial that the fees were for the issuance of permits, not inspections. Indeed, even the invoices that appellant received stated that the charges were for "permits," with no mention of "inspections." While there were some internal city documents that used terms such as "fire inspection fee," those documents could not be authenticated, and the trial court gave them little to no weight. The author of those documents is not known, and there is no evidence that defendant relied on them. Accordingly, the trial court did not err by finding no cause of action for that aspect of Count III.

[8] The Detroit City Code was later recodified in December 2019. The content in this quoted portion was moved to Detroit Ordinances, § 18-1-22, Subsection 1.6.2. Although there are some minor modifications to the 2019 recodification, the content is substantially the same.

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receiving fire inspections, but as already explained, that is not the case. The charges are a fee paid to obtain occupancy permits.

Although appellant's complaint only alleges that the ordinances were violated in this one respect in its proposed conclusions of law, appellant asserted that the charges were unlawful for two other reasons: (1) the city council never approved the charges, and (2) the charter provision cited in the ordinance does not allow for permit fees. The trial court rejected the former argument, but did not address the latter.

Regarding the former, the parties stipulated that there was no evidence of the city council approving the charges any time before May 2021. But the city council later retroactively approved the charges. Appellant argues that the retroactive approval is a nullity.

There is no per se prohibition on retroactive application of legislation. See *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Bd of Trustees v City of Pontiac (On Remand)*, 317 Mich App 570, 578-579; 895 NW2d 206 (2016). However,

> retrospective application of a law is improper where the law takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. [*In re Certified Questions from the United States Court of Appeals for the Sixth Circuit*, 416 Mich 558, 572; 331 NW2d 456 (1982) (quotation marks and citation omitted); see also *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 39; 852 NW2d 78 (2014).]

Appellant essentially argues that it had a vested right to not pay any of the charges until the city council approved them in May 2021. According to appellant, the retroactive imposition of those charges affected its vested right. Appellant's position is not persuasive. "Retroactive statutes curing defects in acts done, or authorizing or confirming the exercise of powers, are valid where the legislature originally had authority to confer the power or authorize the acts, except where it is attempted to impair vested rights." *Stott v Stott Realty Co*, 288 Mich 35, 45; 284 NW 635 (1939). As discussed below, the city council at all relevant times had the power or authority to approve the charges, making its retroactive authorization permissible. Notably, appellant during the preceding years thought that the charges were legally due and paid them to defendant. This is significant because the reason vested rights are not to be affected by retroactive legislation is that "it can deprive citizens of legitimate expectations and upset settled transactions." *LaFontaine*, 496 Mich at 38 (quotation marks and citations omitted). Because appellant had no expectation to be free from paying the permit fee, the retroactive authorization of that very same permit fee did not affect appellant. In other words, the retroactive imposition of the charge did not affect appellant as it incurred no new obligations to defendant after the passing of the resolution.

Additionally, a retroactive application must be a rational means of achieving a city's legitimate objective. *Downriver Plaza Group v Southgate*, 444 Mich 656, 667; 513 NW2d 807 (1994). In this case, the retroactive ratification of the charges was a rational means to further a legitimate legislative purpose. The purpose was to maintain the Fire Protection Program, which

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certainly is a legitimate purpose, and the means to accomplish that was to simply authorize charges that property owners had already paid, which was reasonable.[9]

Appellant's latter argument not contained in its complaint was that the city council lacked the authority to approve the charges because they violate § 9-507 of the city charter. Section 9-507 provides:

> Any agency of the City may, with the approval of the City Council, charge an admission or service fee to any facility operated, or for any service provided, by an agency. The approval of the City Council shall also be required for any change in any such admission or service fee.

This section allows for the imposition of a charge for (1) admission to an agency-operated facility or (2) a service provided by a city agency. Only the second clause is pertinent in this case. While appellant concedes that if the charge was for a fire inspection, then the charge would be for a service, it argues that if the charge is truly a "permit fee," then it is not a charge for a service. We disagree.

The city charter is to be interpreted according to the rules of statutory construction. *Save Our Downtown*, ___ Mich App at ___; slip op at 5. "The provisions are to be read in context, with the plain and ordinary meaning given to every word. Judicial construction is not permitted when the language is clear and unambiguous. Court apply unambiguous statutes as written." *Id*. (quotation marks and citation omitted). When a term is not defined in a statute, courts may consult dictionary definitions to determine the plain and ordinary meaning of the term. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 578; 609 NW2d 593 (2000). As evidenced by the 27 different definitions of the noun "service" in the dictionary, the term is defined broadly. See *Random House Webster's College Dictionary* (1995). However, one of those definitions is most pertinent: "the duty or work of public servants." *Id*. Although the work provided in this instance is not the provision of a fire inspection, it nonetheless still is a service because it is providing a permit. Consequently, the city's imposition of a charge to a property owner to obtain a permit does not run afoul of the city charter.

Appellant also contends that it is improper for the charges to fund "all of the direct and indirect costs" of the Fire Prevention Program. Appellant avers that the ordinance only allows for defendant to recover the administrative costs associated with issuing the permits. Appellant provides no authority for this argument and merely quotes the applicable provision in the city code: "the Fire Commissioner is authorized to establish necessary fees, with the approval of the City Council, for the cost of . . . [i]ssuance of permits and certificates." Detroit Ordinances, § 19-1-22, Subsection 1.4.11. Appellant focuses on the word "issuance" for its position. "Issuance" is defined as "the act of publishing or officially giving out or making available." *Merriam-Webster's Collegiate Dictionary* (11th ed).

[9] The only reason the charges had not been authorized earlier is that the Fire Marshal Department had thought that an authorization already was in place.

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The strictly literal interpretation of this provision lends support to the suggestion that a charge is allowable only for the "act" of "giving out" the permit. However, the concept of a "permit" encompasses much more than a physical piece of paper. The more reasonable interpretation is that the cost of the issuance of a permit includes all the work involved with a particular program which that permit represents.

When interpreting an ordinance, courts are to give some deference to a municipality's interpretation. See *Macenas v Village of Michiana*, 433 Mich 380, 398; 446 NW2d 102 (1989). Battle testified that the Fire Marshal Department has been issuing the permit in the same manner since at least 1996, and that it would not be possible to issue these permits if all of the Fire Marshal's related programs were not funded.[10] Thus, the Fire Marshal Department has been interpreting the term "issuance" within the ordinance as encompassing the costs of the Fire Prevention Program, as well as the cost of physically issuing the permit itself. We defer to the Fire Marshal's interpretation of the ordinance and similarly conclude that the ordinance allows for the recovery of the costs of the Fire Prevention Program in the issuance of the permits.

Therefore, given the above analysis, we hold that the trial court did not err by finding no cause of action on appellant's claims related to any alleged violations of city charter or ordinances.

IV. EQUAL PROTECTION

Appellant also argues that the trial court erred by finding no cause of action for its equal-protection claim. We disagree.

A trial court's findings of fact are reviewed for clear error, while its conclusions of law are reviewed de novo. *Walters*, 239 Mich App at 456.

"The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law." *Shepherd Montessori Ctr Milan v Ann Arbor Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010), citing Const 1963, art 1, § 2 and US Const, Am XIV. "Michigan's equal protection provision is coextensive with the Equal Protection Clause of the federal constitution." *Grimes v Van Hook-Williams*, 302 Mich App 521, 532-533; 839 NW2d 237 (2013) (cleaned up). "The essence of the Equal Protection Clauses is that government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment." *Id*. at 533 (quotation marks and citation omitted). Thus, the relevant inquiry is whether there has been discriminatory intent or purposeful discrimination. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 308; 553 NW2d 377 (1996).

Appellant claims that its "group" has been discriminated against because it did not receive fire inspections, while others who paid the charges at issue did. Because no suspect classification is involved, such as race, national origin, ethnicity, gender, or illegitimacy, the proper level of review is rational basis. See *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174 (2004).

[10] These also are findings of fact that the trial court made, which appellant does not challenge on appeal.

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"The rational basis test considers whether the classification itself is rationally related to a legitimate governmental interest." *Id*. (quotation marks and citations omitted).

Fire Marshal Battle testified that the goal of his department is to inspect every property, but that the lack of funding and manpower makes it impossible to do so. Thus, while some properties in a given year received inspections, some did not, even though both inspected and uninspected properties pay the same charge. It is beyond dispute that a legitimate governmental interest is to provide fire inspections. It also is rationally related to only perform as many inspections as is economically feasible. Knowing that it is impossible to inspect every property, defendant was left with two choices: (1) conduct as many inspections as it could, or (2) conduct zero inspections so everyone was treated equally. Defendant's choice to proceed with the first option is eminently rational.

Therefore, the trial court did not err by finding no cause of action for appellant's equal-protection claim.

V. CONCLUSION

The trial court correctly ruled in favor of defendant on all counts. We affirm.

/s/ Michelle M. Rick
/s/ Michael J. Kelly
/s/ Michael J. Riordan

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STATE OF MICHIGAN

COURT OF APPEALS

MIDWEST VALVE & FITTING COMPANY, and all others similarly situated,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
March 9, 2023
APPROVED FOR PUBLICATION
June 1, 2023
9:05 a.m.

No. 358868
Wayne Circuit Court
LC No. 18-014337-CZ

Before: RICK, P.J., and M. J. KELLY and RIORDAN, JJ.

RIORDAN, J.

Plaintiff-appellant, Midwest Valve & Fitting Company, appeals as of right the trial court's order that, after a bench trial, dismissed its remaining claims related to the legality of certain fees charged by defendant, City of Detroit. The appeal also involves the trial court's earlier opinion and order granting summary disposition in favor of defendant on appellant's other claims.

This case involves appellant's challenge to the legality of certain annual charges that are imposed by defendant. The trial court determined that the charges are legal and dismissed appellant's claims, some in a pretrial motion for summary disposition and the remainder after a bench trial. Because its arguments have no merit, we affirm.

I. FACTS

Defendant imposes an annual charge on owners of commercial real property and multiunit residential real property located in Detroit. Although appellant initially claimed that the charges were "fire inspection charges," appellant on appeal has acquiesced to the trial court's and defendant's position that they are "permit fees."

Appellant received bills from defendant for these charges since at least 2013 and paid them. However, appellant maintained that it never received any fire safety inspection during this time.

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Appellant filed a complaint, alleging numerous claims against defendant: Count I—violation of the Headlee Amendment, Count II—assumpsit/unreasonable charges, Count III—unjust enrichment/unreasonable charges, Count IV—assumpsit/violation of MCL 141.91, Count V—unjust enrichment/violation of MCL 141.91, Count VI—assumpsit/violation of city ordinance, Count VII—unjust enrichment/violation of city ordinance, and Count VIII—violation of equal protection.

Appellant moved for summary disposition under MCR 2.116(C)(10) on Counts I, IV, and V. It argued that the charges constituted taxes, which were imposed in violation of § 31 of the Headlee Amendment[1] and MCL 141.91.[2] After analyzing the characteristics of the charges, the trial court ruled that the charges were fees, not taxes, and granted summary disposition in favor of defendant on Counts I, IV, and V.

The trial court conducted a one-day bench trial on the remaining counts. In support of its position that the charges at issue were inspection fees, appellant primarily relied on (1) a fire marshal web page indicating that inspections get scheduled after payment of the fee, and (2) some internal city documents[3] that used terminology, such as "safety inspection charges" or "fire permit safety inspection," while referencing these charges. But, Fire Marshal Shawn Battle testified that those representations were factually incorrect because the fees were exclusively for permits, which allow businesses to operate, and have no relation to inspections.[4] Although it was the department's goal to inspect every commercial property every year, Battle stated this was not feasible because of a lack of manpower. Battle also testified that his department did not utilize any of the documents appellant relied on and instead it used a system called MobileEyes, which identifies the charges as being for "permits." Further, the actual invoices and permits relating to these charges were admitted into evidence via stipulation. Those documents specifically reference "industrial/business/mercantile occupancy permit[s]," with no mention of inspections.

Although defendant was unable to verify that the city council had approved the charges any time before May 2021, the council later approved them retroactively back to 2013.

In its closing argument, appellant argued that even if the charges were "permit fees," they would be illegal because the city council never approved them, which was required by the city charter and ordinances. Appellant claimed that the city council's attempt to retroactively approve

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[1] Const 1963, art 9, § 31.

[2] As will be discussed in greater detail below, § 31 of the Headlee Amendment "prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate," *Durant v Mich*, 456 Mich 175, 183; 566 NW2d 272 (1997), and MCL 141.91 prohibits cities from imposing taxes other than ad valorem property taxes.

[3] The parties stipulated that these documents were created by an unknown city employee at some unknown time.

[4] Battle also testified that 10 months before trial started, someone had put in a request to Detroit's Information Technology Department to have that information removed from the website, but apparently, the information was still present as of a few days before trial.

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the charges was a legal nullity. Regarding its equal-protection claim, appellant argued that, with it not receiving any inspections, as opposed to other commercial property owners, it had not been treated objectively and reasonably.

The trial court found that the charges at issue are annual permit fees and not inspection fees. The trial court also noted that the burden was on appellant to prove that any fee or charge was unreasonable or otherwise unlawful. Further, the trial court ruled that Counts II and VI were not viable because Michigan does not recognize an independent cause of action for assumpsit.

The trial court dismissed appellant's unjust enrichment claims in Counts III and VII. The court noted that Count III was premised on the allegation that the charges were for fire inspections when no inspections had taken place. The trial court rejected this claim because the charges are not for inspections, but are for permits. The trial court also ruled two additional arguments appellant raised relating to the claims of unjust enrichment were unpersuasive. First, the trial court rejected appellant's contention that the charges were in violation of the city ordinance because they were in excess of the cost of the "issuance" of permits. The trial court noted that cities are allowed to recover all of their direct and indirect costs related to the regulation of those who are charged the fee and that courts are to give deference to a city's interpretation of its own ordinances. Second, the court rejected appellant's contention that defendant was unjustly enriched because the charges were never approved by the city council. The trial court then ruled that the city council's retroactive approval of the charges was permissible as a matter of law.

Finally, the trial court ruled that appellant failed to prove any of the essential elements of its equal-protection claim, including that defendant made a classification identifying a particular group, that defendant intentionally or purposefully treated that group differently from similarly situated individuals, and that there is no rational basis for defendant's disparate treatment.

II. HEADLEE AMENDMENT AND MCL 141.91

Appellant argues that the trial court erred when it granted summary disposition in favor of defendant on Counts I, IV, and V of its complaint. We disagree.

Whether a municipal charge is a "tax" is a question of law, which this Court reviews de novo. *Mapleview Estates, Inc v Brown City*, 258 Mich App 412, 413-414; 671 NW2d 572 (2003). This Court also reviews a trial court's decision on a motion for summary disposition de novo. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A motion under (C)(10) is properly granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

In Counts I, IV, and V, appellant alleges violations of § 31 of the Headlee Amendment and MCL 141.91. Section 31 of the Headlee Amendment states, in pertinent part:

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

This section "prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." *Durant v Mich*, 456 Mich 175, 183; 566 NW2d 272 (1997).

MCL 141.91 states:

> 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. [Emphasis added.]

In concert, these provisions restrain a local government's ability to assess taxes. If the charges levied are not taxes, the Headlee Amendment is not implicated and appellant's claims here, based on violations of the Headlee Amendment and MCL 141.91, would necessarily fail. See *Bolt v City of Lansing*, 459 Mich 152, 158-159; 587 NW2d 264 (1998) (stating that user fees are not taxes and are not affected by the Headlee Amendment).[5]

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Id*. at 160. Three primary factors are considered in determining whether a charge is a fee or a tax. "The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose." *Id*. at 161. "A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service." *Id*. at 161-162. A third criterion is voluntariness: fees generally are voluntary, while taxes are not. *Id*. at 162. "[T]hese 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." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

There is no question of fact that the charges at issue here were for the acquisition of permits, not inspections. Although appellant took the position below that the charges were "fire inspection charges" or "fire inspection fees," it submitted no evidence to show that the charges were paid in consideration for receiving an inspection. Instead, the evidence showed that the charges were for obtaining occupancy permits. Thus, appellant's arguments that rely on the charges being fees for receiving inspection services are misplaced and are without merit.

Considering the first *Bolt* factor, whether the charge serves a regulatory purpose rather than a revenue-raising purpose, it is understood that a fee can raise money as long as it is in support of the underlying purpose. *Merrilli v St Clair Shores*, 355 Mich 575, 583; 96 NW2d 144 (1959).

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[5] Although *Bolt* only concerned whether a particular charge was a "tax" for the purposes of the Headlee Amendment, we find it equally relevant for determining whether a particular charge is a "tax" for the purposes of MCL 141.91 as well.

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Indeed, in *Merrilli*, our Supreme Court held that permit fees, as opposed to taxes, are regulatory in nature. *Id*. at 582. Fire Marshal Battle testified in his deposition that the charge at issue provides the property owner with a permit, which allows the owner to operate in Detroit. Further, in a response to appellant's third set of interrogatories, defendant averred that those who pay the charge, and who do not receive an inspection, still receive the benefit of defendant's Fire Protection Program, which includes the "training of [the fire marshal] staff, maintenance of Fire Marshal's physical facility, public education, provision of information related to properties subject to the Fire Marshal's programs, maintenance of information, capacity to continue provision of services, including but not limited to inspections, etc."

Appellant argues that the Fire Protection Program serves a public purpose, but ignores the primary benefit to a property owner who pays the charge—a permit, allowing the owner to operate on its premises. Undoubtedly, the public also benefits from the Fire Protection Program, but as this Court recognized in *Westlake Trans, Inc v Pub Serv Comm*, 255 Mich App 589, 613; 662 NW2d 784 (2003), fees that benefit the general public still can maintain their regulatory nature.

In *Westlake*, the plaintiffs argued, in part, that fees assessed to trucking companies were an impermissible tax. *Id*. at 611. This Court stated:

> [I]n exchange for the fees, a motor carrier receives the right to operate its trucks in Michigan, and the fees are used to enforce the provisions of the act that carry out the above-listed purposes. Thus, there is a direct benefit to the one who pays the fees. We recognize that promoting and regulating safe use of the highways benefits the general public as well. However, a regulatory fee can have dual purposes and still maintain its regulatory characterization. As long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose, and use benefit the general public. [*Id*. at 613 (citation omitted).]

The situation in *Westlake* is analogous to the circumstances before us. Like the plaintiffs in *Westlake*, who received the right to operate trucks in Michigan, appellant in the instant case receives a benefit by being allowed to operate its business in Detroit. Thus, appellant received "a direct benefit" from paying the charge. The fact that the general public also benefits from the Fire Protection Program does not negate the charge's regulatory nature. See also *Jackson Co v City of Jackson*, 302 Mich App 90, 108; 836 NW2d 903 (2013) ("[A] regulatory fee may confer a benefit on both the general public and the particular individuals who pay the fee and still maintain its regulatory character . . . ."). Therefore, the first of the factors we must consider weighs in favor of the charge being a fee and not a tax.

Secondly, the city's charge appears to be proportionate to the necessary costs of the service it is providing. Courts are to presume that the amount of the fee is reasonable. *Id.* at 109. Appellant's position is that the costs are not proportionate because, by not receiving any inspections, appellant received nothing different from anyone else in the city who was not required to pay the charges. We disagree with this argument because the main benefit of the city's charge was the receipt of a permit, not an inspection. Thus, those who paid the charge did receive a benefit distinct from someone who did not pay the fee—the right to occupy the premises as a business. Furthermore, these charges funded the year-to-year operations of the Fire Marshal Department.

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This is an important distinction from *Bolt*, in which our Supreme Court noted that the purpose of the charge, which it found to be a tax, was to finance a multiyear construction of a large infrastructure project. There, the benefit gained—new infrastructure—would substantially outlast the time period for which the charge was to be in place. *Bolt*, 459 Mich at 163-164. Further, the amounts collected from the charges in the case before us historically were significantly less than the program's costs. Consequently, the charge is reasonably proportional.

As to the third factor, we must consider whether the city's charge was voluntary. The trial court did not explicitly rule on this factor and instead simply assumed that the charge was not voluntary. We agree that the charge was not voluntary. Although, while technically, the charge is voluntary because a business could decline to pay and simply opt to not operate in Detroit, that option is highly impractical for a business. Indeed, our Supreme Court in *Bolt* rejected the argument that a charge was voluntary because property owners could relinquish their rights of ownership. *Id.* at 168.

After weighing these same factors, the trial court ruled the charge was a fee, not a tax. We agree with the trial court's analysis and find it did not err. Significantly, this Court has recognized that "the lack of volition does not render the charge a tax, particular where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler v Shelby Twp*, 265 Mich App 657, 666; 697 NW2d 180 (2005). Thus, even with the charge at issue being involuntary, that fact alone is not sufficient to overcome the other two factors that appellant received a benefit and that the fee is proportional.

Because the charge at issue is a fee, not a tax, appellant is precluded from succeeding on its claims alleging violations of the Headlee Amendment and MCL 141.91. As a result, the trial court properly granted summary disposition in favor of defendant on Counts I, IV, and V.

III. VIOLATION OF CITY CHARTER AND ORDINANCES

Appellant argues that the trial court erred by finding no cause of action for its claims related to the violation of the city charter and ordinances. We disagree.

A trial court's findings of fact in a bench trial are reviewed for clear error, while its conclusions of law are reviewed de novo. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Id*. A trial court's interpretation of a municipal charter is a question of law that this Court reviews de novo. *Save Our Downtown v Traverse City*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 359536); slip op at 5.

Initially, it should be recognized that after the trial court's grant of summary disposition in favor of defendant on some of appellant's counts, trial proceeded with respect to only Counts II, III, VI, VII, and VIII. The trial court dismissed Counts II and VI, which alleges independent causes of action of assumpsit. This was not erroneous because Michigan no longer recognizes an

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independent cause of action for assumpsit.[6] *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013). Notably, appellant does not challenge the dismissal of those counts. Instead, appellant focuses on its allegations that the charges were unlawful because they were imposed in violation of the city charter and ordinances. Thus, only appellant's claims pertaining to the alleged violations of the city charter and ordinances are before this Court.[7]

In Count VII, appellant asserted a claim of unjust enrichment premised on a violation of Detroit Ordinances, § 19-1-22, Subsection 1.4.11, which stated at the time, in pertinent part:[8]

> In accordance with Section 9-507 of the 1997 Detroit City Charter, the Fire Commissioner is authorized to establish necessary fees, with the approval of the City Council, for the cost of:
>
> (1) Inspection and consultation;
>
> (2) Issuance of permits and certificates;
>
> (3) Administrative appeals;
>
> (4) Issuance of reports; and
>
> (5) Copying of records.

Appellant alleges in its complaint that this ordinance was violated because the charges could not be considered "necessary" when a property owner does not receive a fire inspection. This position again is premised on the assertion that the charges were paid in consideration for

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[6] Although no independent cause of action for assumpsit exists, "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). In this instance, appellant's counts of assumpsit essentially were covered by its claims of unjust enrichment.

[7] In Count III, appellant alleges that defendant unjustly enriched itself by collecting charges pertaining to fire inspections, while not providing such fire inspections. However, the trial court found that the charges at issue were fees for permits, not inspections. That finding, precluding unjust enrichment, is not clearly erroneous. Fire Marshal Battle testified at trial that the fees were for the issuance of permits, not inspections. Indeed, even the invoices that appellant received stated that the charges were for "permits," with no mention of "inspections." While there were some internal city documents that used terms such as "fire inspection fee," those documents could not be authenticated, and the trial court gave them little to no weight. The author of those documents is not known, and there is no evidence that defendant relied on them. Accordingly, the trial court did not err by finding no cause of action for that aspect of Count III.

[8] The Detroit City Code was later recodified in December 2019. The content in this quoted portion was moved to Detroit Ordinances, § 18-1-22, Subsection 1.6.2. Although there are some minor modifications to the 2019 recodification, the content is substantially the same.

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receiving fire inspections, but as already explained, that is not the case. The charges are a fee paid to obtain occupancy permits.

Although appellant's complaint only alleges that the ordinances were violated in this one respect in its proposed conclusions of law, appellant asserted that the charges were unlawful for two other reasons: (1) the city council never approved the charges, and (2) the charter provision cited in the ordinance does not allow for permit fees. The trial court rejected the former argument, but did not address the latter.

Regarding the former, the parties stipulated that there was no evidence of the city council approving the charges any time before May 2021. But the city council later retroactively approved the charges. Appellant argues that the retroactive approval is a nullity.

There is no per se prohibition on retroactive application of legislation. See *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Bd of Trustees v City of Pontiac (On Remand)*, 317 Mich App 570, 578-579; 895 NW2d 206 (2016). However,

> retrospective application of a law is improper where the law takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. [*In re Certified Questions from the United States Court of Appeals for the Sixth Circuit*, 416 Mich 558, 572; 331 NW2d 456 (1982) (quotation marks and citation omitted); see also *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 39; 852 NW2d 78 (2014).]

Appellant essentially argues that it had a vested right to not pay any of the charges until the city council approved them in May 2021. According to appellant, the retroactive imposition of those charges affected its vested right. Appellant's position is not persuasive. "Retroactive statutes curing defects in acts done, or authorizing or confirming the exercise of powers, are valid where the legislature originally had authority to confer the power or authorize the acts, except where it is attempted to impair vested rights." *Stott v Stott Realty Co*, 288 Mich 35, 45; 284 NW 635 (1939). As discussed below, the city council at all relevant times had the power or authority to approve the charges, making its retroactive authorization permissible. Notably, appellant during the preceding years thought that the charges were legally due and paid them to defendant. This is significant because the reason vested rights are not to be affected by retroactive legislation is that "it can deprive citizens of legitimate expectations and upset settled transactions." *LaFontaine*, 496 Mich at 38 (quotation marks and citations omitted). Because appellant had no expectation to be free from paying the permit fee, the retroactive authorization of that very same permit fee did not affect appellant. In other words, the retroactive imposition of the charge did not affect appellant as it incurred no new obligations to defendant after the passing of the resolution.

Additionally, a retroactive application must be a rational means of achieving a city's legitimate objective. *Downriver Plaza Group v Southgate*, 444 Mich 656, 667; 513 NW2d 807 (1994). In this case, the retroactive ratification of the charges was a rational means to further a legitimate legislative purpose. The purpose was to maintain the Fire Protection Program, which

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certainly is a legitimate purpose, and the means to accomplish that was to simply authorize charges that property owners had already paid, which was reasonable.[9]

Appellant's latter argument not contained in its complaint was that the city council lacked the authority to approve the charges because they violate § 9-507 of the city charter. Section 9-507 provides:

> Any agency of the City may, with the approval of the City Council, charge an admission or service fee to any facility operated, or for any service provided, by an agency. The approval of the City Council shall also be required for any change in any such admission or service fee.

This section allows for the imposition of a charge for (1) admission to an agency-operated facility or (2) a service provided by a city agency. Only the second clause is pertinent in this case. While appellant concedes that if the charge was for a fire inspection, then the charge would be for a service, it argues that if the charge is truly a "permit fee," then it is not a charge for a service. We disagree.

The city charter is to be interpreted according to the rules of statutory construction. *Save Our Downtown*, ___ Mich App at ___; slip op at 5. "The provisions are to be read in context, with the plain and ordinary meaning given to every word. Judicial construction is not permitted when the language is clear and unambiguous. Court apply unambiguous statutes as written." *Id*. (quotation marks and citation omitted). When a term is not defined in a statute, courts may consult dictionary definitions to determine the plain and ordinary meaning of the term. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 578; 609 NW2d 593 (2000). As evidenced by the 27 different definitions of the noun "service" in the dictionary, the term is defined broadly. See *Random House Webster's College Dictionary* (1995). However, one of those definitions is most pertinent: "the duty or work of public servants." *Id*. Although the work provided in this instance is not the provision of a fire inspection, it nonetheless still is a service because it is providing a permit. Consequently, the city's imposition of a charge to a property owner to obtain a permit does not run afoul of the city charter.

Appellant also contends that it is improper for the charges to fund "all of the direct and indirect costs" of the Fire Prevention Program. Appellant avers that the ordinance only allows for defendant to recover the administrative costs associated with issuing the permits. Appellant provides no authority for this argument and merely quotes the applicable provision in the city code: "the Fire Commissioner is authorized to establish necessary fees, with the approval of the City Council, for the cost of . . . [i]ssuance of permits and certificates." Detroit Ordinances, § 19-1-22, Subsection 1.4.11. Appellant focuses on the word "issuance" for its position. "Issuance" is defined as "the act of publishing or officially giving out or making available." *Merriam-Webster's Collegiate Dictionary* (11th ed).

[9] The only reason the charges had not been authorized earlier is that the Fire Marshal Department had thought that an authorization already was in place.

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The strictly literal interpretation of this provision lends support to the suggestion that a charge is allowable only for the "act" of "giving out" the permit. However, the concept of a "permit" encompasses much more than a physical piece of paper. The more reasonable interpretation is that the cost of the issuance of a permit includes all the work involved with a particular program which that permit represents.

When interpreting an ordinance, courts are to give some deference to a municipality's interpretation. See *Macenas v Village of Michiana*, 433 Mich 380, 398; 446 NW2d 102 (1989). Battle testified that the Fire Marshal Department has been issuing the permit in the same manner since at least 1996, and that it would not be possible to issue these permits if all of the Fire Marshal's related programs were not funded.[10] Thus, the Fire Marshal Department has been interpreting the term "issuance" within the ordinance as encompassing the costs of the Fire Prevention Program, as well as the cost of physically issuing the permit itself. We defer to the Fire Marshal's interpretation of the ordinance and similarly conclude that the ordinance allows for the recovery of the costs of the Fire Prevention Program in the issuance of the permits.

Therefore, given the above analysis, we hold that the trial court did not err by finding no cause of action on appellant's claims related to any alleged violations of city charter or ordinances.

IV. EQUAL PROTECTION

Appellant also argues that the trial court erred by finding no cause of action for its equal-protection claim. We disagree.

A trial court's findings of fact are reviewed for clear error, while its conclusions of law are reviewed de novo. *Walters*, 239 Mich App at 456.

"The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law." *Shepherd Montessori Ctr Milan v Ann Arbor Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010), citing Const 1963, art 1, § 2 and US Const, Am XIV. "Michigan's equal protection provision is coextensive with the Equal Protection Clause of the federal constitution." *Grimes v Van Hook-Williams*, 302 Mich App 521, 532-533; 839 NW2d 237 (2013) (cleaned up). "The essence of the Equal Protection Clauses is that government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment." *Id*. at 533 (quotation marks and citation omitted). Thus, the relevant inquiry is whether there has been discriminatory intent or purposeful discrimination. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 308; 553 NW2d 377 (1996).

Appellant claims that its "group" has been discriminated against because it did not receive fire inspections, while others who paid the charges at issue did. Because no suspect classification is involved, such as race, national origin, ethnicity, gender, or illegitimacy, the proper level of review is rational basis. See *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174 (2004).

[10] These also are findings of fact that the trial court made, which appellant does not challenge on appeal.

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"The rational basis test considers whether the classification itself is rationally related to a legitimate governmental interest." *Id*. (quotation marks and citations omitted).

Fire Marshal Battle testified that the goal of his department is to inspect every property, but that the lack of funding and manpower makes it impossible to do so. Thus, while some properties in a given year received inspections, some did not, even though both inspected and uninspected properties pay the same charge. It is beyond dispute that a legitimate governmental interest is to provide fire inspections. It also is rationally related to only perform as many inspections as is economically feasible. Knowing that it is impossible to inspect every property, defendant was left with two choices: (1) conduct as many inspections as it could, or (2) conduct zero inspections so everyone was treated equally. Defendant's choice to proceed with the first option is eminently rational.

Therefore, the trial court did not err by finding no cause of action for appellant's equal-protection claim.

V. CONCLUSION

The trial court correctly ruled in favor of defendant on all counts. We affirm.

/s/ Michael J. Riordan
/s/ Michelle M. Rick
/s/ Michael J. Kelly

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EXHIBIT B

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Court of Appeals, State of Michigan

ORDER

Midwest Valve & Fitting Company v City of Detroit

Docket No. 358868

LC No. 18-014337-CZ

Michelle M. Rick
Presiding Judge

Michael J. Kelly

Michael J. Riordan
Judges

The motion for reconsideration is DENIED.

Michelle Rick

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

April 24, 2023
Date

Jerome W. Zimmer Jr.
Chief Clerk

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EXHIBIT C

MICHIGAN'S WATCHDOG
CAPCON

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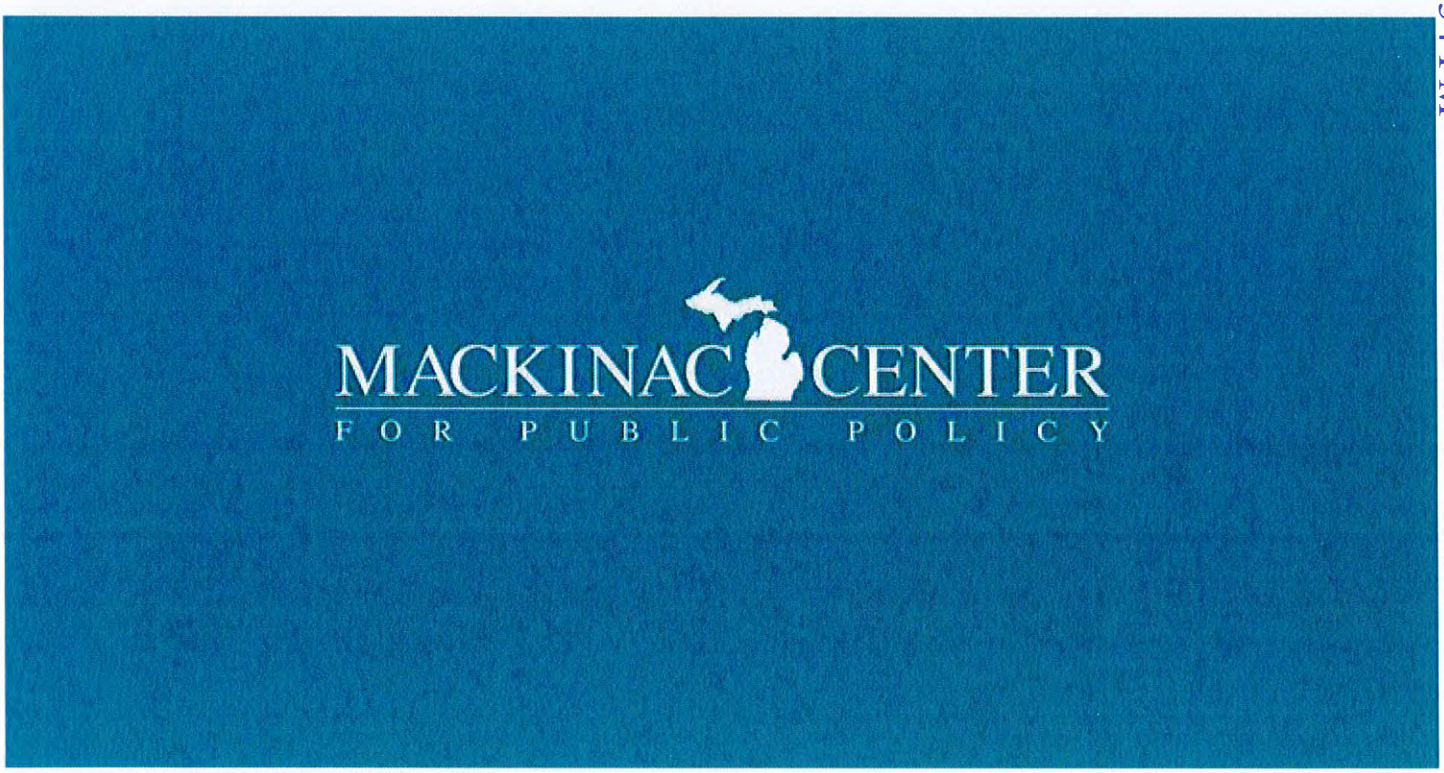
Commentary

Report: Give Local Governments More Money, But Don't Ask Taxpayers

That's the gist of a new study on local government finance in Michigan

By Jarrett Skorup and James M. Hohman | November 11, 2020



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A new report on local government financing in Michigan recommends giving local governments more money from taxpayers. But it is misleading, incomplete and never gets around to addressing the most important problems facing local governments.

The report, "Towards Fiscally Healthy Michigan Local Governments," was published by the Lincoln Institute of Land Policy. It contains several overt errors and misleads by glossing over significant issues facing local governments in Michigan.

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The basic problem with the report is that it says local governments should be given more money, but never explains why. It never demonstrates that a need exists or shows that the benefits of giving locals more money exceed the costs for taxpayers. One should expect a reasoned argument along these lines in a report ostensibly about how local governments need more money.

But it has other problems, as well.

The report criticizes Michigan's Headlee Amendment, a constitutional provision that requires voter approval for local governments to retain increases in property tax collections that exceed the inflation rate (excluding property tax gains from new construction) and to enact new tax levies. The effect of this law, the report says, is to "severely curb local governments' ability to raise revenues necessary for critical local services such as road upkeep, fire protection and public education." (Local governments, it should be noted, do not pay for public education in Michigan.)

Amusingly, the report suggests the Headlee limitations prevent "greater local control of the property tax." That is an Orwellian way to describe a law that requires governments to get voter approval of local tax policies.

Local government exists to serve residents, not the other way around. Popular control of local tax policy ensures that local government fiscal policies have voter support. Local officials who want more revenue can get it if they convince their residents that what they want is worth it. If the report wishes to call for removing voters' control over property taxes, it ought to argue why these governments should have the power to authorize unpopular taxes on their own.

But the report never explains why municipalities shouldn't have to get popular approval or why local tax policy should be beyond voter control.

The report also complains that Michigan lacks "revenue diversity" for its local governments. To the extent that that's true, it's because alternative revenue sources are unpopular with voters. For example, state law gives cities the ability to levy an income tax, with voter approval. But only 21 out of Michigan 312 cities levy them, and in the past 25 years, only one new city has started to levy one.

And while Michigan doesn't allow local governments to assess sales taxes, it does give local governments a share of the state's sales tax collections. The state constitution requires 10% of sales tax revenues be sent to cities, villages and townships already, distributed to them based on population. This provides "diversification" of local government resources even if it doesn't let local governments assess their own taxes.

Local governments also receive portions of the state's fuel and vehicle registration taxes, to take care of local roads. And Detroit has been authorized to levy a handful of other taxes unique to the city.

There may be reasons why the report wants even further diversification of state revenue, but it leaves the case unstated.

In its "key recommendations" section, the report suggests Michigan "create a special state fund to distribute state aid to local governments." That already exists: 10% of state sales tax revenue goes to municipalities. The report even mentions this fund, it but doesn't specify how a new special fund would be different. The reasoning simply seems to be: Local governments should get more revenue.

The report includes a section where authors argue that local governments can save some money through consolidating services and contracting out, which is a fine standalone recommendation. There's also gains to be had in pension reform, because local government officials have racked up over $10 billion in debt to their own employees and retirees. But the report completely ignores that issue.

And that's really the core problem with the report. It focuses almost exclusively on finding ways to increase taxes and revenue for local governments without showing the need for it. Worse, perhaps, the report fails to wrestle with local spending problems. A study ostensibly working "towards fiscally healthy Michigan local governments" should not be taken seriously if it doesn't consider the most fundamental problems of local governments' finances.

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EXHIBIT D

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March 27, 2023

Mr. Jerome W. Zimmer, Jr., Chief Clerk
Michigan Court of Appeals
Hall of Justice
925 W. Ottawa St.
P.O. Box 30022
Lansing, MI 48909-7522

Re: Midwest Valve & Fitting Co v City of Detroit
COA Docket No. 358868
Request for Publication

Dear Mr. Zimmer:

Pursuant to MCR 7.215(D), I am writing to request publication of the Court's opinion in this case. We feel that this opinion should be published because it involves a legal issue of significant public interest (MCR 7.215(B)(5)) – the Headlee Amendment, MCL 141.91 and, specifically, whether the City's permit fee constitutes a "tax." The Court's holding that it does not is very significant for all municipalities in the state. Further, the Court's opinion provides important guidance that will help trial courts analyze these issues.

For these reasons, the City requests publication of this opinion. A copy of the opinion is attached.

Very truly yours,

/s/Sheri L. Whyte

SHERI L. WHYTE
Senior Assistant Corporation Counsel
Attorney for Defendant-Appellee City of Detroit

SLW:hs

cc: Gregory D. Handley
Eric B. Gaabo
Michigan Court of Appeals

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