STATE OF MICHIGAN

COURT OF APPEALS

ROBERT E. GRUNOW and TAMIE L. GRUNOW, Plaintiffs-Appellees,	UNPUBLISHED October 22, 2002
v	No. 226094 Saginaw Circuit Court
TOWNSHIP OF FRANKENMUTH, Defendant-Appellant.	LC No. 98-023482-CZ

Before: Markey, P.J., and Cavanagh and R. P. Griffin*, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's grant of summary disposition in plaintiffs' favor after holding that defendant's water connection charge of $7,500 was a tax in violation of the Headlee Amendment, Const 1963, art 9, § 31, in this declaratory action. We affirm.

On appeal defendant argues that it had the authority to impose the $7,500 connection fee on new users of the Frankenmuth Township Water System. Defendant claims that the fee is not a disguised tax because, consistent with *Graham v Kochville Twp*, 236 Mich App 141; 599 NW2d 793 (1999), it serves a regulatory purpose, is proportional to the cost of the service, and is voluntary. We disagree.

This Court reviews the grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Here, although plaintiffs mislabeled their motion as brought pursuant to MCR 2.116(C)(7), the parties and the trial court treated the motion as brought under MCR 2.116(C)(10); therefore, we will consider the motion granted under MCR 2.116(C)(10). See *Ottaco, Inc v Gauze*, 226 Mich App 646, 650; 574 NW2d 393 (1997); *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the documentary evidence, considered in a light most favorable to the nonmoving party, fails to establish a genuine issue of material fact, the movant is entitled to a judgment as a matter of law. *Id*. Further, whether a charge is a permissible fee or an illegal tax is a question of law considered de novo on appeal. See *Bolt v Lansing*, 459 Mich 152, 158; 587 NW2d 264 (1998).

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

The Headlee Amendment, Const 1963, art 9, § 31, prohibits the levying of a tax by a unit of local government without voter approval. However, a user fee may be instituted without violating the Headlee Amendment because, rather than being an exercise of the municipal's power to tax, it is an exercise of the municipal's police power to regulate the public health, safety, and welfare. See MCL 41.181; *Merrelli v St Clair Shores*, 355 Mich 575, 583; 96 NW2d 144 (1959). Consequently, one primary factor to consider in determining if a charge is a permissible user fee or an illegal tax is whether the charge is imposed to serve or support a regulatory purpose. *Bolt*, *supra* at 161; *Graham*, *supra* at 151. The second factor is whether the charge is proportionate to the necessary costs of the regulatory service and benefits the particular person on whom the charge is imposed. *Bolt*, *supra* at 161-162; *Graham*, *supra* at 151, 153-154. Finally, the charge must be voluntary which, in this case, is uncontested. See *Bolt*, *supra* at 162. To the contrary, a tax is designed to raise revenue that will benefit the general public and is compulsory. *Bolt*, *supra* at 161-162.

In this case, defendant apparently adopted a resolution in December 1995 that required new users of the Frankenmuth Township Water System—which is comprised of special assessment districts with paid-off water main systems that had been installed in the 1970s—to pay a $7,500 connection "fee" to access city water. The asserted purpose of the charge is to "establish a reserve fund to provide for the maintenance and repair of the Frankenmuth Township Water System" when the eventual need arises. Defendant also claims, without explanation, that the user charge is regulatory in nature because it regulates connections to its water systems. The trial court disagreed, holding that the purpose of the connection "fee" was to raise revenue, that the charge, although voluntary, was not proportionate to the cost of a regulatory service because the cost of tapping into the water system was $800, and the charge was designed to benefit the general public. We agree with the trial court.

First, the connection "fee" does not serve or support a regulatory purpose instituted for the protection of the health, safety, and general welfare of the community. Defendant admits that the revenue collected from imposing the charge is placed in a "reserve fund to provide for the maintenance and repair of the Frankenmuth Township Water System. This fund would minimize the need to levy any additional assessments from the users within the Water System for any future maintenance and repair work," considering the pipe used in the construction of the water system has a useful service life of fifty years. Consequently, the principal purpose of the charge is not regulatory, e.g., to control access to the System, to prevent overburdening the System, to expand use of the System, or to change the System, although it may incidentally have a regulatory effect.

Defendant's reliance on *Graham*, *supra*, is misplaced. In that case, the charge was instituted to pay for an extension of the defendant's water pipeline system to permit the distribution of water to communities not being served by the system that was in place, i.e., a new use; hence, the charge served to defray the cost of a regulatory activity. Similarly, the amicus curiae's reliance on *Contractors & Builders Ass'n of Pinellas Co v Dunedin*, 329 So2d 314 (Fla, 1976) is misplaced because, there, the purpose of the disputed charge was also to expand the water and sewerage systems. *Id*. at 318.

The facts of the instant case are more similar to those of *Bolt*, *supra*, where the defendant instituted a storm water service charge for the purpose of funding an investment in infrastructure, a sewer overflow control program, by an ordinance that lacked a "significant element of

regulation." Here, the connection "fee" was instituted to fund maintenance and repairs projected to be necessary at some time in the future with regard to the existing Water System that was constructed in the 1970s—clearly a revenue-raising, not regulatory, purpose.

Second, the connection "fee" is not proportionate to the costs of a regulatory service provided. "[W]here revenue generated by a 'regulatory' fee exceeds the cost of regulation, the 'fee' is actually a tax in disguise." *Gorney v Madison Heights*, 211 Mich App 265, 268; 535 NW2d 263 (1995). Here, defendant claims that the "fee" is proportional because it is "based on apportioned costs of constructing the Water System." However, defendant fails to explain how the connection "fee" is proportionate to the cost of any purported regulatory purpose or service. If a regulatory purpose is allegedly controlling access to city water, what is the cost of that regulation, or regulatory program? How does it comport with the fact that defendant also charged a fee of $800 for the tap-in line to plaintiffs' home, presumably the cost of the actual service rendered? See *Bolt*, *supra* at 164.

In *Graham*, *supra*, the connection fee was imposed to pay the actual cost, in part, of the extension of a water pipeline into a community that was not serviced by the existing water system. Further, the benefits conferred by the fee flowed only to "those citizens in the community newly serviced by the water extension who connect to the water line." *Id*. at 153. In the instant case, the revenue collected does not confer a benefit on anyone because it is not used but, rather, is placed in a reserve fund that may eventually be spent on repairing any of the existing water mains within the Water System. Further, the Water System was constructed in the early 1970s and the resolution to impose the $7,500 charge on new users was adopted in 1995. Consequently, the possible future benefits conferred by the imposition of the charge on new users of the System will eventually, and impermissibly, flow to users of the Water System who were not required to pay the charge. See *Bolt*, *supra* at 164-165. In sum, the charge is not proportionate to the necessary costs of a regulatory service and it confers benefits on users of the System who were not required to pay the charge.

We conclude that, although the charge was voluntary, it was not a valid user fee but a tax in violation of the Headlee Amendment. Accordingly, we affirm the trial court's grant of summary disposition in favor of plaintiffs.

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Robert P. Griffin