

CITY OF NOVI MONTHLY ATTORNEY REPORT

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SUBMITTED BY: ROSATI SCHULTZ JOPPICH & AMTSBUECHLER

April 2023

I. PENDING LITIGATION

A. CASES BEING HANDLED BY OUR OFFICE

- **William Nofar vs. City of Novi.**; Oakland County Case No. 2020-183155-CZ; Hon. Nanci Grant.

General: Plaintiff's lawsuit claims that under the existing Michigan case law, the City's water and sewer rates constitute a disguised tax that the City has imposed on the system users in violation of the Michigan Constitution. A primary argument put forth by the Plaintiff is that the combined water and sewer fund balance—claimed in the complaint to be over \$60 Million, but actually as of today more like \$43 Million—is, according to Plaintiff, unreasonable and far in excess of what is reasonably needed to operate and maintain these two systems, thereby allegedly making the user rates established by the City unreasonable and excessive. Plaintiff claims that, as a result, the City has been unjustly enriched by the alleged overcharges at the expense of the rate payers, and also that the rates have been established in a manner that is in violation of the City's ordinances and Michigan statutes.

Furthermore, Plaintiff argues that the City unlawfully transferred, loaned, and used millions of dollars in water and sewer fund reserves to finance other governmental activities unrelated to the City's water and sewer systems. Plaintiff further asserts that these loans and transfers are evidence supporting its claim that the City has collected far more than it needs for the water and sewer system operations and management. Plaintiff asserts, as a remedy for these alleged wrongs, that the Court should order the City to refund a significant portion of the fund balance to the system users, adjust the rates downward accordingly, and pay their attorney fees and costs.

At the forefront of the City's defenses will be arguments based on the Home Rule City Act (HRCA) and the Michigan Revenue Bond Act (RBA) in support of an argument that the City's water and sewer charges are lawful fees, as opposed to unlawful taxes, and that the City has the authority to charge such fees. Another argument in the City's defense will involve establishing the reasonable, non-arbitrary reasons and support underlying the water and sewer rates that the City Council has adopted and the resulting fund reserves.

Based on the discussions we have had with City staff so far, as well as the information that we have gathered to date, there appears to be good reasoning behind the accumulation of these reserves. Accordingly, while the initial impression of a third-party observer might be that the City is overcharging and hoarding profits in these funds, we expect to be able to establish through both witness testimony and documentary evidence that there is a well thought-out plan and good reasoning behind it. Foremost among those reasons is a long list of capital infrastructure replacement and enhancement efforts that the City has established for both the water and sewer systems.

Status:

As City Council is aware, Judge Grant issued an Opinion and Order on September 23 ruling in the City's favor on both the Plaintiff's motion for summary disposition as to funds spent on the Eight Mile Retention Facility and the City's motion for summary disposition seeking to dismiss Plaintiff's entire complaint. That Opinion and Order ended the case in the circuit court.

Unfortunately, the Plaintiff has appealed to the Court of Appeals. That claim of appeal (which is an appeal by right and does not require a grant of leave to appeal) was filed on October 12, 2022. The transcript of the hearing before Judge Grant was filed on Friday October 14, 2022.

The Plaintiff's brief in the Court of Appeals is due 56 days from October 14, or around December 9, 2022, unless he asks for an extension of time. Our brief will be due 35 days after his brief, unless we ask for an extension.

Once the briefs are filed, it takes some time for the case to be set for argument and for the Court to issue an opinion. We would expect that to be well into 2023.

Addressing Plaintiff's appeal of Judge Grant's September ruling should be relatively straightforward. It will be time-consuming to re-work the trial court materials into an appellate brief, but we don't necessarily anticipate any surprises.

The main issue the City has to decide right now, though, doesn't have to do with Judge Grant's September ruling. It is whether to **cross-appeal** either of her two previous rulings that went against the City.

A cross-appeal by the party who won in the trial court is not unusual—but it is only filed if the party who lost appeals. It is an opportunity to challenge any adverse rulings that the trial court might have made during the case in the event the primary appeal is granted and the trial court's ultimate determination is reversed. In this case, the issues that Judge Grant ruled against Novi on before ruling for Novi were **(a) her decision early in the**

case to certify the class and treat this as a class action, and (b) her decision to deny the City's early motion for summary disposition (back in 2021) alleging that the equitable theories of unjust enrichment and/or assumpsit were actually not valid claims through which to challenge the City's water and sewer rates.

On the first issue, class certification, there is currently a case from Farmington Hills pending in the Court of Appeals in which the Oakland County Circuit Court (different judge) denied class certification and the plaintiff (represented by the same firm, Kickham Hanley) is the one appealing. It involves essentially the same arguments that we made in this case, but the judge in that case ruled for the city. On the off chance that Novi were to lose on Plaintiff's main appeal, it would be unfortunate if the Court of Appeals upheld that denial of class certification in the Farmington Hills case and we did not preserve the issue in the Court of Appeals in this case.

The other issue that Judge Grant ruled against Novi on was our argument that the unjust enrichment/assumpsit claims that she eventually found had no merit should actually have been dismissed at the beginning of the case for a few different reasons: (1) that they are implied contract claims and the Michigan Supreme Court has clearly barred contract causes of action, including those for restitution (i.e., refunds), that arise from and seek to enforce *legislation*—i.e., statutes, charters, and ordinances; (2) that as a matter of law Plaintiff does not have a *private* right of action against the City to enforce its City charter or the state law asserted; (3) that the Supreme Court has found that asserting *equitable* claims in a case challenging public utility fees is an improper attempt to avoid utility fee challenge claims, at *law*, under the Headlee Amendment, which are subject to a one-year statute of limitations; and (4) that Plaintiff's claims in equity are improper because Novi—as specifically authorized by lawful state statutes, charter provisions, and Michigan Department of Treasury requirements—imposes, collects, and ultimately uses the subject charges for the utility systems and the benefit of the putative class members, not itself, so the equitable claims shouldn't even be available for Plaintiff to assert.

As with the class certification issue, some of these general arguments have been made in other cases that are percolating through the appellate court process. If one of those cases rules in the local government's favor, it would be unfortunate if the City didn't preserve the argument in this case. It would also be good just generally to get favorable rulings on these issues.

Although it is certainly awkward to appeal in a case the City eventually won, it is our recommendation that the City do so by way of cross-appeal on these two early rulings by Judge Grant.

We filed for extensions of time to file the City's two appellate briefs. Our Response to Nofar's brief is now due on May 5, 2023, and our Cross-Appeal Brief is due on May 22, 2023.

- **City of Novi v Malles**; (Boat docking case); Oakland County Circuit Court Case No. Case No. 2022-193912-CZ; Hon. Yasmine I. Poles

General:

We filed a Complaint for Declaratory and Injunctive Relief regarding Defendant's violation of the City's Lakefront Protection Ordinance and Zoning Ordinance for maintaining a seasonal dock for approximately 10-15 boats on Walled Lake at Lot 9 in the Lake Wall Subdivision. The City's enforcement resulted from the complaints to the City by the adjacent neighbor. The subdivision deed restrictions applicable to Lot 9 authorize its use for a "right-of-way" to the lake. "Right-of-way" is typically determined by courts to mean "access" and does not grant riparian rights such as docking. *Dyball v. Lennox*, 260 Mich. App. 698, 680 N.W.2d 522 (2004). The City's Lakefront Protection Ordinance would prohibit using Lot 9 for a park or for a dock because Lot 9 does not meet the minimum standards set forth in the ordinance, as it lacks the minimum area and the minimum frontage, and the necessary frontage for a dock facility.

Defendant's Answer to Complaint cites historic use of Lot 9 as a park with a dock and the plaintiff's intent to use the lot for a park as having given the lot owners vested rights in the dock, and the City should be prohibited from enforcing the ordinance due to the passage of time.

Status:

We filed a Motion for Summary Disposition to strike Defendant's defenses as invalid or inapplicable under the law since Defendant cannot have vested rights in the application of a regulatory ordinance. *Square Lake Hills Condo. Ass'n v. Bloomfield Twp.*, 437 Mich. 310, 471 N.W.2d 321 (1991). Furthermore, we argued that the passage of time in enforcing an ordinance does not prevent enforcement. *Twp. of Fraser v. Haney*, 509 Mich. 18 (2022). The Court declined to grant the Motion and stated that the issues remain a question of fact. We filed a Motion for Reconsideration, which is currently pending. ~~Trial is scheduled for April 24, 2023 in front of Judge Poles.~~

~~***Defendant's attorney contacted us on January 30, 2023 and proposed a settlement of the case consisting of the parties agreeing to cap the docking at the current dock with no more than 15 boats, and requested a counter-offer if the number was too high. Defendant did~~

~~not indicate a reason for settlement other than avoiding the creation of binding case law that could impact the City's ordinance going forward.~~

Trial has been adjourned for 90 days. We had some issues arise regarding subpoenas for City officials (e.g., the Mayor). We also have agreed to have both parties update their witness lists.

Judge Poles also, on Friday, denied the City's motion for reconsideration of her denial of summary disposition. A copy of that is attached. Judge Poles also ordered the parties to mediation, which apparently needs to occur before July 14.

BEING HANDLED BY OTHER ATTORNEYS FOR INSURANCE COMPANIES

None this report.

C. CASES BEFORE THE MICHIGAN TAX TRIBUNAL (MTT)

None this report.

II. OTHER MATTERS OF NOTE

The Schools have indicated that they are ready to go ahead with closing on the property swap. What's left to do is to set a value on the properties for purposes of getting title insurance amounts. We'll probably use a local realtor or appraiser for that task. We also need to begin the paperwork for the formal land divisions/combination by the City Assessor/County. The Planning Commission will hold the public hearing on the master plan amendment on Wednesday, April 19. We don't expect an issue there.

At that same meeting, the City will introduce a text amendment to the Zoning Ordinance to address a request from the Schools that its use of Ella Mae Power Park property be clearly authorized under the Ordinance. See the attached memo to the PC regarding that amendment. Basically, allows the extension of existing public schools not adjacent properties in the R-1 through R-4 districts.

The Schools want to close by the end of this month. All of the items above except the Zoning Ordinance text amendment should be resolved in time for that to happen.

Prepared by:

**ROSATI SCHULTZ JOPPICH &
AMTSBUECHLER**

THOMAS R. SCHULTZ

MEMORANDUM



TO: MEMBERS OF THE PLANNING COMMISSION
FROM: BARBARA MCBETH, AICP, CITY PLANNER
SUBJECT: RESIDENTIAL TEXT AMENDMENTS
DATE: APRIL 14, 2023

In connection with the school and park property exchange, and with the expectation that the Novi Community Schools likely intends at some point in the future to use a portions of the exchanged property for school uses, staff is proposing ordinance modifications to the Single Family Residential districts related to the standards for public and private elementary, intermediate or secondary school uses, and to clarify the standards and remove inconsistencies that have been noted. Explanations of the draft versions of the amendments are included in this memo followed by the text of the ordinance with proposed changes highlighted in red text.

RA, RESIDENTIAL ACREAGE DISTRICT

In the RA, Residential Acreage District, elementary schools are currently considered a Principal Permitted Use. Intermediate or secondary schools are considered a Special Land Use. In review of the ordinance, staff identified an inconsistency in the ordinance placing elementary schools in both categories, Principal Permitted Uses and Special Land Uses. The proposed ordinance correction below will allow elementary schools in the RA, Residential Acreage District as a Principal Permitted Use, as we believe the original ordinance intended.

Staff is also recommending adding the word "other" to references to "Public, parochial, and *other* private schools" throughout the ordinance for consistency.

3.1.1 RA Residential Acreage

B. Principal Permitted Uses

- iv. Public, parochial, and other private elementary Schools. SS 4.3

C. Special Land Uses

- v. Public, parochial, and other private elementary, intermediate or secondary schools. SS 4.3

R-1 THROUGH R-4 DISTRICTS

In the R-1 through R-4 Districts, public, parochial, and other private elementary, intermediate or secondary schools are considered a Special Land Use, subject to the standards of Section 4.3.2. There are no significant changes proposed to these sections, but the standards of Section 4.3.2 are proposed to be updated to amend this section, as noted below.

3.1.2 R-1 One-Family Residential

C. Special Land Uses

- ii. Public, parochial, and other private elementary, intermediate or secondary schools SS 4.3.2

SECTION 4.3 USE STANDARDS

Section 4.3 provides use standards for schools and is referenced in the RA, and the R-1 through R-4 Districts. Two clean-ups to this section are proposed. First, Section 4.3.1 is proposed to be updated to reflect more accurately that different schools are permitted either as a Principal Permitted Use or as a Special Land Use, as provided in Section 3.1.1. The second clean-up is to Section 4.3.2 to note that, in the ordinance most school uses are considered a Special Land Use, except for elementary schools in the RA District.

Finally, a new section is added to 4.3.2 noting that an existing public school use on the R-1 through R-4 properties may expand to occupy adjacent properties, and shall be considered a Principal Permitted use. It also clarifies that "adjacent" in this situation shall include property that is separated from a street or road. The amendments are being made at the request of the school district to confirm in the ordinance that adjustments or additions to existing developed public school properties have typically been reviewed and approved through the Site Plan Review process without the need for new review of a Special Land Use once the primary use as a school has been established.

SECTION 4.3 SCHOOLS

1. In the RA district, public, parochial, and other private elementary schools offering courses in general education, not operated for profit, and not including dormitories are permitted as a Principal Permitted Use.
2. In the RA, R-1, R-2, R-3 and R-4 districts, public, parochial, and other private elementary, intermediate or secondary schools offering courses in general education, not operated for profit, and not including dormitories are a permitted special land use, except as otherwise noted. Access to the site shall be in accordance with Section 5.13. A noise impact statement is required subject to the standards of Section 5.14.10.B. Notwithstanding anything in this Section 4.3 of the Zoning Ordinance, as well as Article 3.0 and Article 3.1, a public school that has been approved and constructed under the Michigan School Code, MCL 380.1263 on property zoned R-1, R-2, R-3, or R-4 may expand or extend to occupy adjacent property and shall be considered a principal permitted use thereon.

The Planning Commission is asked to review the amendments, and if acceptable, to set the matter for a public hearing at an upcoming meeting. Additional modifications to the ordinance language may be made by staff or the City Attorney's office prior to the public hearing.

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND**

**CITY OF NOVI,
Plaintiff,**

v.

**Case No. 22-193912-CZ
Hon. Yasmine I. Poles**

**EMANUEL N MALLES, II,
Defendant(s),**

_____/

ORDER RE: MOTION FOR RECONSIDERATION

This matter is before the Court on Plaintiff's Motion for Reconsideration. The Court dispenses with oral argument pursuant to MCR 2.119(F)(2).

In the motion, Plaintiff seeks reconsideration of the Court's January 13, 2023, Order Denying Plaintiff's Motion for Summary Disposition. Plaintiff argues that the Court erred when it found that a question of fact remains as it relates to the case as defenses including laches, estoppel, immunity, and statute of limitations do not apply to the enforcement of a city ordinance. In support of this proposition, Plaintiff relies on *Twp of Fraser v Haney*, 509 Mich 18; 983 NW2d 309 (2022).

In response, Defendant argues that the instant case is distinguishable from *Fraser*. Here, Defendant is advancing a prior vested non-conforming use argument, which was not at issue in *Fraser*. In the instant case, Defendant argues that his use of his riparian property was legal prior to the passage of the ordinance at issue. The Court agrees that *Fraser* is distinguishable from the instant case such that a question of fact remains as it relates to Plaintiff's claims and Defendant's defenses.

In review of Plaintiff's Motion for Reconsideration, the Court relies on MCR 2.119(F)(3), which provides, in relevant part:

a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Further, "[t]he grant or denial of a motion for reconsideration rests within the discretion of the trial court." *Charbeneau v Wayne Cty. Gen. Hosp.*, 158 Mich App 730,733; 405 NW2d 151 (1987). And, "a trial court has discretion on a motion for reconsideration to decline to consider new legal theories or evidence that could have been presented when the motion was initially decided." *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012); citing MCR 2.119(F)(3); *Woods v SLB Property Management, LLC*, 227 Mich App 622, 629-30; 750 NW2d 228 (2008).

After reviewing Plaintiff's motion, it is clear that it presents the same issues previously considered by the Court. While Plaintiff's arguments demonstrate that it disagrees with the Court's rulings, they do not demonstrate palpable error. Simply, Plaintiff has failed to demonstrate a palpable error by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

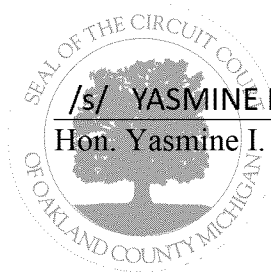
In the motion, Plaintiff also seeks an extension of discovery. The Court observes that on April 12, 2023, the parties filed a stipulated order adjourning the trial to August 28, 2023. Based on the same, the Court will reopen discovery for the limited purpose of deposing Defendant. The deposition shall be completed by May 12, 2023. It is further ordered that the parties attend mediation/facilitation by July 14, 2023.

Based on the foregoing, Plaintiff's Motion for Reconsideration is DENIED IN PART and GRANTED IN PART as to reopening discovery only.

IT IS SO ORDERED.

4/14/2023

Date



/s/ YASMINE I. POLES

Hon. Yasmine I. Poles, Circuit Court Judge

mz