

CITY OF NOVI MONTHLY ATTORNEY REPORT

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SUBMITTED BY: ROSATI SCHULTZ JOPPICH & AMTSBUECHLER

November 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.

The case is now fully briefed in the Court of Appeals. We are just waiting for oral argument date in the Court of Appeals.

- **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:

~~Trial has been adjourned until November 17, 2023. Still no response from Defendants on the draft consent judgment, but we are hearing Mr. Malles moved out of the subdivision. It's possible that the plan by Defendant will be to seek to dismiss the case as moot, if he's moved. We are evaluating out options on that subject.~~

Defendant's legal counsel (who represents all 15 of the back lot owners who have used the dock for mooring boats) has submitted a counter-proposal to our proposed consent judgment. It is attached. It leaves much of the City's proposal in place but is looking for a different enforcement process. It proposes creating a homeowners' association (HOA) that would manage the dock and the 8 spaces.

The counter-offer makes some sense, and we therefore agreed to another adjournment of the trial to January 26, 2024. We are also agreeing to another session of "facilitation" with John Staran. The Defendant's attorney is proposing to bring all 15 of his clients to a facilitation so that Mr. Staran

(a neutral facilitator who is also a well-known municipal lawyer) can help them understand the potential resolution of the case.

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

None this report.

Prepared by:

**ROSATI SCHULTZ JOPPICH &
AMTSBUECHLER**

THOMAS R. SCHULTZ

SUBJECT TO MRE 408

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

CITY OF NOVI, a Michigan Municipal Corporation,

Plaintiff,

vs.

Case No. 2022-193912-CZ
Hon. Yasmine I. Poles

Emanuel N. Malles II,

Defendant.

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CONSENT JUDGMENT

This matter having come before the Court pursuant to Plaintiff, City of Novi's ("Novi"), Complaint filed on April 29, 2022. Defendant, Emanuel Malles II ("Malles" or "Defendant"), having responded, the parties having engaged in discovery, the Court having reviewed the City's motion for summary disposition, and the Court being otherwise fully informed in the premises:

IT IS HEREBY ORDERED AS FOLLOWS:

- A. Novi filed a Complaint seeking declaratory and injunctive relief relating to allowable uses of Lot 9 of the Lake Wall Subdivision, a vacant lot fronting on Walled Lake in the City of Novi that Defendant Malles does not own, but over which Defendant and other similarly-situated property owners who own properties within the Lake Wall Subdivision have a right to access the Lake, and which Defendant and the other property owners have used to install a seasonal dock for the mooring of boats and/or jet skis and for other recreational purposes. The legal description of the parcel is T1N, R8E, SEC 3, LAKE WALL SUB LOT 9, Parcel Number 50-22-03-204-014, hereinafter called the “Subject Property.”
- B. ~~Novi~~~~The City’s~~ Complaint asserted, among other things, that Defendant (and the other ~~similarly-situated~~similarly situated property owners on whose behalf Defendant engaged in certain activities relating to installation of the seasonal dock) were not permitted to install or use the seasonal dock, including for the mooring of boats or other watercraft. The basis for ~~the City’s~~Novi’s Complaint included provisions of its zoning ordinance (which Novi alleged classifies the property for single-family residential use), provisions of its lakefront protection ordinance (which Novi alleged limits use of lakefront lots by backlot owners like Malles), and public nuisance (which Novi alleged resulted from the use by Malles and others).
- C. Defendant Malles denied that ~~the City~~Novi was entitled to the relief requested, citing historical use of Lot 9 by property owners within the Lake Wall Subdivision for lake access and docking and other recreational purposes.
- D. The City filed a motion for summary disposition pursuant to MCR 2.116(C)(8), which the Court denied, finding that there is some likelihood that the homeowners of the Lake Wall Subdivision used Subject Property~~Lot 9~~ for boat docking and lakefront recreational uses

before the adoption of the lakefront protection ordinance, and potentially even preceding ~~Novi~~the City's zoning ordinance.

- E. While ~~the City~~Novi contends that use of ~~the Subject Property~~Lot 9 for installation of a seasonal dock and recreational purposes is not (and cannot be) "grandfathered," ~~Novi~~the City and Defendant have determined to settle this matter by having the Court establish a use and limitations on such use of ~~the Subject Property~~Lot 9 based on information relating to the historical use of ~~the Subject Property~~Lot.
- F. During discovery it was established that other individuals than Defendant who are property owners of residential lots within the Lake Wall Subdivision who have an interest in the seasonal dock and who have been using the dock to moor boats and other watercraft. Resolution of this case is therefore dependent upon, and would not proceed without, the concurrence in the resolution and the relief set forth herein, without a clear indication by such other individuals that they fully concur in and intend to be bound by this Consent Judgment.

NOW, THEREFORE:

1. The parties agree that Defendant and other owners or legal occupants of real property within the Lake Wall Subdivision may continue to install a seasonal dock on ~~the Subject Property for the overnight mooring of boats/watercraft, installation/removal of a dock and for general~~ Lot 9 for boat/watercraft docking and lake access, subject to the following limitations:
 - a. *Length of Dock:* The seasonal dock may not exceed its current length of ~~Two Hundred Fifty-Four feet (254')~~please confirm feet.
 - b. *Number of Watercraft:* The seasonal dock may not be used to moor more than eight (8) watercraft at any time, including overnight mooring; provided, however, that

the dock may be used to assist in brief and temporary loading/unloading of no more than one other watercraft at any given time. ~~Two~~A jet ski~~s~~ or “personal watercraft” shall be considered to equal one~~be a~~ boat if moored at the dock.

- c. *Placement of Dock*: The seasonal dock shall be installed from the Subject Property~~Lot 9~~ in such a manner as to permit docking only along the south side of the dock.
 - d. *Owners/Occupants Only*: Only the owners or occupants of homes located on lots within the Lake Wall Subdivision whose deeds include lake access rights shall be permitted to use the dock. Owner/occupants shall not rent to, or share the dock space with, third parties who do not own or occupy a home within the Subdivision.
 - e. *Compliance with laws and regulations*: All activities in connection with the use of Subject Property~~Lot 9~~ for lake access and mooring watercraft shall be done in accordance with the City of Novi Code of Ordinances,~~including without limitation the noise provisions of Section 22-96 of the City Code.~~ The benefits of this Consent Judgment shall inure to the benefit of all Lake Wall Subdivision owners or occupants in perpetuity
2. This Consent Judgment has been signed by and stipulated to below as to both form and content by Defendant and ~~also~~ the other signatories~~individuals~~ who have access rights over the Subject Property~~Lot 9~~ and also an interest in the dock at issue and who have in the past used the dock to moor their boats/watercraft. The Court finds that no other owners/occupants within the Lake Wall Subdivision have established any use rights regarding the installation of a dock and/or the over-night mooring of boats related to the Subject Property~~related to Lot 9~~ that Novi is required to acknowledge or permit.

3. This Consent Judgment shall be recorded in the Oakland County Register of Deeds as to the Subject Property Lot 9 and the Lots owned by the signatories below, only. However, all owners/occupants of the Lake Wall Subdivision shall~~are to~~ be given notice of the recording of this Consent Judgment.
4. The Court, Defendant, and the other signatories below acknowledge and agree that the limitations in Paragraph 1 above are essential to Novi's decision to enter into this Consent Judgment. Defendant and the other signatories below, who collectively control the installation and use of the seasonal dock, shall be solely responsible for ensuring compliance with its terms and limitations. The Lake Wall Subdivision agrees to the legal formation of a Lake Wall Subdivision homeowners association ("Association") to manage the activities at the Subject Property. The Association will manage the Subject Property in accordance with the stipulations set forth in this Consent Judgment. The Association will permit all property owners in the Lake Wall Subdivision who have deeded access to the Subject Property, the opportunity to join the Association if the respective property owner agrees to use the Subject Property pursuant to the Consent Judgment and any other rules promulgated by the Association regarding the use of the Subject Property. This agreement to offer membership to all property owners in the Lake Wall Subdivision to join the Association with remain in perpetuity. If any future complaints are received by Novi or the Association, by any party, the Association shall have ninety (90) days from the date the written complaint is received by the Association, to investigate any alleged complaint. If a complaint is determined not to be in violation of this Consent Judgment by the Association, the Association shall provide a written summation to Novi detailing the investigation that took place and the findings of the Association. If it is determined that the complaint is in fact a

violation, the Association will have until the balance of the ninety (90) days to correct the violation or file a lawsuit in a court of proper jurisdiction naming all alleged violator(s) seeking correction of the violation. If the alleged complaint is found to be a violation and the Association fails to file lawsuit naming the alleged violator(s) within ninety (90) days from when the Association received the written complaint, Novi shall have the right but not the obligation to pursue enforcement of the terms of this Consent Judgment.~~In the event that the City is required to take action to enforce this Judgment at any time in the future, and succeeds in securing relief under this Judgment, Defendant and the signatories below shall be responsible, jointly and severally, for the Novi's attorneys' fees, court, and enforcement costs. In addition, and because of Novi's interests in ensuring reasonable limitations on the use of Lot 9 for boat docking purposes, in the event Novi establishes two violations of this Consent Judgement in any year (e.g., boating season), Novi shall have the right (but not the obligation) to declare this Consent Judgment to be null and void and to re-open this case, or file a new action in the Oakland County Circuit Court that shall not be subject to this Consent Judgment. Novi shall also have the right (but not the obligation) to declare this Consent Judgment to be null and void and to re-open this case, or file a new action in the Oakland County Circuit Court that shall not be subject to this Consent Judgment, if any formal action (e.g., filing a new lawsuit or a motion in this case) is undertaken by any owner or occupant of a Lot in the Lake Wall Subdivision not represented by the signatories below.~~

5. The signatories to this Consent Judgement shall remain liable and obligated by its terms unless and until all of the following occurs:

a. A duly formed Association as described in paragraph 4 above is formed;

b. A board of directors for the Association, including a president, vice president, treasurer and secretary are elected;

c. Bylaws are adopted by the Association empowering the board of directors to sign an agreement accepting the obligations of this Consent Judgment including but not limited to those contained in paragraph 4 above. The agreement will be signed by the board of directors of the association, the signatories to this Consent Judgment and include an acknowledgement to be signed by Novi;
AND

d. The board of directors of the Association executes a document acknowledging that the Association accepts all obligations of this Consent Judgment including but not limited to paragraph 4 above.

If paragraphs 5(a) – (d) are completed, the signatories to this Consent Judgment shall be relieved of any joint and several liability as it relates to this Consent Judgment.

~~5.6.~~ This Court retains continuing jurisdiction to assure enforcement and compliance with the terms of this Order.

~~6.7.~~ This is a Final Order and closes the case.

HONORABLE YASMINE I. POLES

Stipulated as to form and content:

Richard D. Linnell (P59339)
Attorney for Defendant, Emanuel Malles II

Thomas R. Schultz (P42111)
Attorney for Plaintiff, City of Novi

DRAFT

Stipulated to by dock users of the Lake Wall Subdivision:

[List by lot/name]

DRAFT