CITY OF NOVI MONTHLY ATTORNEY REPORT

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SUBMITTED BY: ROSATI SCHULTZ JOPPICH & AMTSBUECHLER

March 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 plattor'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 March 14, 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 12 boats and to**

shorten the docket to accommodate parking of a limit of 12 boats. The Community Development Director's proposal of support for two (2) boats and a short dock was rejected by Defendant.

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

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