

CITY OF NOVI MONTHLY ATTORNEY REPORT

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SUBMITTED BY: ROSATI SCHULTZ JOPPICH & AMTSBUECHLER

March 2024

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.

The case is now fully briefed in the Court of Appeals both defending the trial court's ultimate decision and her determination not to make the ruling in the City's favor earlier in the case. We are just waiting for oral argument date in the Court of Appeals. [This remains the status—just waiting for an oral argument date]

- **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:

At the last Council meeting, City Council reviewed a redlined draft of a consent judgment that had made some progress but still wasn't complete. The document settles on 8 watercraft permitted to be docked from the property at any one time, and some other general details.

The issue is how to enforce that limitation. At the last closed session, Council did not want to give up much as far enforcement options, including the right to just declare the settlement null and void and just re-start the litigation.

I met with Charles Boulard after the last closed session, and we took another crack at it. The attached clean version of a proposed consent judgement (the redline was just getting too difficult to read) basically sets up this matrix:

- **Violation by HOA itself.** A violation of the 8-boat limitation by a member of the HOA that is to be formed, or the 15 property owners who would sign this document is treated the harshest: We can go into court for any single violation and seek whatever relief we think is appropriate

(up to declaring the consent judgment void) but we aren't obligated to do that. And regardless of whether we do that or not, if the City itself finds that the 8-boat limit has been violated 3 times during a boating season, the City Council can unilaterally declare the consent judgment void, with notice to the HOA/property owner signatories.

- **Excess boats resulting from some random 3rd party using the dock.** This is the situation where a boat just docks there with no connection to the Lake Wall Sub, or the HOA, etc. This is not considered a violation so long as they cooperate with the City in whatever enforcement actions we take against the violator. This seems unlikely ever to happen, so I doubt it will ever be an issue—but if it did happen, it seems no different than if someone just tied up at a lakefront owner's dock without permission—we would likely treat it as a criminal trespass eventually.
- **Violation caused by a person iwho lives on a back lot in the Lake Wall Subdivision but doesn't join the HOA and doesn't agree to be bound by the term sof this consent judgement.** This subdivision has 30-something back lot houses. The attorney for the Defendant says he can get 15 of them to sign onto this Consent Judgment. So, this part of the judgment is about what happens if one of the other parcels who *doesn't* sign this and *doesn't* agree to join the HOA uses the dock or moors a boat off the property without the HOA's approval. The HOA would like that to be the City's problem to enforce. We have written this to be the HOA's problem to deal with, and if it fails to deal with it, then the City Council can declare the consent judgment void. **This is the biggest sticking point in this settlement at this point, I think.**

~~I sent this attached draft to the other side's lawyer this week. I didn't hear anything as of today, but figured I should get this to City Council in the event someone shows up on Saturday. You should know that that the attorney did say that his clients would like to "sit down with the whole City Council as a group and just hammer this out." I told him that I would actively oppose and recommend that, but I am obligated to pass it on, so that's all I'll mention about it here. I can't imagine anything useful coming out of that kind of a session.~~

~~It is possible that this is just getting too complicated and unwieldy as a document, but we are still trying to get this resolved short of a trial (set ofr January 29) if possible.~~

~~I look forward to discussing with you Monday night in closed session.~~

We haven't heard from Defendants' counsel for some time. At this point, we are again beginning to prepare for trial, set for April 8, 2024.

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