2005-03

STATE OF MICHIGAN
IN THE MICHIGAN COURT OF APPEALS

CITY OF GAYLORD, a Michigan Municipal Corporation,
Plaintiff/Appellee,

v

MAPLE MANOR INVESTMENTS, LLC, A Michigan Limited Liability Company; THOMAS McHUGH and GLADYS McHUGH, Husband and wife; ERIC JENSEN; FRANK A. MOORE; THE BERNADETTE SEIDELL TRUST; MARK LaFOREST; HUFFMASTER ASSOCIATES, LLC, a Michigan Limited Liability company; THE FRANCESCO R. MAZZELLA TRUST DATED SEPTEMBER 22, 1990; THE YOLANDA MAZZELLA TRUST DATED SEPTEMBER 22, 1990; GERALD BEATTIE and SUE E. BEATTIE, husband and wife; LARRY K. MILLER and MARY E. MILLER, husband and wife; WILLIAM TOTTEN and LYNNEADAIR TOTTEN, husband and wife,
Defendants/Appellants.

Court of Appeals Docket No. 266954

Lower Court File No. 04-10967-CZ

AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE

---/

Steve R. DuBois P23769
Attorney for Plaintiff/Appellee
Kirkpatrick & DuBois PLC
213 East Main, Second Floor
Gaylord, MI 49735
(989)732-2912

Eric D. Williams P33359
Attorney for Amicus MML
524 North State Street
Big Rapids, MI 49307
(231)796-8945

James F. Pagels P32242
Attorney for Mazzella, Miller, and Totten, Defendants/Appellants
PO Box 126
Gaylord, MI 49734

Richard G. Bensinger P23906
Attorney for Beattie
308 W. Main, PO Box 1000
Gaylord, MI 49734
(989)732-7536

---/

AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE

ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Court Rules

Rules of Evidence

STATEMENT OF JURISDICTION

The statement of jurisdiction of the Appellants/Defendants is correct.

STATEMENT OF QUESTIONS INVOLVED AS POSED BY THE CITY OF GAYLORD, APPELLEE

I. DID THE CIRCUIT COURT ERR IN RULING THAT THE CITY OF GAYLORD'S ORDINANCE MANDATING CONNECTION TO AND USE OF THE MUNICIPAL WATER SYSTEM IS CONSTITUTIONAL?

Circuit Court said	NO
Appellants/Defendants say	YES
Appellee/Plaintiff/Gaylord says	NO
Amicus MML says	NO

II. DID THE CIRCUIT COURT ERR IN RULING THAT THE APPELLANTS/DEFENDANTS FAILED TO STATE A VALID DEFENSE TO THE CITY OF GAYLORD'S COMPLAINT?

Circuit Court said	NO
Appellants/Defendants say	YES
Appellee/Plaintiff/Gaylord says	NO
Amicus MML says	NO

STATEMENT OF FACTS

The counterstatement of facts provided by the City of Gaylord as the Appellee is complete and correct. The trial court decided the case on a motion for summary disposition.

STANDARD OF REVIEW

The standard of review described by the City of Gaylord is correct; the grant or denial of a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). "Constitutional issues are questions of law and are reviewed de novo on appeal." *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997).

ARGUMENT

I. THE CITY OF GAYLORD'S ORDINANCE REQUIRING CONNECTION TO AND USE OF THE MUNICIPAL WATER UTILITY IS CONSTITUTIONAL.

The key provisions of the City of Gaylord ordinance Section 5302(25.502) are:

> [T]he owner of all ...structures...within the City of Gaylord, in or which water is used or consumed and abutting any street...in which there is...located facilities of the City of Gaylord to supply potable water, shall connect to such facilities and use the same for all water used or consumed on the premises. ... Provided, however, that the requirements of this section shall apply only in the event that the potable water facilities are located within two hundred (200') feet of the nearest property line.

The Appellants/Defendants refused to connect and challenged Gaylord's ordinance through noncompliance, apparently because their counsel found no statute specifically authorizing the adoption and enforcement of such an ordinance. See Appellants' brief on appeal, pages 4-5. At the trial court and now before the Court of Appeals Appellants/Defendants assert the same argument in various forms.

Proper Exercise of Police Power

Appellants argue that the challenged ordinance is not a legitimate application of the police power without evidence of contamination. See Appellants' brief on appeal, Argument III, pages 13-17. However, Appellants cite no federal or Michigan case in which a municipal ordinance compelling connection to a public water utility was overturned, choosing instead to criticize the analysis and authorities cited by the Circuit Court and the City of Gaylord.

Appellants acknowledge the clear police power authority of a municipality to compel connection to a public sewer system, Appellants' brief on appeal, pages 16-17, but offer no cogent explanation as to why there is no police power authority of a municipality to compel connection to a public water utility. Appellants seize upon the existence of a statute requiring connection to a public sanitary sewer, MCL 333.12753, and the absence of a corresponding statue requiring connection to a public water system, but fail to analyze and explain what effect the existence of one statute and the nonexistence of another has on Gaylord's police powers. Presumably Appellants contend that the absence of a statute requiring connection to a municipal water utility means that the City of Gaylord lacks the police power authority to adopt and enforce an ordinance with that requirement in it. However, that contention is not supported by any appellate authority or precise argument articulated by Appellants.

For example, Appellants cite *Bedford Township v Bates*, 62 Mich App 715; 233 NW2d 706 (1975), in which the Court of Appeals upheld the mandatory sewer connection ordinance of Bedford Township and the underlying statute in the face of arguments virtually identical to those advanced by Appellants in this case. But the Court of Appeals did not rely on the statute to uphold the ordinance:

> The United State Supreme Court has twice faced this issue, and twice found the police power of a state allows this type of sewer regulation, with no compensation to property owners.

Bedford Township, supra, page 717. As applied by analogy to mandatory water connection ordinances as well as mandatory sewer connection ordinances, the holding in *Bedford Township* is dispositive of all of Appellants' arguments. If the police power of the state "allows this type of sewer regulation, with no compensation to property owners," then the police power of the state allows this type of water utility regulation, with no compensation to property owners. *Bedford Township*, page 717.

Gaylord's water connection ordinance is authorized by state law. It is not necessary to rely on a specific enabling statute describing mandatory connection to a public water utility to uphold the ordinance, because of the broad powers of a home rule city. See MCL 117.4j(3):

> Each city may in its charter provide:
>
> (3) **Municipal powers.** For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated

> or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.

The police power authority of Michigan Home Rule Cities is derived from the state constitution, Const 1963, art 7, § 22:

> Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

And the authority to own and operate a water utility is specified in Const 1963, art 7, § 24:

> Subject to this constitution, any city or village may acquire, own or operate, within or without its corporate limits, public service facilities for supplying water, light, heat, power, sewage disposal and transportation to the municipality and the inhabitants thereof.

The Home Rule Cities Act authorizes each city to provide in its charter "[f]or the installation and connection of sewers and waterworks on and to property within the city." MCL 117.4b. The City of Gaylord adopted a charter provision as allowed by the Home Rule Cities Act, being Section 10.1202 [Sec. 12.1 GENERAL POWERS RESPECTING UTILITIES]:

> The city shall possess and hereby reserves to itself all the powers granted to cities by statute and Constitution to acquire, construct, own, operate, improve, enlarge, extend, repair, and maintain, either within or without its corporate limits, including but not by the way of limitation, public

utilities for supplying water, light, heat, power, gas, sewage treatment, and solid waste disposal facilities, or any of them, to the municipality and the inhabitants thereof, and also to sell and deliver water, light, heat, power, gas and other public utility services without its corporate limits to an amount not to exceed the limitations set by statute and Constitution.

Gaylord also adopted broad charter provisions on municipal powers.

Sec. 1.3 GENERAL POWERS.
Unless otherwise provided or limited in this Charter, the City and its officers shall be vested with all the powers, privileges and immunities, expressed or implied, which cities and their officers are permitted to exercise or provide for in their Charters under the Constitution and laws of the State of Michigan and of the United States of America. This shall include all powers and immunities which cities have or may have under and by virtue of Act No. 279, Public Acts of 1909, as amended, and also all powers, privileges and immunities conferred upon cities by Act No. 215, Public Acts of 1895, as amended, commonly known as the Fourth Class City Act.

Sec. 3.1 GENERAL POWERS.
The government of the City, and all the powers thereof, except the judicial powers, shall be vested in the council. The council shall exercise such powers in the manner and through the agencies provided by law; shall exercise the management and control of all municipal property and the administration of the municipal government whether or not such powers be expressly enumerated in this Charter. It shall pass upon and secure the performance of any act necessary to advance the interests of the City, good government and prosperity of the municipality and its inhabitants, and shall make all laws which may be necessary and proper for carrying into execution the powers granted to the City by law.

Sec. 3.13 HEALTH AND SAFETY
The council shall see that provision is made for the public peace and health, and for the safety of persons and property. The council shall also provide for comprehensive land use

> planning and zoning administration. Until otherwise provided for by ordinance or resolution, the council shall constitute the board of health of the city, and it and its officers shall possess all the powers, privileges and immunities granted to boards of health by statute.

Certainly the City of Gaylord is authorized to own and operate a municipal water utility, Const 1963, art 7, § 24, and to provide "for the installation and connection of sewers and waterworks on and to property within the city," MCL 117.4b, as described in Section 10.1202 [Sec. 12.1] of the Gaylord City Charter. The ordinance challenged by Appellants/Defendants plainly provides for the "installation and connection of ... waterworks on and to property within the city." Undoubtedly Gaylord's water connection regulations are part of an ordinance "relating to its municipal concerns, property and government." Const 1963, art 7, § 22. And the enumeration of powers in Const 1963, art 7, § 24 shall not "limit or restrict the general grant of authority conferred by" Const 1963, art 7, § 22. There is more statutory authority conferred on local units of government for the operation of public waterworks by MCL 324.4301:

> **A local unit of government**, either individually or jointly by agreement with another local unit of government, **may own, acquire, construct, equip, operate, and maintain** either within or outside of the statutory or corporate limits of the local unit or units of government **waterworks systems approved by the department of public health, including such facilities as water mains, treatment works, source facilities, pumping stations, reservoirs, storage tanks, and other appurtenances for the purpose of obtaining, treating, and delivering pure and wholesome water in adequate quantity to the local unit** or units **of government**. These

> powers are in addition to any powers granted to the local unit of government by statue or charter. Emphasis added, as excerpted.)

And in MCL 324.4303:

> **The legislative body of a local unit of government** or the respective legislative bodies of the local units of government who have agreed to jointly own and operate waterworks systems, intercepting sewers, or sewage treatment plants, **may create a separate board or may designate certain officials of the local unit** or units of government **to have the supervision and control of the waterworks systems**, intercepting sewers, transfer stations, or sewage and refuse and garbage processing or disposal plants. **The legislative body**, respective legislative bodies, or the board **may make all necessary rules governing the use, operation, and control of the facilities and systems. The legislative body** or respective legislative bodies **may establish just and equitable rates or charges to be paid to them for the use of the waterworks system** or disposal or processing plant and system **by each person whose premises are served, and the rates or charges may be certified to the tax assessor and assessed against the premises served and collected or returned in the same manner as other county or municipal taxes are certified, assessed, collected, and returned.** (Emphasis added.)[1]

This authority "is in addition to and not in derogation of any power existing in any of the local units of government under any statutory or charter provisions." MCL 324.4309.[1] Gaylord also relies on MCL 106.1, MCL 106.3, and MCL 106.7 of the Fourth Class Cities Act, the authority of which is incorporated within Gaylord's City Charter in Section 1.3, by stating "and also all powers, privileges and immunities conferred upon cities by Act No. 215, Public Acts of 1895, as amended, commonly known as the Fourth Class Cities Act." In the face of all of this plain authority to adopt the Gaylord

[1] Gaylord mistakenly cited MCL 123.114, which seems to have been replaced by MCL 324.4303.

ordinance, Appellants/Defendants offer no specific legal authority or analysis to perfect their challenge to the ordinance on appeal.

Appellants contend "that the ordinance is unconstitutional because not a proper exercise of the police power of the city" as was claimed in *People v Sell*, 310 Mich 305, 314; 17 NW2d 193 (1945). The Supreme Court quoted the same constitutional provisions cited above and sections of the Home Rule Cities Act in describing the powers of a home rule city, noting that "[t]he provision for a general law for their incorporation was intended to confer upon them almost exclusive rights in the conduct of their affairs, not in conflict with the Constitution or general laws applicable thereto." *People v Sell*, page 311. Rather than read the Home Rule Cities Act narrowly, the Supreme Court confirmed an expansive reading of it:

> A reading of the Home Rule Act shows that it is rather comprehensive in its provisions as to what the city may or may not incorporate in its charter, but it leaves many things to be implied from the power conferred. The purpose of the legislative enactment was to give the city a large measure of home rule. Considering its purpose, it should be construed liberally and in a home rule spirit.

People v Sell, pages 312-313. The Supreme Court confirmed that the Home Rule Cities Act was a "general grant of rights and powers subject only to certain enumerated restrictions, instead of the former method of only granting enumerated rights and powers definitely specified." *People v Sell*, page 313. And a key point not briefed by the Appellants was that "[e]xcept as limited by the Constitution or by statute, the police power of Gaylord "as a home rule city is of the same general scope and nature as that

of the state." *People v Sell*, page 315. This is significant, because "authorities relating to the police power of the State are equally applicable in relation to the police power of the city." *People v Sell*, page 315. Thus the police power exercised by the State of Michigan in the statute compelling connection to a public sewer is the same as that exercised by the City of Gaylord in compelling connection to the public water utility. The police power analysis of the statute and ordinance in *Bedford Township v Bates*, supra, applies directly to the Gaylord ordinance, with no diminution in force or effect, because Gaylord's "police power" exercised "as a home rule city is of the same general scope and nature as that of the state." *People v Sell*, page 315. And the decision in *Bedford Township v Bates*, supra, is an authority "relating to the police power of the State" that is "equally applicable in relation to the police power of the city." *People v Sell*, page 315.

Therefore, the absence of a statute mandating connection to a public water utility does not detract from the police power of Gaylord as a home rule city to enact such a local regulation in the first instance. The presence of a statute mandating connection to a public sewer system does nothing to detract from the police power of Gaylord as a home rule city to enact an ordinance compelling connection to the public water utility. Of course the state legislature may weigh in on the subject and require connection to public water utilities across the state, or may encourage or direct municipalities to require connection to public water utilities under certain circumstances, or may limit the authority of municipalities to require connection to public water utilities, but such specific state policy and direction has not yet been enacted. That the state legislature

has not seen any reason or need to adopt a statute requiring, encouraging, directing, or prohibiting mandatory connections to public water utilities under any specified set of circumstances is of no help to Appellants. The City of Gaylord is free to exercise its police powers in this area without any conflict with the general law of the state. Appellants cannot claim or argue that Gaylord's ordinance conflicts with state law and is preempted, because the state legislature has adopted no statute expressly prohibiting or regulating mandatory connection to public water utilities. "[A] municipal ordinance is preempted by state law if 1) the statute completely occupies the field that ordinance attempts to regulate, or 2) the ordinance directly conflicts with a state statute." *Rental Property Owners Ass'n of Kent County v City of Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997).

Appellants urge the Court of Appeals to apply an outdated and unduly narrow view of Gaylord's police powers. At one time it was said that "[t]he police power rests in the State," and it "belongs to a municipality only if specifically conferred upon it by statute or by Constitution." *Butcher v City of Detroit*, 131 Mich App 698, 702; 347 NW2d 702 (1984).

> The 1908 Constitution, however, changed the role of the municipality in our governmental life in this state ... In other words, before 1908: "municipal corporations exercised only such powers as were expressly granted to them by the legislature. [U]nder the [the 1908] Constitution and our home rule cities act, cities may exercise substantially greater powers essential to local self government than they previously were allowed to exercise," (Cites omitted.)

Butcher v City of Detroit, pages 702-703. The Court of Appeals then noted that the Supreme Court "defined police power expansively":

> Ordinances having for their purpose regulated municipal development, the security of home life, the preservation of a favorable environment in which to rear children, the protection of morals and health, the safeguarding of the economic structure upon which the public good depends, the stabilization of the use and value of property, the attraction of a desirable citizenship and fostering its permanency are within the proper ambit of the police power. Changes in such regulations must be sought through the ballot or legislative branch.

Butcher v City of Detroit, page 703, quoting from *Cady v City of Detroit*, 289 Mich 499, 514; 286 NW 805 (1939). The Gaylord ordinance provides for the operation and extension of the municipal water utility, requiring inhabitants to connect to the water utility in advance of failed wells or any other problem with the private water supply. The general subject of the ordinance regulation is authorized by Const 1963, art 7, § 24, MCL 117.4b, MCL 324.4303, and Section 10.1202 [Sec. 12.1] of the Gaylord City Charter. The specific terms of the Gaylord ordinance are within Gaylord's police powers.

> Accordingly, it is also clear that home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied.
>
> Home rule cities are empowered to form for themselves a plan of government suited to their unique needs and, upon local matters, exercise the treasured right of self-governance.

City of Detroit v Walker, 445 Mich 682, 690; 520 NW2d 135 (1994).

Appellants cite *Tally v City of Detroit*, 54 Mich App 328; 220 NW2d 778 (1974) for the test of a police power ordinance. Appellants' brief on appeal, page 18. Appellants assert that "the Circuit Court's opinion fails to clearly address what legitimate state interest of being served by mandatory connection or how that allegedly legitimate state interest is substantially advanced by the mandatory connection ordinance." Appellants' brief on appeal, page 20. Then Appellants offer the conclusion that "concern about 'administrative chaos' and 'higher overall costs' resulting from property owners exercising their right to use their own ground water, is a flatly improper basis for an exercise of the police power, resulting in the ordinance being unconstitutional." Appellants' brief on appeal, page 20. This conclusory and circular argument includes no analysis of the legislative purpose of Gaylord's ordinance or the reasonableness of the relationship between the ordinance and the legislative purpose. Appellants cite no federal or Michigan authority for their claim of "a flatly improper basis," and the Court of Appeals should not search for it. *Peterson Novelties Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

The reasoning in *Tally v City of Detroit*, supra, fits neatly with the present case, notwithstanding Appellants' protestations. "It cannot be doubted that the [provision of safe, wholesome water with adequate pressure and supply to all of the structures within a municipality] is a proper purpose for the exercise of police power." *Tally*, page 336. "Since this type of business activity directly affects the public welfare, the City of [Gaylord] has the authority to regulate it." *Tally*, page 336. "The propriety of the

relationship between the character of the remedy and the public need should be determined by the legislative body [of the City of Gaylord], and that determination should not be easily disturbed." *Tally*, page 336. "The ordinance in question, which requires that persons [owning structures within the City of Gaylord, must, over time or as wells become inoperable, connect to and use the municipal water utility,] "has been found by the City of Gaylord to be reasonably suited to the accomplishment of an objective within the City's police power." *Tally*, pages 336-337. The public purposes in providing sewers and safe water by municipalities cannot be questioned seriously. Nor can the requirement that inhabitants of a municipality actually participate in the sewer system and water utility system by connecting to both.

Appellants cite *Graham v Kochville Twp*, 236 Mich App 141; 599 NW2d 793 (1999), in support of the argument "that any charge associated with the providing of water would constitute a tax, not a fee" because Gaylord seeks to compel connection to the public water utility. Appellants' brief on appeal, page 24. Kochville Township imposed a connection fee to be charged when property owners connected to the township water supply system, after an earlier imposed special assessment was reduced by the Tax Tribunal. Property owners resisted payment of the connection fee on multiple grounds, one of which was an unlawful exercise of the police power. The Court of Appeals stated:

> In our judgment, it is clear that an ordinance regarding the water supply system of a township, including the fee requirements that will sustain the system, does bear a

> rational relationship to the public health, safety and general welfare of the township. The availability of clean water is of paramount importance to the people of the township, affecting their health and safety, as well as the welfare of their property - as evidenced by the $2,000 increase in value to the properties affected by the new water system.

Graham v Kochville Twp, page 148. The same "judgment" should be reached with regard to a rational relationship between Gaylord's ordinance and the public health, safety, or general welfare.

Appellants' due process challenge to the Gaylord ordinance must fail for the reasons stated in *Bedford Township v Bates,* supra, at pages 717-718:

> The United States Supreme Court has twice faced this issue, and twice found that the police power of the state allows this type of sewer regulation, with no compensation to property owners. (Cites omitted.)
>
> It is the commonest exercise of the police power of a State or city to provide for a system of sewers and to compel property owners to connect therewith. And this duty may be enforced by criminal penalties. (Cites omitted.)
>
> The community is to be considered as a whole in the matter of preservation of the health of all inhabitants, for a failure by a few to conform to sanitary measures may inflict ill health and death upon many. Though the action of the governing boards charged with responsibility may work a hardship on one or more individuals whose facilities may be sanitary, their action cannot be regarded as unconstitutionally arbitrary, or the taking of property without due process of law. It would seem that although properly operated private septic tanks may afford a sanitary disposal system, the publicly managed sewage system of the whole community is undoubtedly better as doing away with potential as well as actual health menaces. (Cites omitted.)

All of the same rationale and analysis applies with equal force to the Appellants' arguments. The City of Gaylord need not wait until private water supplies fail, become contaminated, or become inadequate to meet demand, before constructing and operating its public water utility system. To do so would be illogical and foolhardy. Municipalities are the primary source of public water and sewer facilities in Michigan. Forcing municipalities to wait until a private sewer or water system fails before developing and requiring participation in the public utility would place unnecessarily burdensome limitations on the public utility systems. The courts are not local boards of health. Indeed, the City of Gaylord can fill this role:

> The council shall see that provision is made for the public peace and health, and for the safety of persons and property. ... Until otherwise provided for by ordinance or resolution, the council shall constitute the board of health of the city, and its officers shall possess all the powers, privileges and immunities granted to boards of health by statute.

Gaylord City Charter, Section 10.313 [Sec. 3.13]. The threshold standard for requiring connection to the Gaylord water utility is for the City of Gaylord to determine, not individual property owners or local courts. The standard adopted by the City of Gaylord is reasonable, patterned after sewer connection standards, and only becomes effective when "the potable water facilities are located within two hundred (200') feet of the nearest property line." Section 53.02 [25.502].

Appellants may have misunderstood the role of the courts in reviewing their defenses. The "courts may determine the reasonableness of the relationship between a

statute and the legislative purpose behind it when the constitutionality is challenged, but may not determine the reasonableness of the Legislature's purpose." *McDonald Pontiac v County of Saginaw*, 150 Mich App 52, 56; 388 NW2d 301 (1986). Appellants really challenge the reasonableness of Gaylord's legislative purpose in providing a public water supply to all of the structures within the City of Gaylord when some of the owners of those structures do not presently need or desire that service, and this challenge is misdirected to the courts. "The courts have a duty to determine whether a statute is valid or void as unconstitutional by analyzing whether the legislative act bears a reasonable relationship to a legitimate legislative purpose." *McDonald Pontiac v County of Saginaw*, page 55, citing *Carolene Products Co v Thomson*, 276 Mich 172; 267 NW 608 (1936). The Gaylord ordinance requiring each structure to connect to public water utility lines within 200 feet of the property bears a reasonable relationship to Gaylord's legitimate legislative purpose in providing its public water supply to all of the structures within its corporate limits. Ordinances are presumed to have a reasonable relation to a permissible governmental purpose. *City of Lansing v Edward Rose Realty*, 442 Mich 626, 634; 502 NW2d 638 (1993). Appellants have not overcome this presumption.

No Taking

> [N]ot every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense. Rather, the determination whether a state law unlawfully infringes a landowner's property in violation of the Taking Clause requires an examination of

> whether the restriction on private property forces some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. This examination entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. When regulation goes too far it will be recognized as a taking. (Cites omitted.)
>
> Rights of property, like all other social and conventional rights, are subject to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in it by the Constitution, may think necessary and expedient. [Where] question of the facts established is a fairly debatable one, courts accept and carry into effect the opinion of the legislature. Courts cannot substitute their opinions for that of the legislative body on questions of policy. (Cites omitted.)

Butcher v City of Detroit, pages 706-708. In this case the restriction on private property rights applies equally to all owners of developed real property within the City of Gaylord. Appellants are not called upon to bear the expense of connection and abandonment of private water supply systems alone. The governmental action is aimed at preserving and enhancing public health through the extension and operation of the municipal water utility. The economic impact is positive in that the properties affected will have safe, stable, pressurized potable water provided by the public water utility, and an enhanced fire suppression system. The negative economic impact is limited to the capping of privately developed wells or other alternative water supplies. Because one water supply system is replaced with another there is minimal interference with investment backed expectations. Therefore, a careful examination of Appellants' takings argument should result in a determination that it is without merit.

Appellants concede that their use of well water from their properties is founded upon "a right [that] has been held a property right, which cannot be taken away or impaired by legislation, unless by the exercise of the right of eminent domain or the police power," *Schenk v City of Ann Arbor*, 196 Mich 75, 82; 163 NW 109 (1917). Obviously, the City of Gaylord can exercise its police powers in a manner that impairs or prohibits the use of well water on Appellants' properties. A new regulatory approach is not necessarily illegal.

> Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.
>
> Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs.

Sailors v Board of Ed of Kent County, 387 US 105, 110-111; 87 SCt 1549; 18 LE2d 560 (1967).

No Headlee Violation

Appellants argue that charges for water they don't need or want constitute an illegal tax imposed contrary to the Headlee Amendment, Const 1963, art 9, § 31, which provides in relevant part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a

> majority of the electors of that unit of Local Government voting thereon.

No record was developed at the trial court on the level or rate of taxation by the City of Gaylord when the Headlee Amendment was ratified, or what water utility charges will be paid by Appellants. The trial court made no threshold finding or determination in this regard, so the issue has not been preserved properly for appellate review. Nevertheless, the trial court's ruling on the factors used in determining if municipal charges constitute a fee or a tax warrants review and affirmation.

The trial court considered and rejected Appellants' argument that water utility service charges would be a tax rather than a fee according to the holding in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1999). In *Bolt* a storm water service charge was imposed on each parcel of real property in the city for the creation of a storm water enterprise fund "to help defray the cost of the administration, operation, maintenance, and construction of the storm water system". This "fund replaced that portion of the system that was previously funded by general fund revenues secured through property and income taxes." *Bolt*, FN4. The city billed for the storm water service charge and plaintiff filed his complaint with the Court of Appeals, which found the charge to be a fee. The Supreme Court reversed, finding the storm water service charge to be an unauthorized tax. The "Court has articulated three primary criteria to be considered when distinguishing between a fee and a tax." *Bolt*, page 161.

> The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose. A second,

> and related, criterion is that user fees must be proportionate to the necessary cost of the service. ... To be sustained [as a regulatory fee], the act we are considering must be held to be for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the costs of issuing the license, and the regulation of the business to which it applies. In *Ripperger*, this Court articulated a third criterion: voluntariness. (Cites omitted.)

Bolt, pages 161-162. In this case there is a police power ordinance requiring connection to the public water utility system, which is regulatory in nature rather than a means primarily of producing revenue.[2] The water utility connection and service fees purportedly are or will be proportionate to the costs of providing water to the customers. Although compelled to connect to the water utility, Appellants can choose how much municipal water to use and thereby impact, if not control, how much their water bills will be. It certainly was not established that the revenue generated by the Gaylord water utility will exceed the cost of operating and regulating the water utility. The trial court correctly rejected the claim of a Headlee amendment violation on the record before it.

Graham v Kochville Twp, supra, discussed earlier in reviewing Gaylord's exercise of its police powers, also deserves to be examined in determining if Gaylord will be charging a tax or a fee. The Court of Appeals took "note that the Supreme Court cautioned that these criteria are not to be considered in isolation, but rather in their

[2] The factual record below is scant at best with regard to actual fees to be charged to Appellants.

totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee." *Graham v Kochville Twp*, page 151. The Court found "the charge will pay for the regulation of a specific part of the community's access to a municipal water supply," which was "a rural part of the community that formerly was served only by private wells." *Graham v Kochville Twp*, page 152. Then the Court said "[t]here is no evidence in the record indicating that a water extension would benefit anyone who does not pay for the privilege of "hooking up" to the extension, nor that anyone who did not benefit would be forced to pay the charge, in contrast to the situation in the *Bolt* case." *Graham v Kochville Twp*, page 153. The same is true in Gaylord. Customers will pay upon connection, and will pay fees for the water they use. They will receive the benefit of a safe, stable, pressurized water system and improved fire protection. They were given time to make the connection. If their property remained undeveloped and they had no use for the system, they would not have to connect to it. The court explained its rationale in the words relied upon by Appellants.

> We see no evidence inhibiting property owners from retaining their current wells or drilling new wells, or in fact from using no water at all if the property is not developed and they do not require it.

Graham v Kochville Twp, page 155. Certainly Gaylord's ordinance prohibits property owners from retaining the use of their wells or drilling new wells. But the property owners will pay to connect to the system and for the water they use, which are fees. If their property is not developed, they need not connect and pay for the service they do not require. Upon connection, they remain in control of the amount of water they

consume, and the amount of fees they will be charged. While there is less voluntariness in Gaylord than there was in Kochville Township, there remains some component of voluntariness and the fees for connection and water use do not become a tax.

In *Jones v Board of Water Commissioners of Detroit*, 34 Mich 273 (1876), the Michigan Supreme Court struck down a tax on parcels of property not using water from the City's public water utility. This was a local tax authorized by the state legislature. The court contrasted the invalid tax with fees for water, noting that "[t]he water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity." *Jones* at page 274. The court went on to observe:

> No one can be compelled to take water unless he chooses, and the lien, although enforced in the same way as a lien for taxes, is really a lien for an indebtedness, like that enforced on mechanics' contracts, or against ships and vessels. The price of water is left to be fixed by the board in their discretion, and the citizens may take it or not as the price does or does not suit them.

Jones, page 274. Appellants do not describe the language quoted above from *Jones* as obiter dictum or binding precedent. It appears to be no more than an observation of what was factually accurate at that time: nobody in Detroit was compelled to accept and purchase water from the public water utility, because there was no ordinance compelling connection. The court did not strike down an ordinance compelling connection to the public water utility, and the trial court properly declined to assign any weight to the language in *Jones* in deciding this case.

In *Preston v Board of Water Comm'rs of the City of Detroit*, 117 Mich 589, 598; 76 NW 92 (1898), the Michigan Supreme Court rebuffed a challenge to the water rates charged to customers receiving water from the public water utility, and commented on the voluntariness associated with fees for water service:

> We think it is not accurate to speak of these water rates as taxes. All property except that which is exempt by law is subject to the payment of taxes, but the use of water is not compulsory. If the owner of property prefer to dig a well and construct a cistern instead of connecting with the system of waterworks, he, in most instances at least, would be at liberty to do so.

Again this was an observation of what was factually accurate at that time: the use of water was not compulsory. The court acknowledged that the alternative of digging a well and constructing a cistern would not necessarily be available in all circumstances. In the City of Gaylord connection to the public water utility system *is* compulsory, and the use of city water *is* compulsory, but the amount of city water consumed remains voluntary and discretionary. The *Preston* opinion does not support Appellants' argument that Gaylord's ordinance is unconstitutional.

In *Ripperger v City of Grand Rapids*, 338 Mich 682; 62 NW2d 585 (1954), a pre-Headlee case, the Michigan Supreme Court determined that municipal sewer charges were not a tax, but a fee. The specific ordinance provision involved the authority "to shut off the water supply to a customer for failure to pay sewage disposal charges." *Ripperger*, page 684. The plaintiffs contended the "charges for both water service and sewage disposal should be considered a tax," and the court acknowledged its prior

ruling in *Jones v Board of Water Commission*, supra, that "charges for water service [are] not a tax." *Ripperger*, page 686. The court applied its analysis in *Jones* about fees for water not being a tax to the sewer charges in *Ripperger*, concluding the same outcome should be reached. Thus *Ripperger* became the source of the "voluntariness" component of the analytical framework constructed and applied in *Bolt v City of Lansing*, supra, page 162. The voluntariness component of the water utility fees charged by the City of Gaylord was considered and evaluated by the trial court, finding:

> Defendants are able to exercise discretion in their individual water consumption, and therefore, an element of volition is present. By electing to conserve water, each Defendant will be able to curb the fees incurred each month. The fact that Defendants vigorously contest a water connection hook up does not render the voluntariness requirement futile.

Opinion, pages 21-22. The trial court's application of the law to the facts of this case was thorough, well reasoned, and correct. None of the cases cited by the Appellants compel a different result on appeal.

Cases From Other States

There is a split in the decisions from other states, but the law of Montana is quite similar to that of Michigan, so the rationale and holding in *Ennis v Stewart*, 247 Mont 355; 807 P2d 179 (1991) is the most persuasive. Ennis adopted an ordinance very much like that of the City of Gaylord, and sought to enforce connection to the public water utility. Defendants cited *City of Midway v Midway Nursing & Convalescent Center*, 230 Ga 77; 195 SE2d 452 (1973), just as Appellants/Defendants have done in the present case,

for the proposition "that a municipality has no authority to enact and enforce ordinances which are designed to compel everyone within the city to use its water system." *Ennis v Stewart*, page 360. The Supreme Court of Montana rejected the argument.

> Considerations of public policy lead us to disagree with the holding of *Midway*. Generally, a government entity may exercise is police powers in matters affecting public health and welfare. There is more recent authority in opposition to *Midway* holding that the enactment and enforcement of ordinances that compel citizens to connect to a municipal water system is within the scope of the police power.

Ennis v Stewart, page 360. The Montana Supreme Court quoted with approval some of the more recent authorities. "This court can find no meaningful distinction between mandatory sewer connections and mandatory water connections." *Shrader v Horton*, 471 FSupp 1236 (WDVa 1979); aff'd 626 F2d 1163; *Hutchinson v City of Valdosta*, 227 US 303; 33 SCt 290; 57 LEd 520 (1913); *Weber City Sanitation Commission v Craft*, 196 Va 1140; 87 SE2d 153 (1955). The court acknowledged that "[i]t is, of course, well settled that the protection of the public health is a valid object for the exercise of the police power. A pure water supply is so intimately connected with the health of the community that the provisions with regard to it are properly a part of the police power of the state." *Ennis v Stewart*, page 361, cites omitted. Finally, the Montana Supreme Court explained the underlying municipal authority to enact such an ordinance, which is quite similar to the underlying municipal authority in Michigan.

> In Montana, a local government with self-governing powers may exercise any power or provide any service except those specifically prohibited by the constitution, laws, or its

> charter. ... The legislature has given municipalities broad general powers to construct and improve facilities necessary for operating viable water systems. Cities and towns may establish sewer and water systems under the authority of ... that provides that "the city or town council has power to adopt, enter into, and carry out means for securing a supply of water for the use of a city or town or its inhabitants." Thus, regardless of whether it has a self-government charter, the enactment and enforcement of the ordinances in this case is clearly within the scope of the Town's general police power.

Ennis v Stewart, page 361, cites omitted. The rationale of the Montana Supreme Court is instructive.

> Regarding the exercise of this power, we adopt the reasoning of *Shrader* and *Weber*, quoted above. While the town does not allege that there are immediate health threats arising from the use of private well water in Ennis, the potential for such problems always exists. A municipal water system is better suited to meet these health concerns and prevent potential health problems that could arise absent such a system. Furthermore, in small communities a water system may not be affordable unless a sufficient number of citizens connect to the system and pay the corresponding fee. Allowing some citizens to forgo connection to such a system indefinitely or until a health threat is imminent may make such a system unaffordable to the community and thereby defeat the purpose of preventing potential health problems *before* they arise. Sound public policy considerations indicate that the ordinance in question here is rationally related to the legitimate purpose of providing a healthy and safe water supply.

Ennis v Stewart, pages 361-362. The *City of Midway* case originated in Georgia, where municipal powers are "strictly construed, and [those] powers which are not expressly, or by necessary implication, conferred upon the corporation can not be exercised by it."

Midway, page 79. That is contrary to the Michigan experience with home rule cities and the broad grant of authority in Const 1963, art 7, § 22 and Const 1963, art 7, § 27.

Appellants cite *Eckstein v City of Lincoln*, 202 Neb 741; 277 NW2d 91 (1979), in which the Supreme Court of Nebraska found Lincoln's mandatory connection ordinance overbroad. There was not much inquiry or analysis.

> As we view the record the ordinance is overbroad. The evidence does not support a finding that the possibility of the plaintiff's wells becoming contaminated is sufficiently probable to justify an absolute prohibition against their use for domestic purposes.

Eckstein v City of Lincoln, page 744. The opinion in *Ennis v Stewart*, supra, is more thorough, well reasoned, and persuasive.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY DISPOSITION OF APPELLANTS' DEFENSES.

Standard of Review

Appellate review of summary disposition motions, constitutional issues, and statutory construction is de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004), *Studier v Michigan Public School Employees' Retirement Board*, 472 Mich 642, 649; 690 NW2d 350 (2005), and *Cruz v State Farm*, 466 Mich 588, 594; 648 NW2d 591 (2002), respectively.

Presumption of Constitutionality

"There is always a presumption in favor of constitutionality," *Osborn v Charlevoix Circuit Judge*, 114 Mich 655, 660; 72 NW 982 (1897). "No rule of construction is better settled in this country, both upon principle and authority, than that of Acts of a State Legislature are to be presumed constitutional until the contrary is shown." *Evans Products Co v Fry State Treasurer*, 307 Mich 506, 534; 12 NW2d 448 (1943).

"With regard to the presumption of constitutionality, the rule applicable to ordinances of a city government is the same as that applied to statutes passed by the legislature." *1426 Woodward Ave Corp v Wolff*, 312 Mich 352, 369; 20 NW2d 217 (1945).

The exact effect of the presumption in favor of the validity of an ordinance or statute has not been explored and explained by Michigan appellate courts in the context of motions for summary disposition. A plaintiff's obligation to prove the law may not be the same as the conventional burden of proof of facts necessary to establish liability or the entitlement to relief.

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally case.

MRE 301. While directed at factual presumptions more so than a presumption as to the validity of a law, MRE 301 would require the Appellants/Defendants to come forward with evidence to rebut or overcome the presumption of constitutionality. This is consistent with the case law. "Because ordinances are presumed constitutional, the party challenging the validity of an ordinance has the burden of proving a violation." *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). Appellants/Defendants did not shoulder and carry this burden, perhaps because of the belief that "[t]he issue involved in this motion is legal, not factual in nature." Appellants' brief on appeal, page 19.

The City of Gaylord moved for summary disposition pursuant to MCR 2.116(C)(9), and Appellants/Defendants responded with a request for summary disposition under MCR 2.116(C)(8), (C)(10), and (I)(2). See Defendants' Answer to Plaintiff's Motion for Summary Disposition dated May 23, 2005, and Defendants' Answer to Plaintiff's Motion for Summary Disposition dated August 5, 2005. This is important, because the trial court effectively decided the case on a (C)(10) basis, finding "[t]he relevant facts are undisputed by the parties to this litigation." Opinion, page 2. "For purposes of this Opinion and Order, the following facts are also taken as undisputed." Opinion, page 7. The trial court said it would "only consider the pleadings" on the (C)(9) motion, but found that "Defendants must submit facts and law to overcome the strong presumption of constitutionality for ordinances." Opinion, page 8. Curiously, Appellants/Defendants presented very little in the form of affidavits and

other documentary evidence demonstrating the effect of Gaylord's water ordinance upon them. This tactic sharply limited the scope of the case before the trial court as to the specific consequences of applying the ordinance to Appellants/Defendants, who would have to connect to Gaylord's water utility and use Gaylord water, rather than pump water from their own wells. There was no clear record made of ordinance rates, water consumption rates, the number of customers, plant capacity, water main extension costs, tap fees, or the overall financial structure of Gaylord's water utility.[3]

While disposing of the defense that the ordinance is unconstitutional on a (C)(9) basis might be appropriate, the (C)(10) and (I)(2) basis invoked by the Appellants/Defendants more accurately fits the opinion and ruling of the trial court. "A trial court is not necessarily constrained by the subrule under which a party moves for summary disposition." *Computer Network Inc v AM General Corp*, 265 Mich App 309, 312; 696 NW2d 49 (2005). "[I]t is well settled that, where a party brings a motion for summary disposition under the wrong subrule, a trial court may proceed under the appropriate subrule if neither party is misled. *Computer Network Inc v AM General Corp*, page 312. Appellants/Defendants were not misled, because they invited the trial court's decision under MCR 2.116(C)(10) and (I)(2). Where the trial court relies on the wrong subrule in reaching or announcing its decision, the Court of Appeals can review the ruling according to the correct rule. *Smith v Kowalski*, 223 Mich App 610, 613; 567

[3] Appellants' effort to insert facts about capital connection fees should be recognized as an inappropriate attempt to supplement the record. See Appellants' Brief on Appeal, pages 7-8.

NW2d 463 (1997). In this case the trial court properly considered undisputed facts within the context of the (C)(10) provisions of MCR 2.116, and correctly disposed of Appellants' defense of unconstitutionality of the ordinance.

Appellants/Defendants came forward with two basic complaints about the validity of the Gaylord water connection ordinances: Appellants/Defendants could not use their private wells and water from them, and Appellants/Defendants would be compelled to use and pay for Gaylord's publicly supplied water. Appellants do not appreciate the force of the presumption in favor of the constitutional validity of the Gaylord ordinance. "The Plaintiff's Complaint fails to set forth any allegation concerning why the Plaintiff's right to use their own groundwater, for uses on their own property, should be eliminated." Appellants' brief on appeal, page 12. "[N]either the Plaintiff nor the court made a showing that mandatory connection to a public water supply constitutes a valid application of the police power." Appellants' brief on appeal, page 13. Obviously, the burden was, and is, on Appellants/Defendants to prove or show the unconstitutionality of Gaylord's ordinance. The ordinance is presumed to be constitutional. *Cady v City of Detroit*, supra, page 505:

> With regard to the presumption of constitutionality, the rule applicable to ordinances of a city government is the same as that applied to statutes passed by the legislature. A statute will be presumed to be constitutional by the courts unless the contrary clearly appears; and in case of doubt every possible presumption not clearly inconsistent with the language and the subject matter is to be made in favor of the constitutionality of legislation. Every reasonable presumption or intendment must be indulged in favor of the

> validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution, that a court will refuse to sustain its validity. A statute is presumed to be constitutional and it will not be declared unconstitutional unless clearly so, or so beyond a reasonable doubt.

Neither the Plaintiff nor the circuit court was under any obligation or burden to make "a showing" that Gaylord's ordinance was constitutional, unless and until Appellants/Defendants produced some evidence and law tending to prove the ordinance was unconstitutional. In this regard Appellants/Defendants cited no federal or Michigan case upholding their key argument of unconstitutionality, and they proved no fact establishing an arbitrary or unreasonable system of classifying or charging water customers. Gaylord's system of classifying all water customers according to structures in the City within 200 feet of a water main is very broad, and not susceptible to the type of challenges asserted by Appellants. The trial court considered the arguments and analyzed them in some detail before rejecting them in its written opinion.

CONCLUSION

The water utility ordinance is a lawful exercise of Gaylord's police power, as the trial court correctly decided and ruled.

RELIEF

This being a matter of first impression, the trial court's decision should be affirmed by the Court of Appeals in a published opinion.

Dated: March 15 2006

Eric D. Williams P33359
Attorney for Amicus MML
524 North State Street
Big Rapids, MI 49307
(231)796-8945