STATE OF MICHIGAN

IN THE SUPREME COURT

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY and STEVEN E. CHESTER, Director	SUPREME COURT NO. 141810 Court of Appeals No. 289724 Ingham County Circuit Ct No. 07-970-CE

Plaintiffs/Appellees,

v

WORTH TOWNSHIP,

Defendant/Appellant.

/

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AMICI CURIAE BRIEF OF THE MICHIGAN TOWNSHIPS ASSOCIATION, MICHIGAN ASSOCIATION OF COUNTY DRAIN COMMISSIONERS AND MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF DEFENDANT/APPELLANT WORTH TOWNSHIP

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STATEMENT OF QUESTIONS INVOLVED

I. Is the decision of the Michigan Court of Appeals that the requirement of the Headlee Constitutional Amendments at Article 9, Sections 25 and 29 that the increased costs of any new or expanded activity demanded of local governments by the legislature or by any state agency must be financed by a state appropriation of such increased costs before it becomes effective, does not apply unless such new or expanded activity lessens the state's financial burden, contrary to the plain language of said Sections of the Headlee Amendment and the electors' intentions in initiating and confirming such amendment?

The Michigan Court of Appeals said	"No"
Plaintiffs/Appellees answer	"No"
Defendant/Appellant answers	"Yes"
Amici Curiae answer	"Yes"

II. Whether, even if one accepts arguendo the Court of Appeals conclusion that the funding obligation in the Headlee Constitutional Amendments only applies when there is an unfunded state mandate that lessens the state's financial burden by shifting the burden to a local unit of government, that condition is met in this case?

The Michigan Court of Appeals said	"No"
Plaintiffs/Appellees answer	"No"
Defendant/Appellant answers	"Yes"
Amici Curiae answer	"Yes"

AUTHORITY TO FILE AMICI CURIAE BRIEF

Under Michigan Court Rule 7.306(D)(2), "An association representing a political subdivision" is authorized to file an amicus curiae brief "on behalf of any political subdivision of the state" without obtaining previous authority from the Michigan Supreme Court.

Amicus Curiae Michigan Townships Association was incorporated in 1953 for the purpose of assisting and educating Michigan township officials in the performance of their statutory obligations, to improve their knowledge of authority and case law pertinent to township government and to provide amicus curiae support in pending litigation that the board of directors of the Michigan Townships Association believes is of statewide importance to the operation of township government and the residents and businesses within those townships. The Michigan Townships Association membership currently consists of more than 1235 Michigan townships out of a total of 1241 Michigan townships.

Amicus Curiae Michigan Association of County Drain Commissioners is a statewide organization comprised of elected and appointed Drain Commissioners for each of Michigan's 83 counties. Drain Commissioners are public officials charged with administering Michigan laws related to flood protection, storm water management, and soil erosion. They build and maintain many millions of dollars' worth of infrastructure to serve Michigan citizens. The Michigan Association of County Drain Commissioners is dedicated to protection of the health, safety, and welfare of Michigan's citizens, their lands and environmental quality, and to the protection and restoration of Michigan's water resources. It seeks to accomplish these goals by promoting professional

development, continuing education, and encouraging member involvement in issues of public concern.

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This brief amicus curiae is authorized by the Legal Defense Fund's Board of Directors whose membership includes: the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys; Randall L. Brown, city attorney, Portage; Lori Grigg Bluhm, city attorney, Troy; Stephen K. Postema, city attorney, Ann Arbor; Eric D. Williams, city attorney, Big Rapids; Clyde J. Robinson, city attorney, Kalamazoo; James O. Branson, III, city attorney, Midland; James J. Murray, city attorney, City of Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; John C. Schrier, City Attorney Muskegon; Thomas R. Schultz, city attorney Farmington and Novi; and William C. Mathewson, general counsel, Michigan Municipal League.

The undersigned firm of Bauckham, Sparks, Lohrstorfer, Thall & Seeber P.C., has been authorized by each of the foregoing Amicus Curiae to file this joint brief in support of Worth Township on its application for leave to appeal and its appeal to this

Court of the December 11, 2012 decision of the Michigan Court of Appeals on remand from this Court's decision and order dated May 17, 2012.

STATEMENT OF FACTS

In its first decision in this case, *Dep't of Environmental Quality v Worth Twp*, 289 Mich App 414 (2010), the Michigan Court of Appeals reversed the circuit court's decision requiring Defendant Worth Township to correct pollution caused by fourteen (14) private septic tanks, holding that MCL 324.3109(2) did not impose that responsibility on Worth Township. Because of its decision, the Michigan Court of Appeals did not address either the impact of the Headlee Amendment[1] on the Township's responsibility, or whether MCL 324.3115(1) authorized the trial court to impose a schedule for remedial action, a fine, and an award of attorney fees.

On May 17, 2012, this Court reversed the decision of the Michigan Court of Appeals and remanded the case to the Court of Appeals to decide the issues regarding the impact of the Headlee Amendment and regarding the remedies available under MCL 324.3115(1) that it had not previously addressed. *Dept of Environmental Quality v Worth Twp*, 491 Mich 227, 251 fn 42 (2012).

On remand, without further briefs and without oral argument, the Michigan Court of Appeals concluded that MCL 324.3115(1) did not violate the Headlee Amendment and that MCL 324.3115(1) authorizes a circuit court to "require compliance" with NREPA and assess fines and attorney fees at its discretion. *Dept of Environmental Quality v Worth Twp*, Ct of Appeals Docket No 289724 (December 11, 2012).

Worth Township seeks to appeal this decision on the basis of the following errors of the Court of Appeals. The Court of Appeals added a new criterion for analyzing whether an obligation imposed on a local unit of government by the state or a state

[1] Const 1963, art 9, §§ 25 through 34; in particular §§ 25 and 29.

agency obligates the state to fund the cost of the obligation under the Headlee Amendment. This added criterion is contrary to both the actual language of Const 1963, Art 9, §§ 25 and 29 and the intent of the people of Michigan when they voted to approve the Headlee Amendment. This added criterion allows the state and its agencies to effectively avoid the constraints imposed by the Headlee Amendment and constitutes a potentially monumental adverse financial impact on local units of government and their taxpaying residents and businesses.

Moreover, even if it could be found that the Court of Appeal's new criterion is valid (which amici curiae strongly contest), the Court of Appeals further erred by failing to recognize that its new criterion was in fact met in the instant case.

Amici curiae file this brief in support of Worth Township for the reversal of the decision of the Michigan Court of Appeals.

Amici curiae accept the Statement of Facts submitted by Worth Township in its Application for Leave to Appeal.

STANDARD OF REVIEW

Decisions involving questions of Constitutional or statutory interpretation, as well as decisions granting or denying a motion for summary disposition, are subject to *de novo* review. *People v Watkins,* 491 Mich 450, 466-467; 818 NW2d 296 (2012); *Saffian v Simmons,* 477 Mich 8, 12; 727 NW2d 132 (2007); *Oakland Co Rd Comm'n v Mich Prop & Cas Guar Ass'n,* 456 Mich 590, 610; 575 NW2d 751 (1998).

ARGUMENT

I. The Decision of the Court of Appeals that the Headlee Amendment Applies Only When an Unfunded State Mandate Shifts to Local Governments the Responsibility of Providing Services that Lessen the State's Financial Burden Is Contrary to the Plain Language of the Headlee Amendment, the Electors' Intention In Initiating and Confirming the Headlee Amendment, and Decisions of Both the Court of Appeals and this Court.

Const 1963, Art 9, § 25, established by vote of the electorate in 1978 as part of the Headlee Amendment to the Michigan Constitution, provides:

> "Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval. The state is prohibited from requiring any new or expanded activities by local governments without full state financing, from reducing the proportion of state spending in the form of aid to local governments, or from shifting the tax burden to local government. A provision for emergency conditions is established and the repayment of voter approved bonded indebtedness is guaranteed. Implementation of this section is specified in Sections 29 through 34, inclusive, of this Article." (Emphasis added.)

Const 1963, Art 9, § 29, also established in 1978 as part of the Headlee Amendment, provides:

> "The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and

> disbursed to pay the unit of Local Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18." (Emphasis added)

In *Adair v State*, 486 Mich 468, 477; 785 NW2d 119 (2010), this Court described the proper analysis to be employed to interpret constitutional provisions:

> "We have established that '[t]he primary and fundamental rule of constitutional or statutory construction is that the court's duty is to ascertain the purpose and intent as expressed in the constitutional or legislative provision in question. When interpreting constitutional provisions, we are mindful that the interpretation given the provision should be 'the sense most obvious to the common understanding' and one that 'reasonable minds, the great mass of the people themselves, would give it'. [T]he intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or obtuse meaning in the words employed."

Although the language of Sections 25 and 29 is clear, the intent of the electorate in initiating and confirming these sections of the Headlee Amendment not only supports reliance on the plain language of those sections but also is important, particularly because the decision of the Court of Appeals in this case is contrary to and undermines the purpose and intent of these sections and of the Headlee Amendment in general.

A. **The Headlee Amendment Was Intended to Limit Government Spending and to Lower Taxes.**

In *Durant v State Board of Education*, 424 Mich 364, 378 (1985), this Court explained the purpose and intent of the electorate in enacting the Headlee Amendment, referencing close to a dozen news articles documenting the "taxpayer revolt" that gave rise to the Headlee Amendment to the Michigan Constitution in 1978 and stating:

> "Art 9 §§ 25 to 34 of the Michigan Constitution was presented to the voters under the popular term 'Headlee Amendment' named after its original proponent, Richard Headlee. It was proposed as part of a nationwide 'taxpayer revolt' in which taxpayers were attempting to limit legislative expansion of requirements placed on local government, to put a freeze of what they perceive was excessive government spending, and to lower their taxes both at the local and state level." (Footnote omitted.)

This statement of the purpose of the Headlee Amendment was repeated in *Mahaffey v Attorney General*, 222 Mich App 325, 341; 564 NW2d 104 (1997).

The effect of the Court of Appeals decision in this case will be to allow the state to expand the obligations and burdens placed on local governments, contrary to both the intent and the clear restrictions in the Headlee Amendment, with the result that local governments will be required to raise taxes (which in most cases could only occur with voter approval) or otherwise increase the burden on businesses and residents within their jurisdiction.

B. **The Decision of the Court of Appeals Is Contrary to the Clear Language and Intent of Both Section 25 and Section 29 of the Headlee Amendment.**

The purpose of the second sentence of art 9, § 29, sometimes referred to as the "prohibition on unfunded mandates" or "POUM," was clearly expressed in *Wayne County Board of Comm'n v Wayne County Airport Authority*, 253 Mich App 144, 167 (2002) as follows:

> "The purpose of this sentence was to ensure that the state would fund any new activity or fund any increase in the level of any activity required by the state. Wayne Co. Chief Executive v Governor, 230 Mich App 258, 265; 583 NW2d 512 (1998). In other words, Headlee focuses on state-mandated activities requiring local funding. Detroit Mayor v Michigan, 228 Mich App 386, 401; 579 NW2d 378 (1998), affirmed in part and vacated in part 460 Mich 590, 597 NW2d 113 (1999). Specifically, the above sentence becomes operational only by 'a mandate that requires local units to perform an activity that the state previously did not require local units to perform or at an increased level from that previously required of local units'. Judicial Attorneys Assn. v Michigan, 460 Mich 590, 606; 597 NW2d 113 (1999)." (Emphasis added)

This statement of the purpose of the second sentence of Art 9, §29 has not been overturned or questioned and is consistent with other decisions of this Court and the Court of Appeals.

In *Adair v State*, 279 Mich App 507, 523 (2008), the Court of Appeals stated:

> "The language of the POUM clause is clear and uncomplicated. It prohibits the Legislature from increasing the level of an activity or service beyond that required by existing law 'unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.' According each term and phrase employed in the POUM clause its plain meaning, the language employed in the POUM clause reflects the voters' intent that the clause serve as a directive to the Legislature to appropriate and disburse the funds required to cover the necessary costs associated with implementing a new legislative mandate. At the heart of this directive lies the command to appropriate and disburse the funds to carry out new legislative mandates. The term 'appropriation' commonly means a legislative body's act of prescribing a particular, special or distinct use for particular money authorized to be paid from a public treasury. *Webster's New Twentieth Century Dictionary* (Unabridged 2d ed), p. 91; *Random House Webster's College Dictionary (2nd ed.,*1997), p.66; Black's Law Dictionary (5th Ed.), p. 93. The presence of the term 'appropriation' in the POUM clause reflects the intent of the voters that the legislature actually determine the necessary costs associated with the implementation of new legislative mandates and then appropriate that amount for the expressed purpose of funding the new mandate. The language of the POUM clause does not reflect any intent to allow the Legislature to appropriate a certain level of 'discretionary' funds to the districts and then remove some of the 'discretion' afforded the districts by mandating how some of those funds must be used. Indeed, '[s]uch a result is inconsistent with the historic ability of school districts to use funds as they see fit; a system of local control and local accountability is in keeping with the clear desire of the voters in passing the Headlee Amendment'. Durant, 424 Mich at 386-387; 381 NW2d 662."

Adair involved a requirement imposed on school districts by an executive order of the Governor to actively participate in collecting, maintaining, and reporting various types of data, but without providing funding for the costs incurred to comply. Following interim appeals and remands, in *Adair v State*, 486 Mich 468; 785 NW2d 119 (2010), this Court held that the increased costs incurred by the plaintiff school district to comply with these new requirements were more than de minimis, that the plaintiff school district was entitled to reimbursement of those increased costs from the state, and that the plaintiffs were entitled to attorney fees on this claim. The Court in *Adair* made no finding that the state previously undertook the activities in question.

The Michigan Supreme Court in *Durant v State Board of Education*, *supra,* discussed and clarified the meaning and intent of Section 29 of the Headlee Constitutional amendment by separately reviewing both the first and second sentences as follows:

> "First, a proper reading of the first two sentences of § 29 in combination with each other, evidences that the correct interpretation of the term 'state law' in the section is that asserted by the defendants i.e., state statutes and state agency rules. The first sentence of § 29 states:
>
> > 'The state is hereby prohibited from reducing the state financed portion of the necessary costs of any existing activity or service required of units of local government by state law'.
>
> "The second sentence adds:
>
> > 'A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of local government, unless a state appropriation is made and disbursed to pay the local unit of government for any necessary increased costs.'
>
> "The first sentence, the one at issue in this case, is aimed at existing services or activities already required of local government. The second sentence addresses future service or activities. Both sentences clearly reflect an effort on the part of the voters to forestall any attempt by the legislature to shift responsibility for services to the local government, once its revenues were limited by the Headlee amendment, in order to save the money it would have had to use to provide the services itself. [Footnote omitted]
>
> "Because they were aimed at alleviation of two possible manifestations of the same voter concern, we conclude that the language 'required by the legislature or any state agency' in the second sentence of § 29 must be read together with the phrase 'state law' in the first sentence. This interpretation is consistent with the voters' intent that any service or activity required by the legislature or a state agency, whether now or in the future, be funded at an adequate level by the state and not by local taxpayers." (Emphasis added) 424 Mich at 378-379.

In *Schmidt v Dep't of Education*, 441 Mich 236, 254 (1992), this Court explained the dual purpose of the language of §§ 25 and 29 of the Headlee Amendment as follows:

> "The text reflects the Headlee amendment's purpose of limiting the state's discretion in several ways. First, it expresses the desire to prohibit the state from requiring new or expanded activities without fully funding them. The clause that embodies this purpose refers to funding for 'local governments', a plural reference, which implicitly suggests that funding must be provided to those local governments of whom the programs are required. Second, the language evidences a purpose of preventing the state from reducing 'the proportion of state spending in the form of aid to local governments'. This language again includes a singular description of the state spending 'proportion' along with a plural reference to the 'local governments' that are receiving the aid. Finally, the language embodies an antishifting purpose that prevents the state from shifting 'the tax burden to local governments'. This text evidences the aggregate antishifting purpose embodied in the text of § 30. It also may be read to incorporate an absolute prohibition of any shifting to local government, including the type of shifting advocated by the state and supported by Chief Justice Cavanagh." (Emphasis added)

These cases provide established and clear precedent for interpretation and application of the required funded mandate language in Const 1963, art 9, §§ 25 and 29 and should have been followed by the Court of Appeals in this case. The Court of Appeals addition of a criterion that would preclude a finding of a violation of the funded mandate requirement in Headlee unless "a statutory requirement lessens the state's burden by shifting to units of local government the responsibility of providing services once provided or funded by the state" is not supported by the plain language of the Headlee Amendment, the intent and purposes of the Headlee Amendment, or precedent, and should be overruled by this Court.

C. The Court of Appeals Erred by Holding that State Funding of a New Activity Is Mandated Only If the State's Burden Is Lessened By Shifting to Units of Local Government the Responsibility of Providing Services Once Provided or Funded by the State.

Notwithstanding the clear language of §§ 25 and 29 of art 9 of the Michigan Constitution prohibiting the state "from requiring any new or expanded activities by local governments without full state financing" at § 25; and at § 29, prohibiting the "legislature

or any state agency" from requiring "a new activity or service or an increase in the level of any activity or service beyond that required by existing law" "unless a state appropriation is made and disbursed to pay the unit of local government for any necessary increased costs," the Court of Appeals incorrectly added an additional criterion:

> "Furthermore, Headlee will apply only when a statutory requirement lessens the state's burden by shifting to units of local government the responsibility of providing services once provided or funded by the state."

It repeated this incorrect additional criterion in the last paragraph of its decision when it stated:

> "In sum, we hold that requiring defendant's compliance with MCL 324.3109(2) does not violate the Headlee amendment because, although it may financially burden the defendant, it does not shift the financial burden from the state to a unit of local government."

The Court of Appeals erroneously based this supplemental condition on a misreading of *Livingston County v Dep't of Management and Budget*, 430 Mich 635 (1988). *Livingston County* involved an increase in the operational requirements of an optional sanitary landfill, which landfill was not a required obligation of the county. It was only an optional operation or activity by the county. As stated by this Court in the first paragraph of its decision in *Livingston County*:

> "This case involves an interpretation of the Solid Waste Management Act and Const 1963, art. 9, § 29, a provision of the Headlee Amendment, which in part, requires the state to appropriate funds to units of local government for the necessary increased costs associated with 'an increase in the level of any activity or service beyond that required by existing law....' The specific question in this case is whether application of the provisions of the Solid Waste Management Act to plaintiff's sanitary landfill triggers art 9 § 29's state funding requirement. We hold that Const. 1963, art. 9, § 29 applies only to services and activities required by state law and that operation of a sanitary landfill is not a required service or activity. Thus, art 9, § 29 does not apply in this case. Therefore, we reverse the judgment of the Court of Appeals." (Emphasis added) 430 Mich at 637.

Livingston County did not involve and did not include any requirement that the state's burden had to be lessened to trigger the Headlee Amendment prohibition against the imposition of a new activity or service upon a local unit of government "by the legislature or any state agency" without a state appropriation of the necessary increased costs of such imposition. This condition added by the Court of Appeals does not comport with either the intent of the electorate or the amendment's clear language. Thus, there was no basis for the Court of Appeals to add that requirement and its addition of that requirement is error that should be reversed.

The Court of Appeals' addition of that requirement also resulted in an incorrect analysis as to whether an unfunded mandate of a new activity had improperly been imposed on Worth Township by Michigan Department of Environmental Quality ("MDEQ") as a "state agency"; the Court of Appeals did not go beyond a review of the language of the statute for purposes of the cost shifting criterion. It neglected to look at how the obligation mandated by the MDEQ as a "state agency" was a new obligation prohibited without state funding.

D. The Addition of the Cost Shifting Criterion Violates the Separation of Powers Clause of the Michigan Constitution.

Absent a basis for the addition in either the language or the intent, this additional condition constitutes legislation by the Michigan Court of Appeals in violation of the separation of powers between the judiciary and legislation. The Michigan Constitution provides at Article 3, Section 2:

> "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

As stated in *Schwartz v City of Flint*, 426 Mich 295, 306 (1986), quoting from the United States Supreme Court's decision in *Massachusetts v Mellon* 262 US 447; 435 Ct 597 (1923):

> "The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive, the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other."

The Michigan Court of Appeals also incorrectly cited *Durant, supra,* to support its legislative decision that there must also be a finding that the "new activity or service" imposed upon a unit of local government must "lessen the state burden" as a prerequisite to requiring the state to fund the necessary costs of that new activity or service under art 9, § 29. The *Durant* case involved the application of the first sentence of art 9, § 29 prohibiting the state from "reducing the state financed proportion of the necessary costs of any existing activity or service required of units of local government by state law" and not the second sentence of art 9, § 29, which is the sentence that is pertinent to the issues in this case. As discussed, the second sentence prohibits the state "or any state agency" from requiring a "new activity or service" to be added to a unit of local government without the state funding that new activity or service. Again, the obligation of the state to fund the new activity or service is completely devoid of any prerequisite that the state's burden be lessened, as incorrectly added by the Court of Appeals' decision.

For this reason as well, the addition by the Court of Appeals of the new cost shifting criterion is in error and should be overturned.

E. **The Unfunded Mandate That Worth Township Eliminate Pollution from Failing Private Septic Systems Constructed under Permits from the Sanilac County Health Department Violates the Headlee Amendment.**

The MDEQ, in requiring Worth Township to eliminate pollution from failing private septic systems constructed under permits from the Sanilac County Health Department and approved by that department, by demanding requiring Worth Township to construct a sanitary sewer collection and treatment system is an unfunded mandate contrary to the Headlee Constitutional Amendment. Although Worth Township has an option to construct such a system if it financially or legally could, townships have never previously been required by statute or regulation to construct a sewer system. Because this particular remedy was mandated by MDEQ and then accepted by the trial court and later by the Court of Appeals on remand, and because other options to abate the pollution from failing private septic tank systems are available and were suggested by Worth Township, this mandate from the MDEQ is an imposition by a "state agency" of a new activity on Worth Township in clear violation of the Headlee Amendment if there isn't appropriation of state funding for that new activity.

As noted previously, at no time prior to the within litigation and the demands of MDEQ has a township ever been required to construct a sanitary sewer plant and system by law or otherwise. The special assessment statutes argued by MDEQ to provide such authority in a township are permissive statutes and in addition are subject to the desires of the electorate within a given special assessment district. Act 116 of 1923 (MCL 41.411, et seq.), for example, requires a petition of the record owners of not less than 51% of the land actually created into a special assessment district to approve such construction and assessment of the costs. With only a small portion of Worth Township experiencing such failing septic tanks the likelihood of obtaining a 51%

authorizing petition to fund approximately $30,000,000 of costs of such a system is an improbability and even if secured, would result in an unmarketable special assessment bond issue for such costs.

Similarly, Act 188 of 1954 (MCL 41.721, et seq.) is another special assessment statute available to a township but again is subject to a petition of the record owners of more than 50% of the land within a special assessment district. Where a township attempts to proceed without such a petition, the project is subject to a veto by a petition of the record owners of lands constituting more than 20% of the total area of the proposed assessment district (MCL 41.723, et seq.)

Financing of a sanitary sewage system through township-wide taxation can only be accomplished through a favorable vote of the entire electorate of the township under Section 31 of Article 9 of the Headlee Constitutional Amendment.

A regular law township such as Worth Township is allocated by the county a tax of 1 mill under MCL 211.211 which is earmarked for the operation of the township government and would not begin to finance a $30,000,000 sanitary sewage treatment plant and system.

As stated by the Court of Appeals in *Michigan Municipal Liability and Property Pool v Muskegon*, 235 Mich App 183, 190 (1999):

> "However, a county's authority like the authority of townships, cities and villages is derived from and limited by the constitution and valid state statutes. . . Our Supreme Court 'has repeatedly stated, local governments have no inherent powers and possess only those limited powers which are expressly conferred upon them by the statute, constitution, or state statutes or which are necessarily implied therefrom. . . . A power is 'necessarily implied' if it is essential to the exercise of authority that is expressly granted".

Even MCL 324.4301 of the Natural Resources Environmental Protection Act only grants permission to local units of government to own, build or operate sanitary sewer systems. It in no manner mandates that activity.

In support of the foregoing, attention is called to the case of *McSwain v Redford Township*, 173 Mich App 492 (1988) which involved litigation requiring a township to correct the failing septic tanks, the court stated at page 500:

> "Although defendant could possibly have taken subsequent measures to control the sewage system (see, eq MCL 123.7429(2); MSA 5.570[12][2], we find nothing which mandated it to do so."

Similarly, the court stated in *Ahearn v Bloomfield Township*, 235 Mich App 486 (1999) at pages 494 and 495:

> "Of course, plaintiff's contentions rests on the assumption that defendant had an affirmative duty to continue providing sewer service to them. Plaintiffs have offered no authority directly in support of this proposition. Moreover, we have found nothing to support the existence of such a duty".

In *Damico v Shelby Township*, 64 Mich App 271 (1975) the court reviewed the Township and Village Public Improvement Act (MCL 41.411 et seq.) allowing a township to construct a sanitary sewer plant and system and stated at page 273, as previously hereinbefore submitted, that this "statute cannot be read as authorizing a township to proceed sua sponte to make public improvements". A valid petition of landowners is first required under MCL 41.412.

MDEQ's requirement as detailed in its complaint in the within cause and as supported by the circuit court and detailed in footnote 3 of the Court of Appeals decision on remand of December 11, 2012, is certainly a mandate by a "state agency" prohibited

under Sections 25 and 29 of the Headlee Constitutional Amendments as "new or expanded activities" "without full state financing" by a "state agency".

Similar to the executive order in *Adair v State*, *supra*, imposing extra duties upon school districts which violated the Headlee Amendment without state funding, MDEQ must be found to have equally violated Headlee with its unfunded demands. Emphasis here is on the actions of a "state agency" as distinguished from the state legislature.

In *Lake Isabella Dev, Inc v Village of Lake Isabella and MDEQ*, 259 Mich App 393 (2004), the Court of Appeals held that MDEQ could not by its Rule 33 shift its responsibility to correct unsanitary conditions under MCL 333.2455 to a local unit of government such as the Village of Lake Isabella, which "has no money, public works, law enforcement, or operating engineers to effectuate a safe, let alone efficient sewage system."

As stated in *Lake Isabella,* 259 Mich App at pages 411-412,

> "The parties also dispute whether the DEQ or the local municipality is in the better position to assess the costs of operations and maintenance on the users of the system. The DEQ argues that municipalities can use assessments to adequately fund and manage sewer systems in the event they are called on to take over a sewage system pursuant to a resolution. The village states that it has no funds to build a sewer system for its citizens, much less guarantee the obligations of a private developer. Where, as here, the village has no money, public works, law enforcement, or operating engineers to effectuate a safe, let alone efficient sewerage system, we fail to understand how the village is in a superior position than the DEQ to further the purpose of the statute, i.e., efficient enforcement of the laws preventing pollution of the waters of the state.
>
> ". . . We find that Rule 33 is arbitrary and capricious because it constitutes an unlawful delegation of discretionary power to municipalities, seeks to impose operational mandates upon municipalities ill-adapted to comply with those mandates, and is unnecessary to the DEQ for enforcement." (Emphasis added)

Thus, prior to the MDEQ's demand or mandate that it do so, Worth Township did not have an obligation to correct unsanitary conditions within or emanating from within its boundaries by construction of a sewage collection and treatment system.

II. Even If the Headlee Amendment Funding Obligation Only Applies When There Is an Unfunded State Mandate that Lessens the State's Financial Burden By Shifting the Burden to a Local Unit of Government, that Condition Is Met In this Case.

MCL 324.3109(2) provides:

> "The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the department. If the discharge is not the subject of a valid permit issued by the department, a municipality responsible for the discharge may be subject to the remedies provided in section 3115. If the discharge is subject to a valid permit issued by the department pursuant to section 3112, and is in violation of that permit, a municipality responsible for the discharge is subject to the penalties described in section 3115." (Emphasis added)

This section was enacted by the state legislature post-Headlee. It is entirely different than MCL 323.1 et. seq., improperly argued by MDEQ and relied upon by the Michigan Court of Appeals to constitute a pre-Headlee provision which avoided the impact of the Headlee Amendment requiring state funding of the added costs of a new activity or service imposed on a local unit of government.

The predecessor statute was substantially different than MCL 324.3109(2) in that it did not include the "state, its agencies and the county" as equally responsible agencies and units of government. It further required administrative hearings before any liability could be determined followed by possible review by the courts under the Administrative Procedures Act. There was no mandate of township responsibility and none had ever been previously imposed.

The Court of Appeals in *White Lake Improvement Association v City of Whitehall*, 22 Mich App 262 (1970) emphasized the distinction between pre-Headlee and post-Headlee statutory enactments by rejecting any injunctive relief against pollution under the pre-Headlee legislation until a public hearing was conducted by the Water Resources Commission under MCL 323.7 and 323.8. This required public hearing was notwithstanding that the City of Whitehall and the Water Resources Commission had entered into an agreement which purportedly resolved the pollution issue.

The court further concluded that section 7 of the prior pre-Headlee Act "contemplates that orders of the commission are conclusive only to those who have had an opportunity to be present at a hearing." 22 Mich App at page 277.

The post-Headlee statute addressing a municipality's implied responsibility for private sewage discharge within its borders defines "municipality" at MCL 324.3101(M) as follows:

> "'Municipality' means this state, a county, city, village, or township, or an agency or instrumentality of any of these entities".

This additional language clearly imposes equal responsibility upon MDEQ and a county health department for any discharge of polluting sewage within a county or the state. The imposition of such responsibility on MDEQ coincides with the duties the legislature has imposed under the Natural Resources and Environmental Protection Act at MCL 324.3103 and 324.3112, among others, in said Act as follows.

MCL 324.3103 provides:

> "(1) The department shall protect and conserve the water resources of the state and shall have control of the pollution of surface or underground waters of the state and the great lakes, which are or may be affected by waste disposal of any person...."

"(2) The department shall enforce this part and may promulgate rules as it considers necessary to carry out its duties under this part...."

"(3) The department may promulgate rules and take other actions as may be necessary to comply with the federal Water Pollution Control Act, 33 USC 1251 to 1387, and to expend funds available under such law for extension or improvement of the state or interstate program for prevention and control of water pollution...." (Emphasis added.)

MCL 324.3112 hereinbefore referred to, provides as follows:

"(1) A person shall not discharge any waste or waste affluent into the waters of this state until a person is in possession of a valid permit from the department." [e.g., private septic tank owners]

"(4) If the department determines that a person is causing or is about to cause unlawful pollution of the waters of this state, the department may notify the alleged defender of its determination and enter an order requiring the person to abate the pollution or refer the matter to the Attorney General for legal action or both." (Emphasis added)

The foregoing duties imposed upon MDEQ by the legislature clearly direct MDEQ as the responsible agency to eliminate existing pollution. MDEQ is authorized to "expend funds" . . . "for prevention and control of water pollution" and it may require the "person . . . causing the pollution . . . to abate the pollution.

For MDEQ as a "state agency" under § 29 of the Headlee amendment to abdicate its responsibilities under MCL 324.3109(2) and NREPA and transfer the same to a small township with no other legislative mandate in this connection certainly "lessens the state's burden by shifting to units of local government the responsibility of providing services once provided or funded by the state". (*Livingston County*, 430 Mich at page 645 cited and relied upon by the Court of Appeals) Although amici curiae strenuously disagree with the addition of this condition to Headlee's mandate for state funding, if this Court were to uphold this additional condition, it is satisfied in this case.

As previously indicated, MDEQ is equally responsible under MCL 324.3109(2) for the correction of pollution occurring within the state's boundaries.

In the case at bar, MDEQ as a "state agency" under the language of Headlee, is abdicating its responsibility to "correct unsanitary conditions" and attempting to transfer such responsibility to a municipality such as Worth Township least capable of correcting the situation without accompanying such transfer with state funding of the necessary costs of such correction. Over the years sanitary sewage treatment plans and systems have been substantially financed by grants from the State to counties or municipalities that could not otherwise finance such systems.

Thus, assuming for argument purposes that the Court of Appeals decision in this case to add a new condition to Headlee that any shifting of state responsibility must "lessen the state's burden" is valid, which validity amici curiae vigorously opposes, such condition is fully satisfied in this case and the Court of Appeals decision should be overturned for that reason.

CONCLUSION

The common, unobtuse language and intent of the electorate in initiating and confirming the Headlee Constitutional Amendments prohibiting the mandatory addition of new activities or services upon units of local governmental by the state legislature or any state agency without state funding of the necessary increase of costs of the same is clear and unambiguous and cannot be encroached upon or added to by judicial legislation. The addition of a necessary finding of a "lessening of the state's burden" by the addition of a new responsibility upon a local unit of government to avoid state funding of the increased costs to the unit cannot be implied or supported either by the

plain language of Const 1963, art 9, §§ 25 and 29 or by the purpose and intent of the Headlee Amendment of which those sections are a part. It is also an obvious violation by the Court of Appeals of the Separation of Power Clause of the Constitution.

Imposition of this additional requirement will burden local units of government with the cost of these unfunded obligations and are likely to result in increased costs to tax paying residents and businesses within those jurisdictions, all contrary to the central intent and purposes of the Headlee Amendment initiated and confirmed by the electorate.

Furthermore, even if this additional condition were to be upheld, it has been satisfied in this case by the fact that MDEQ is primarily responsible under NREPA for protecting the environment against pollution and is attempting to shift its burden onto a local unit of government ill-equipped to comply with such new required activity without complete state funding.

At no time previous to the within lawsuit has a township or drain commission been required by state law or regulation to construct a sewage treatment plant and system. It certainly is a "new activity or service beyond that required by existing law" which per Const 1963, art 9, §§ 25 and 29, must be funded by the state.

Respectfully Submitted,

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