STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE CHARTER TOWNSHIP OF HARING, a Michigan Charter Township,

Plaintiff/Appellant,

v

THE CITY OF CADILLAC, a Michigan Municipal Corporation,

Defendant/Appellee.

and

THE TOWNSHIP OF SELMA, a Michigan General Law Township,

Plaintiff/Appellant,

and

THE TOWNSHIP OF CLAM LAKE, a Michigan General Law Township,

Plaintiff,

v

THE CITY OF CADILLAC, a Michigan Municipal Corporation,

Defendant/Appellee.

Court of Appeal Docket No. 292122

Wexford County Circuit Court Case No. 08-20967-CK

Hon. William M. Faberman

Court of Appeals Docket No. 292164

Wexford County Circuit Court Case No. 08-21381-CK

Hon. William M. Faberman

AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE

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The trial court would say, "Yes."

Defendant says, "Yes."

Amicus Curiae, Michigan Municipal League, says "Yes."

Plaintiffs would say, "No."

Amicus Curiae, Michigan Townships Association, would say, "No."

II. DID THE TRIAL COURT PROPERLY FIND THAT THE CITY IS NOT A "PUBLIC UTILITY" SUCH THAT IT COULD NOT LEGALLY CEASE TO PROVIDE WASTEWATER TREATMENT SERVICES TO THE TOWNSHIPS?

The trial court would say, "Yes."

Defendant would say, "Yes."

Amicus Curiae, Michigan Municipal League, says "Yes."

Plaintiffs would say, "No."

Amicus Curiae, Michigan Townships Association, would say, "No."

STATEMENT OF FACTS

Amicus curiae, Michigan Municipal League, adopts the Statement of Facts set forth in the Brief on Appeal of Defendant/Appellee, City of Cadillac.

STATEMENT REGARDING THE INTEREST OF THE MICHIGAN MUNICIPAL LEAGUE IN THIS MATTER

The Michigan Municipal League, founded in 1899, represents the interests of over 520 Michigan cities, villages, and urban townships. The League has an interest in this matter because of its implications for other publicly owned wastewater treatment plants in Michigan. There are approximately 261 such facilities in Michigan, the vast majority of which provide wastewater treatment services to other municipal entities pursuant to contracts which contain termination provisions similar to those at issue here. A decision by this Court that the municipal owner of a wastewater treatment facility is required to continue to provide wastewater services past the expiration date of the contract would have serious and far-reaching effects. It is for this reason that the League submits this Amicus Brief in support of the City of Cadillac's position in this matter.

ARGUMENT

I. INTRODUCTION.

The City of Cadillac ("the City") and Wexford County in 1975 submitted to the Environmental Protection Agency ("EPA") a long term plan (the "Facilities Plan") for improving the region's wastewater collection systems. The Facilities Plan was a necessary precursor for obtaining federal grant funding to upgrade the City's wastewater system and to extend it into areas outside the City's boundaries. Following approval of the Facilities Plan, the townships surrounding the City had the option of participating in the wastewater project. Initially, three townships, Clam Lake, Cherry Grove, and Selma, passed resolutions agreeing to participate in the project. In 1977, the City and Wexford County entered into a contract for the provision of wastewater services to those townships. Haring Township subsequently agreed to participate in the project and a second contract between the City and the County was entered into in 1980.

Each of these contracts sets a specific date for termination of the agreement, i.e. May 12, 2017. The Appellants in this matter, Haring Charter Township and Selma Township (collectively "the Townships"), filed the instant lawsuit, seeking a judicial declaration that the explicit contract termination date is not really the termination date and that the City is required to continue to provide wastewater treatment services to the Townships indefinitely into the future. The trial court properly declined to do so, finding that the contracts for the provision of wastewater services were not ambiguous and must be interpreted according to their terms. The court also properly found that the City was not a "public utility" such that it could not legally discontinue providing wastewater treatment services to the Townships.

The Townships attempt to cloak this controversy in the intricacies of the Clean Water Act, 33 USC § 1281 *et seq.*, EPA regulations, and the financing of municipal wastewater treat-

ment facilities. While the dispute between these parties may touch on those matters, it is essentially a contract dispute, governed by state contract law. Michigan contract law prohibits the outcome urged by the Townships because it does not allow a court to re-write a clear and unambiguous contract or to force a party to enter into a contract to which it has not agreed. As will be more fully set forth below, the relief sought by the Townships must be denied.

II. STANDARD OF REVIEW.

Amicus Curiae concurs with both Appellants and the City of Cadillac that the appropriate standard of review is de novo, in that this appeal is from the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) and because the appeal involves questions of statutory and contract interpretation. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999), *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

III. THE TRIAL COURT PROPERLY GRANTED PARTIAL SUMMARY DISPOSITION TO DEFENDANT, CITY OF CADILLAC, ON PLAINTIFFS' CLAIM THAT THE CITY IS REQUIRED TO CONTINUE INDEFINITELY TO PROVIDE WASTEWATER TREATMENT SERVICES TO PLAINTIFFS, WHERE THE CONTRACTS FOR SERVICE CLEARLY AND UNAMBIGUOUSLY PROVIDE FOR A SPECIFIC TERMINATION DATE.

The trial court properly rejected the Townships' claim that the contracts at issue here were ambiguous, finding that the language used in the contracts regarding their termination date is "clear and explicit." (Opinion, p. 5.[1]) In reaching that conclusion, the court found that the term "capacity," on which the Townships' argument is based, must be understood in the context of the entire contract. The trial court found it particularly significant that the first numbered paragraphs of each contract clearly and unambiguously state that the City agrees to provide "sewage treatment and disposal **service**." (Emphasis added.) Considered in that context:

[1] The trial court's opinion is attached hereto as Exhibit 1.

> The Court finds that there is no ambiguity in either contract as a result of plaintiffs having "purchased capacity" in the defendant's system. Both contracts provide for a specific term of years for the purchase of a service from the defendant. One of the defining terms of the service and the limits to what its service may be provided has to do with capacity to treat sewage water. The contract properly defines that as capacity and identifies it as the right to receive service as a specified number of gallons per day of average flow. Any other reading of the contract would be inappropriate.

(Opinion, p. 8.) The trial court therefore concluded that the City was entitled to summary disposition. The court did not err in this conclusion and its decision should be affirmed.

A. Michigan Law Requires that Clear and Unambiguous Contracts be Enforced According to Their Terms.

It is a basic tenet of contract law that "[c]lear, unambiguous, and definite contract language must be enforced as written and courts may not write a different contract for the parties or consider extrinsic evidence to determine the parties' intent." *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998), quoting *Sheldon-Seatz, Inc v Coles*, 319 Mich 401, 406-407; 29 NW2d 832 (1947). "A contract that is clear and unambiguous is construed as a matter of law." *Port Huron Ed Ass'n, MEA/NEA v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). The contracts, including their expiration date, must therefore be enforced according to their clear and unambiguous terms.

B. The Court Cannot Write a New Contract for the Parties or Force the City to Enter into a New Contract with the Townships.

The Townships essentially ask the Court to write a new contract which requires the City to continue to provide wastewater treatment services beyond the expiration of the existing contract. This the Court cannot do. "Clear, unambiguous, and definite contractual language must be enforced as written, and courts may not write a different contract for the parties." *Wausau Underwriters Ins Co v Ajax Paving Ind, Inc*, 256 Mich App 646, 650; 671 NW2d 539 (2003). See also, *Mahnick v Bell Co*, 256 Mich App 154, 157; 662 NW2d 830 (2003).

Nor can the Court require the City to enter into new contracts with the Townships because to do so would violate another of the basic tenets of contract law, which is that contracts can only be formed by the **mutual consent** of the parties. *Burkhardt*, *supra*, at 655. Put another way, "[i]n order to form a valid contract, there must be a meeting of the minds on all the material facts." *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). See also, *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 453; 733 NW2d 766 (2006) (A "valid contract requires mutual assent or a meeting of the minds on all the essential terms.") A modification of the existing contract would similarly require the consent of all parties to the contract. *Port Huron Ed Ass'n*, *supra* at 326-327. The "freedom to contract does not authorize a party to *unilaterally* alter an existing bilateral agreement." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003) (emphasis in original).

C. <u>The Contracts, by their Express Terms, Expire on a Date Certain.</u>

The first of the two contracts at issue here is dated May 13, 1977. It provides, *inter alia*:

> This agreement shall become effective upon execution by the duly authorized representatives of the parties hereto and approval and confirmation by the Commission of the City of Cadillac, the Board of Public Works of the County of Wexford and the Wexford County Board of Commissioners, **and shall remain in effect for a period of forty (40) years from the date hereof**, and at the end of said forty (40) year period, this agreement **may be renewed** for successive ten (10) year terms, **by mutual agreement**.

See, Exhibit 4 to Appellee's Brief on Appeal at p. 8 (emphasis added). The April 8, 1980 contract for Haring Township has a similar provision:

> This agreement shall become effective only upon its execution by the authorized representatives of the parties hereto after its approval and authorization for execution by the Commission of the City of Cadillac, the Board of the Department of Public Works and the Wexford County Board of Commissioners and the simultaneous execution of an agreement between the County and Haring Township after approval and authorization of execution of said agreement by the respective parties to that agreement. Once effective, **the agreement shall remain in effect until May 12 of the year 2017.** At that time, the agreement **may be renewed if the**

> **parties agree** for successive ten (10) year terms. Either party may terminate this agreement at the end of the initial or subsequent terms upon a two (2) year written notice to the other party.[2]

See, Exhibit 5 to Appellee's Brief on Appeal at pp. 10-11 (emphasis added).

There is nothing ambiguous about this language. The expiration dates for these contracts could not be clearer or more explicit. Significantly, the contracts explicitly state that the **agreements**, not part of the agreements or only some terms of the agreements, expire on May 12, 2017. Thus, by their unambiguous terms, these contracts expire in their entirety on May 12, 2017, unless the parties **by mutual consent** agree to extend them.

D. The Townships Wrongfully Attempt to Create an Ambiguity in the Contracts Where None Exists.

The Townships, however, seek to avoid the outcome required by the clear and unambiguous language of the contracts by setting forth a novel argument that the contracts are in fact, ambiguous, and that the expiration date is not really the expiration date. According to the Townships, the May 12, 2017, expiration date affects only the "particular terms and conditions of the 1977 and 1980 contracts" (Appellants' Brief at p. 3), but not the City's "legal duty to continue providing sewage treatment and disposal services to the Townships after May 12, 2017 . . . ." *Id.*

Notably, the contracts say no such thing. A court cannot "create ambiguity where none exists." *Edgar's Warehouse, Inc v United States Fidelity & Guaranty Co*, 375 Mich 598, 602; 134 NW2d 746 (1965), *Smith v Physicians Health Plan, Inc*, 444 Mich 743, 759; 514 NW2d 150 (1994). According to the Townships, however, the "ostensible May 12, 2017 expiration date of the 1977 and 1980 Contracts is rendered ambiguous in light of conflicting and irreconcilable

[2] The Townships do not dispute that the City timely provided timely notice of its intent to terminate the contracts on expiration of their initial term. See p. 2 of Appellants' Brief on Appeal: "Prior to the onset of this litigation, the City provided written notice to the Townships that . . . [it] did in fact intend to cease and desist provide sewage treatment and disposal services to the Townships" as of May 12, 2017.

provisions of the 1977 and 1980 Contracts (i.e., a patent ambiguity), and is made even more ambiguous by external factors (i.e., latent ambiguities) which show that the City has a contractual duty—imposed by applicable statutory law and the common law providing [sic] sewer services to the Townships after May 12, 2017."[3] (Appellants' Brief at pp. 14-15.)

It is true that the a contract must be construed in its entirety to determine the intent of the parties and to give legal effect to its provisions as a whole. *Perry v Sied*, 461 Mich 680, 689 fn 10; 611 NW2d 516 (2000). It is also true that a "contract is ambiguous when its provisions are capable of conflicting interpretations." *Klapp v United Ins Group Agency, Inc*, 486 Mich 459, 453; 663 NW2d 447 (2003); see also, *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). When one examines the "ambiguities" alleged to exist by the Townships, however, they turn out to be illusory.

1. <u>There is no patent ambiguity in the Contracts.</u>

First, as to the "patent ambiguity" alleged by the Townships, the Townships argue that to apply the termination date literally would be "to create an insensible and irreconcilable conflict with other provisions of the 1977 and 1980 Contracts, which unambiguously provide for the Townships' purchase and ownership of capacity in the City System." (Appellants' Brief, p. 15.) This argument, which the City of Cadillac has aptly dubbed the "ownership theory," cannot be sustained. As is cogently discussed at length in the City's Brief at pp. 17-22 the Townships did not purchase an ownership interest in the City's wastewater treatment system, but rather purchased a service.

The 1977 contract language on which the Townships' argument is based provides that "the city agrees to grant to the County capacity" and that "the county has agreed . . . to buy into

[3] The Townships do not explain how the City may have a "contractual duty" imposed not by contract but rather by statutory and common law.

the City System . . . ." (See Exhibit 4 to Appellee's Brief, ¶ 1.) The 1980 contract similarly provides that the "City agrees to sell and the County agrees to purchase sewage treatment and disposal service for the Haring Township . . . up to a [set] maximum [volume] . . . ." (See Exhibit 5 to Appellee's Brief, ¶ 1.) It is on this slender thread that the Townships construct their argument that they have an **ownership interest** in the City's wastewater system that survives the expiration of the contracts and therefore that there is a patent ambiguity in the contracts. The trial court properly rejected this claim by the Townships.

The contract language regarding "capacity" and "buy in" must be construed in light of the intent and purpose for the contracts, which was for the sale of wastewater treatment services: "The City, to the best of its ability, agrees to sell . . . **sewage treatment and disposal service** for the County System." *Perry, supra.* (See Exhibit 4 to Appellee's Brief, ¶ 1; emphasis added.) The fact that the contracts reference the purchase of **capacity** in the system does not change the fact that these contracts are for the provision of wastewater treatment services.

There is no patent ambiguity in a contract containing a termination date that requires the buyer to pay not only for service but also for a certain capacity. It is absolutely commonplace for parties to enter into contracts for the provision of services without the buyer obtaining some sort of property interest in the service being provided. A hypothetical example might help to illustrate this point. Assume that the City owned a landfill and a fleet of garbage trucks rather than a wastewater treatment system. Assume also that the City entered into forty-year contracts with the Townships pursuant to which the City agreed to provide solid waste services to the Townships and that the Townships in turn were required not only to pay for the pick-up and disposal service, but were also required to pay for sufficient **capacity** in the trucks used to haul waste to the landfill to ensure that the Townships' solid waste disposal needs would be met for a period of forty

years. When the forty-year contracts expired, would the Townships own the capacity in those trucks? No, they would not. Would they own a property interest in the trucks? No. Their rights to the capacity, along with the solid waste service, would end with the termination of the contract. The same logic applies to components of the wastewater system (such as the interceptor sewers, pump stations, and force mains identified by the Townships at p. 6 of their Brief) that constitute "capacity."

This is not, as the Townships would have it, a "nonsensical" outcome. (See Appellants' Brief at p. 19.) It is, instead, an outcome that is completely consistent with the language of the contracts, which require the City to sell "sewage treatment and disposal **service**" to the County for the benefit of the Townships. (See the 1977 Agreement at ¶ 1 and the 1980 Agreement at ¶ 1 (emphasis added), Exhibits 4 and 5 to Appellee's Brief on Appeal.) While the contracts imposed on the City a contractual duty to provide sewage treatment and disposal **service** to the Townships, the Townships had a corresponding duty not only to pay for the cost of wastewater treatment itself but also to pay the cost of ensuring that the system was capable of handling up to a certain maximum flow of wastewater from the Townships. There is nothing about this arrangement that requires or even suggests, as argued by the Townships, that the purchase of capacity was "an outright transfer of ownership to the buying party." (See Appellants' Brief at p. 19.[4]) There being no transfer of ownership in the system, it follows that there is no patent ambiguity in the fact that the contracts expire by their terms on May 12, 2017.

[4] In response to the Townships' argument at p. 19 of their Brief that they will continue to own capacity past 2017 because the contracts "indisputably do *not* provide" for the conveyance of that capacity back to the City, it must be pointed out that the contracts also do not provide for the conveyance of capacity **to** the Townships in the first place. The Townships do not now and never have held title to any portion of the City's system.

The failure of the Townships' "ownership theory" necessarily means that all of its arguments based on the faulty assumption that it "owns" capacity also fail as, for example, its argument that the City can never "use the Townships' owned capacity," thereby "perpetually relegat[ing] [that capacity] to obscurity and disuse." See Townships' Brief, p. 20.

2. <u>There is also no latent ambiguity in the Contracts.</u>

The trial court also rejected the Townships' argument that there is a latent ambiguity in the contracts. In determining whether a contract provision is ambiguous, a court is to give the language used its ordinary and plain meaning to see if the words may reasonably be understood in different ways. *Rossow v Brentwood Farms Development, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002). Under certain circumstances, a court may look to extrinsic evidence outside the four corners of the contract to determine the existence of a latent ambiguity. *City of Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005). Extrinsic evidence may also be admissible "to indicate the actual intent of the parties as an aid to the construction of the contract." *Id.*, citing *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575; 127 NW2d 340 (1964).

There are, however, limits to the use of extrinsic evidence to show the existence of a latent ambiguity. Extrinsic evidence may be considered only when it "creates the possibility of more than one meaning." *In re Woodworth Trust*, 196 Mich App 326, 328; 492 NW2d 818 (1992). A contractual provision is not ambiguous merely because the parties ascribe different meanings to it, *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354-355; 596 NW2d 190 (1999), or because a word or phrase has more than one dictionary definition, *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 54; 723 NW2d 922 (2006).

3. Neither the Clean Water Act nor the EPA regulations require the City to continue to provide service to the Townships after the expiration of the Contracts.

The Townships attempt to create a latent ambiguity in the contracts by pointing to EPA regulations adopted pursuant to the Clean Water Act. Here again, the City of Cadillac has an apt description for this argument, i.e., the "bootstrapped federal regulation theory." The trial court properly rejected this argument.

Amicus curiae will not repeat the City's well-reasoned analysis as to why the Clean Water Act, which does not create a cause of action accruing to the Townships, does not create a latent ambiguity in the subject contracts. Amicus will, however, respond to one of the points raised by the Townships in support of their latent ambiguity argument.

a. The EPA regulations do not require the City to provide wastewater service for the "design life" of the system.

The EPA regulations upon which the Townships rely had not yet been promulgated at the time the City received grant funding for the upgrade and expansion of its wastewater treatment system in 1975. The regulations did not take effect until October 1, 1978. 43 CFR 44,022-44,070. Under the 1974 regulations in effect at the time the City received grant funding, the City was not required to maintain its wastewater treatment system in perpetuity. Rather, it was required to maintain the system for its "service life" as defined by the regulations. 39 CFR 5269. The regulations also defined a range for the service life for various components of a system, ranging from 10 to 15 years for auxiliary equipment to 30 to 50 years for structures. *Id.* Under the Facilities Plan approved by the EPA, none of the components of the City's system had a "service life" exceeding 40 years.

The Townships argue, however, that because (1) the 1978 regulations require the City to maintain and operate the system for the "design life of the treatment works" and (2) according to

their expert the "design life" of the system extends well beyond 2017, the City is therefore required to continue to provide wastewater treatment service to the Townships past the expiration date of the Contracts. This is a non sequitur. Even if it were true that the 1978 regulations were in effect when the Facilities Plan was prepared, which they were not, the requirement that the City "maintain and operate" the system for its design life does not require the conclusion that it must also continue to provide services to the Townships after the expiration of the contracts. As noted by the trial court, to "hold that the Court should find an ambiguity based upon Federal requirements of design life is contrary to the parties intentions." (Opinion, p. 11.)

In rejecting the Townships' attempt to find ambiguity in the contracts on that basis of the "design life" of the system, the trial court properly looked "to the available evidence that is provided by the parties when evaluating whether or not such an ambiguity truly exists." (Opinion, p. 9.) The court considered it significant that such evidence included:

- The depreciation rate schedules attached to the contracts provided for a maximum forty-year depreciation period, with the depreciation periods for many components being fifteen or twenty years;
- The Facilities Plan refers to a twenty-year planning period; and,
- Under Michigan law, the City could not enter into a contract for the provision of wastewater treatment services for a period longer than forty years, MCL 123.742(1).

From this evidence, the court found it "clear that those involved with the Facilities Plan were anticipating at the maximum a 40 year life." (Opinion, p. 11.) With regard to the statutory limitation on municipal contracts, the court specifically found that the affidavit of the Townships' expert regarding the "design life" of the system did not create a material issue of fact because "to

do so would fly in the face of the presumption that the parties knew the law and would not contract for a time period shorter than the design life. *Id.*

b. The EPA has previously rejected the Townships "design life" argument.

Importantly, as discussed at length in the City's Brief, the EPA has **rejected** the exact argument that the Townships make here. In 1966, the City of Arlington entered into a contract with the City of Fort Worth pursuant to which a portion of Arlington would receive wastewater treatment services from Fort Worth's Village Creek Wastewater Treatment Plant. The treatment plant was constructed in part with federal funds under the Clean Water Act, based upon representations that the facility would serve 22 neighboring communities. The contract between Arlington and Forth Worth expired by its terms on February 14, 2001.

Fort Worth began negotiating in the mid-1980's with the communities that received treatment services from the Village Creek treatment plant. When negotiations with Arlington broke down over the issue of rates for continued service, Fort Worth notified Arlington on December 12, 1988, that the Village Creek treatment plant would not continue to serve Arlington after the expiration of the contract. Arlington brought a state court lawsuit seeking to have the court require Fort Worth to continue to provide service. The trial court rejected Arlington's claim that Fort Worth was required to provide wastewater treatment service after the expiration of the contract. That decision was upheld on appeal. *City of Arlington v City of Fort Worth*, 844 SW2d 875 (Tex App—Fort Worth 1992). Arlington then brought its complaint to the EPA in the context of permit proceedings, culminating in a decision by the Environmental Appeals Board, *In re City of Fort Worth,* 6 EAD 392 (NPDES Appeal No. 95-8, decided April 5, 1996).[5]

[5] Attached hereto as Exhibit 2.

The gist of Arlington's argument was essentially the same as the argument made by the Townships here, i.e. that Fort Worth had a "duty to serve" that required it to provide continued service to Arlington past the expiration of the contract for the "useful life" of the treatment plant. (Exhibit 2, p. 398.) Arlington argued that this "duty to serve" was independent of the contract and arose under the Clean Water Act, the EPA regulations, the regional wastewater management plan, and the fact that Fort Worth had received federal grant money.[6]

The Appeals Board rejected Arlington's claim that it was entitled to continue to use the wastewater treatment facility for its useful life, finding no inconsistency between Fort Worth's permit (which was silent on any "duty to serve") and the applicable regional wastewater treatment plan. *Id.* at 403-404. The Board found no "compelling legal considerations for reviewing the Region's refusal to include a 'duty to serve' condition in the permit" and also found that "Arlington's legal arguments supporting its requested [duty to serve] condition are without merit." *Id.* at 403.

This decision by the EPA Appeals Board cannot be distinguished in any substantive way from the matter before this Court. The Townships, like Arlington, argue that the City's receipt of federal funds, the Clean Water Act, EPA regulations, and the Facilities Plan require the City to continue to provide service past the date of the contract. This is exactly the argument rejected by the Appeals Board in the Fort Worth decision.

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[6] The Townships argue that if the City were to cease providing wastewater treatment services to the Townships, it would thereby "cease using the grant monies 'solely for the purposes of the project as approved'" and that this would "thwart the essential purpose of the EPA's entire construction grant program . . ." (See Appellants' Brief on Appeal, p. 30.) It is important for the Court to bear in mind not only that all grant monies received by the City for the expansion and upgrade of the treatment system were spent decades ago but also that the City has made a significant additional financial investment—over $6 million in improvements to the system since these contracts were executed—to keep the system operational and up to state and federal standards, without further contribution by the Townships. (See Appellee's Brief on Appeal, p. 22; Opinion, p. 3.)

c. The EPA has refused to support the Townships' claim.

If the Townships were correct in their argument that federal law requires the City to continue to provide service past the expiration date of the contracts, one might reasonably expect the EPA, as the agency with the responsibility of enforcing the Clean Water Act, to step into this fray in support of the Townships. Significant, as pointed out by the City at pp. 40-42 of its Brief, not only has it not done so, but it instead has expressly declined a request by the Townships to provide an opinion on whether the City has a legal obligation to continue to provide service. (See, Exhibit 16 to Appellee's Brief on Appeal.)

IV. THE TRIAL COURT PROPERLY FOUND THAT THE CITY IS NOT A "PUBLIC UTILITY" SUCH THAT IT COULD NOT LEGALLY CEASE TO PROVIDE WASTEWATER TREATMENT SERVICES TO THE TOWNSHIPS.

The Townships also claim that the City is a "public utility" and therefore that it is prohibited under Michigan law from discontinuing sewage treatment services to the Townships. The trial court properly rejected this claim, finding that the authority cited by the Townships, in particular *Nelson v County of Wayne*, 289 Mich 284; 286 NW 617 (1930), did not, in fact, support their position.

A. The Trial Court Rejected the Townships' Argument that the City Had "Held Itself Out" as a Public Utility.

The Townships argued in the trial court that the City had "held itself out as a public utility within certain areas of the Townships" by "establish[ing] itself as the sole and exclusive provider of public wastewater treatment and disposal services within the Townships . . . ." (Appellants' Brief on Appeal, p. 40.) The Townships cite the *Nelson* decision as "holding that extraterritorial part of City water main was a public utility, such that there could be no discrimination in the provision of public water to potential users located in the area of the extraterritorial area wa-

ter main." *Id.* Justice Chandler, the author of the *Nelson* decision, likely would not recognize his opinion from that description.

In 1929, Wayne County entered into an agreement with the City of Detroit for the provision of public water to a facility known as the "Wayne County Training School," located about five miles from the Detroit city limits. Under the provisions of the agreement, Wayne County would bear the cost of constructing a water main from the school to the terminus of the city's water main, but most of the components of the system would become the property of the city. The agreement also provided that Detroit could not agree to use the system components constructed by Wayne County to provide service to other users without the consent of the County. Over the next several years, several individual residential tap-ins to the system were approved.

In 1937, the plaintiff in *Nelson* applied for permission to tap into the main in order to supply water to his home in a subdivision in Wayne County. The subdivision contained 66 lots. There was evidence that the plaintiff had entered into land contracts for the sale of several lots in the subdivision and that the contracts contained language to the effect that plaintiff would put a water main through the subdivision. Under these circumstances, Wayne County refused to approve the requested tap-in. Plaintiff sued the county and the city, seeking a writ of mandamus to compel the defendants to allow him to tap into the system. The trial court denied the writ and the plaintiff appealed. Although the Supreme Court described Detroit's water system as a "municipal public utility" it nevertheless upheld the conclusion of the trial court. In doing so, it emphasized that municipalities have considerable discretion to manage and operate public services as they see fit and to enter into contracts for such services as they deem appropriate. *Id.* at 297, 298. The Court concluded:

> We therefore hold that the [Detroit] Board of Water Commissioners was acting within its legal rights in entering into the contract, and that in permitting the

> Board of Wayne County Auditors to exercise control over its operations, as in said contract provided, it did not illegally discriminate against the plaintiff or any other person who might desire to obtain a water supply from the main . . . . The contract is not against public policy, nor is it in contravention of the provision of 1 Comp. Laws, 1929, Sec. 2445 et seq. (Stat. Ann. Sec. 5.2581 et seq.), as claimed by appellant.[7]

The Court thus supported the right of the municipalities to make decisions regarding the provision of municipal services and to enter into contracts for such services, without thereby assuming a responsibility to provide such services to everyone who asked for it. The *Nelson* decision, far from supporting the Townships "public utility" argument, instead supports the right of the City to enter into enforceable contracts for the provision of wastewater treatment services.

It cannot be serious disputed that the trial court here properly rejected the Townships' "public utility" argument. As the court stated:

> For the Court to determine that the defendant is required to provide waste water treatment services to the plaintiffs as a result of the status of public utility would simply avoid the termination date on the contracts. It is clear that the law permits both the defendant and the plaintiffs in this case to enter into such contracts for the collection of waste water. To determine that by so doing that the defendant could be precluded from refusing service would avoid the necessity of the contracts. The contracts in and of themselves indicate that it is not being done in any arbitrary fashion, but rather in an arms length transaction.

(Opinion, pp. 12-13.)

B. <u>The Townships' "Doomsday" Scenario Must be Rejected by this Court.</u>

Finally, both the Appellants and Amicus Curiae, Michigan Townships Association, paint a grim scenario of what will take place if the City is not required to continue to provide wastewater treatment services past the expiration of the contract. According to the Townships, the "results would be catastrophic" and if the City were to discontinue service:

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[7] The *Nelson* plaintiff argued that the referenced statute required the city "to retain such control of its water mains as will enable it to serve all patrons similarly situated along its water mains without discrimination." *Id.* p. 296.

> [I]t would take less than 24 hours for untreated sewage waste to start backing up into approximately 1,100 structures and buildings within the Townships. Once the sewage starts backups started to occur, untreated wastewater would flow into Township buildings and structures at a minimum rate of 30 gallons per minute, undoubtedly resulting in gross contamination of the state's surface water and groundwater with untreated sewage.

(Appellants' Brief on Appeal, pp. 41-42.) The Amicus Brief of the Michigan Townships Association echoes this theme, claiming that the "city's cancellation of its sanitary sewer service to these township areas could certainly cause major pollution and health hazards to the public." (Amicus Brief, p. 12.)

The Court should not be swayed by these hyperbolic and unfounded claims. The City is required by contract to continue to provide wastewater treatment services to these Townships until May 12, 2017. If the Townships and the City are unable to agree on the terms of a new contract for wastewater treatment services, the Townships have more than ample time in which to construct their own treatment facilities.

This situation is clearly distinguishable from that present in *Washtenaw Cty Health Dep't v T&M Chevrolet, Inc*, 406 Mich 518; 280 NW2d 822 (1979), a case relied on by the Township Association. In that case, the City of Saline owned and operated a public sewer system. A portion of one of the sewer lines was located under Michigan Avenue in Pittsfield Township. Two businesses, T&M Chevrolet and Lyle Wheel & Axle Service, owned property in the township abutting Michigan Avenue. The septic tanks on those properties were malfunctioning and raw sewage was being discharged into an open county drain. The Washtenaw County Health Department filed suit, seeking to require the businesses to connect to Saline's sewer system. Saline and Pittsfield Township were brought in as third-party defendants. Saline took the position that it would not approve the connections to its sewer system unless the properties were annexed to the

city. The circuit court ruled that the city was obligated to allow the connection, but the Court of Appeals reversed.

The dispute was then taken to the Michigan Supreme Court, which reversed the Court of Appeals. The Court acknowledged that the sewer connections could not be made without Saline's approval. It found, however, that the city's refusal to allow the connection could not be arbitrary or unreasonable and that the city could not properly condition its approval of the sewer connections on annexation:

> The grant of permission to connect with a sewer is within the municipal authority's discretion and will not be controlled by mandamus unless the discretion is arbitrarily and unreasonably exercised. In determining whether or not Saline acted reasonably in refusing to approve the connections, it is necessary to balance the competing interests.

Id. p. 523 (footnote omitted). Primary among those "competing interests" was the fact that the county health department had declared that the malfunctioning septic tanks constituted a public health hazard.[8] On the other hand, Saline's sole reason for refusing the connections was that the properties were not within the city limits. *Id.* at 524.

The Court stressed that such circumstances called for intergovernmental cooperation and that "use of the existing pipeline to correct a public health measure when the pipeline abuts the properties is both necessary and appropriate under the facts of this case." *Id.* at 525. The Court therefore found Saline's insistence on annexation as a condition of connecting the properties to the sewer line to be unreasonable under the circumstances:

> Since it is evident that Pittsfield could not have arbitrarily and unreasonably refused approval to the city to run its line through Pittsfield, Saline may not arbitrarily and unreasonably refuse the connections **under the facts and circumstances of this case**. Further, we are confident that Pittsfield could not condition approval

[8] Affidavits produced by the health department evidenced that "black, odorous, foul smelling, septic tank effluent" was flowing into an open drain, where it was accessible to "flies, rodents, and other vectors of disease as well as to persons and domestic pets . . ." *Id.* fn 4.

> of the connections on Saline's annexing the properties. When as here an available sewer line crossed municipal boundaries, the municipality operating the sewer system may not condition connection on annexation of the properties involved **when connection means abatement of a public health hazard**.

Id. at 525-536 (footnote omitted; emphasis added).

The outcome in the *T&M Chevrolet* case was clearly driven by what the Court viewed as unreasonable behavior by the city in the face of a then-existing and readily remediable threat to public health. No such circumstances are present here. There is no imminent threat to public health. The City is not going to "close the valve," to borrow the Townships' phrase, next week or next month or even next year. The Townships have more than seven years in which to negotiate a new agreement with the City or, alternatively, build their own system.

V. CONCLUSION

As set forth earlier in this Brief, there are approximately 261 municipal wastewater treatment facilities in Michigan, the vast majority of which serve other municipal entities by contract. Those contracts are the result of long-range planning and arms-length negotiation by both the municipal owners of these facilities and the municipalities receiving services under the contracts. What the Townships seek here is nothing less than a unilateral change in the terms of those contracts to impose an "extra-contractual" requirement on the municipal owners of these facilities that they have not contracted for and have not agreed to. Michigan law prohibits such an outcome.

A finding by this Court that those facilities are required to continue to provide service past the expiration dates of their contracts would fly in the face of long-established Michigan contract law and would contravene the constitutional and statutory authority of municipalities to own and operate public services and to enter into contracts for the provision of such services to

other municipal entities. This Court should refuse the Townships request to change well-founded and long-established law and should deny the relief sought by these Appellants.

REQUEST FOR RELIEF

For all the reasons set forth above, Amicus Curiae, Michigan Municipal League, joins with Defendant, City of Cadillac, in asking this Court to affirm the order of the Wexford County Circuit Court granting summary disposition in favor of Defendant.

Respectfully submitted,

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Dated: October ____, 2009

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