STATE OF MICHIGAN

COURT OF APPEALS

CITY OF GAYLORD,

Plaintiff-Appellee,

v

MAPLE MANOR INVESTMENTS, LLC, THOMAS McHUGH, GLADYS McHUGH, ERIC JENSEN, RANDY RUSSELL, FRANK A. MOORE, the BERNADETTE SEIDELL TRUST, MARK LaFOREST, HUFFMASTER ASSOCIATES, LLC, JAUNICE S. CESARO as trustee of the ELISEO V. CESARO LIVING TRUST, GERALD BEATTIE, SUE E. BEATTIE,

Defendants,

and

the FRANCESCO R. MAZZELLA TRUST, the YOLANDA MAZZELLA TRUST, LARRY K. MILLER, MARY E. MILLER, LYNNEADAIR TOTTEN and WILLIAM TOTTEN,

Defendants-Appellants.

UNPUBLISHED
August 8, 2006

No. 266954
Otsego Circuit Court
LC No. 04-010967-CZ

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

In this action for declaratory and injunctive relief, defendants the Francesco R. Mazzella Trust, the Yolanda Mazzella Trust, Larry K. Miller, Mary E. Miller, Lyneadair Totten and William Totten[1] appeal as of right the trial court's grant of summary disposition in favor of

[1] The remaining defendants are not parties to this appeal.

plaintiff City of Gaylord (the City) pursuant to MCR 2.116(C)(9) and denial of defendants' motion for summary disposition pursuant to MCR 2.116(I)(2). We affirm.

I. Facts and Procedural History

Defendants all own property formerly located in Bagley Township in Otsego County. Between 1993 and 1996, the City annexed territory encompassing the defendants' parcels. Prior to the City's annexation, defendants' properties were each served by private wells and septic systems. However, pursuant to Gaylord Ordinances, § 5302,

> Except as otherwise provided in Section 5304.2, the owner of all houses, buildings, structures, tenements, premises or improvements situated within the City of Gaylord, in or on which water is used or consumed and abutting on any street, highway, alley or right-of-way in which there is now or hereafter may be 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. Such connections shall be made within ninety (90) days of official notice to do so. Provided, however, that the requirements of this section shall apply only in the event that the potable water facilities are within two hundred (200') feet of the nearest property line.

Further, after the annexation, the City enacted the following ordinance applicable to the parcels in the areas annexed:

> As to any property which has come within the jurisdiction of the City of Gaylord through a contract pursuant to Public Act 425 of 1984 or through annexation, between the dates of November 17, 1994 and November 17, 1996, and which has an operating well in use on the effective date of this amendment, the following shall apply:
>
> a. The use of such water well shall be discontinued and said well abandoned and sealed off upon the earlier of 1) a sale of the property, or 2) when said well in no longer operable or needs to be reworked or replaced, or 3) at such time as the premises are connected to the Gaylord Water Supply System, or 4) November 17, 2001. [Gaylord Ordinances, § 5304.2]

After some time, the City notified defendants that, pursuant to these City ordinances and an ordinance requiring connection to the City's sewage system, defendants would have to connect to the City's water and sewage system and cease using their wells. Although defendants connected to or agreed to connect to the City's sewage system, defendants refused to connect to the City's water system and cease using their wells.

In October 2004, the City filed the present action seeking declaratory and injunctive relief. In its complaint, the City asked the trial court to declare that defendants were required to connect to the City's water system and that the failure to do so constituted a nuisance. Defendants responded by arguing that the City did not have the authority to compel defendants

to cease using their wells and connect to the City's water system. In May 2005, the City moved for summary disposition pursuant to MCR 2.116(C)(9) and defendants moved for summary disposition pursuant to MCR 2.116(I)(2).

In November 2005, the trial court issued its opinion and order. The trial court determined that the City ordinances, which required defendants to connect to the City's water system and cease using their wells, were valid and enforceable exercises of the City's police power. Accordingly, the trial court granted the City's motion for summary disposition and ordered defendants to connect to the City's water system.[2] The trial court also denied defendants' motion for summary disposition. Defendants then appealed as of right.

On appeal, defendants do not contest the factual basis of plaintiff's claims. Instead, defendants present various arguments attacking the validity of the ordinances passed by the City, which require defendants to cease using their wells and connect to the City's water system. Because these ordinances are invalid, defendants argue, the trial court should have granted summary disposition in favor of defendants pursuant to MCR 2.116(I)(2). We disagree.

II. Standards of Review[3]

This Court reviews de novo the grant or denial of a motion for summary disposition. *Cawood v Rainbow Rehab Ctr*, 269 Mich App 116, 118; 711 NW2d 754 (2005). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When determining whether there is a genuine issue as to any material fact, the trial court must consider the evidence presented by the parties in the light most favorable to the party opposing the motion. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). "A genuine issue of material

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[2] The City's complaint also asked the trial court to declare that defendants were required to connect to the City's sewer system. In its opinion, the trial court agreed that the City could require defendants to connect to the City's sewer system and ordered defendants to do so. However, because defendants had already connected to the City's sewer system or agreed to do so by the time of the ruling, the propriety of that order is not at issue.

[3] On appeal, defendants argue that the trial court should have granted summary disposition in their favor pursuant to MCR 2.116(C)(8) and (I)(2). However, before the trial court, defendants argued that summary disposition was appropriate under MCR 2.116(C)(8), (C)(10) and (I)(2). Indeed, defendants requested that "summary disposition be granted in their favor both because the Plaintiff has failed to state a claim on which relief can be granted and because there is no material fact in dispute. . . ." Because defendants moved for summary disposition under MCR 2.116(C)(10), the trial court could properly consider evidence submitted by the parties. Likewise, although the trial court stated that its decision was based on MCR 2.116(C)(9), it is clear from its opinion that it considered the factual bases supporting defendants' claims that the ordinances were unconstitutional. Therefore, we shall review defendants' claims under MCR 2.116(C)(10). See *DeHart v Joe Lunghamer Chevrolet, Inc*, 239 Mich App 181, 184; 607 NW2d 417 (1999).

fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court also reviews de novo issues of constitutional law. *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

III. The Police Power

Defendants first contend that enactment of the ordinances constitute an invalid application of the City's police power. We disagree.

A. Authority to Regulate

The City is a home rule city. Pursuant to Const 1963, art 7, § 22, home rule cities have the power to "adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law." This grant of authority has been broadly construed to not only include those powers specifically granted, but also all powers not expressly denied. *AFSCME v Detroit*, 468 Mich 388, 410; 662 NW2d 695 (2003). "Among the powers that may properly be exercised by a home rule city is the police power." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 481; 666 NW2d 271 (2003); see also MCL 117.3(j) (requiring city charters to include provisions for the "public peace and health and for the safety of persons and property.").[4] Except where limited by constitution or statute, the police power of a home rule city "'is of the same general scope and nature as that of the state.'" *Belle Isle Grill Corp, supra* at 481, quoting *People v Sell*, 310 Mich 305, 315; 17 NW2d 193 (1945).

It is well settled that ordinances are presumed valid and the burden is on the person challenging the ordinance to rebut the presumption. *Detroit v Qualls*, 434 Mich 340, 364; 454 NW2d 374 (1990). Defendants have not identified any statute or constitutional provision that expressly denies municipalities the power to require property owners to connect to a municipal water supply and use only the municipal water on the premises.[5] Instead, relying on *Jones v Bd of Water Comm'rs of Detroit*, 34 Mich 273 (1876), defendants contend that municipalities may never compel persons to purchase water. Defendants' reliance is misplaced.

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[4] Under its police power, the state may regulate public safety, public health, morality, and law and order. *People v Derror*, 475 Mich 316, 338; 715 NW2d 822 (2006), citing *Berman v Parker*, 348 US 26, 32; 75 S Ct 98; 99 L Ed 27 (1954).

[5] We reject defendants' contention that the Legislature's failure to enact a statute specifically permitting home rule cities to compel connection to a municipal water system, despite enacting such a provision for sewage systems creates an inference that home rule cities lack such authority. See MCL 333.12753. As already noted, home rule cities have not only those powers specifically granted to them, but also all powers that have not been expressly denied. *AFSCME v Detroit, supra* at 410. Therefore, the fact that the Legislature specifically granted municipalities the power to compel persons to connect to a municipal sewer system does not affect a home rule city's inherent police power.

In *Jones*, the Court was presented with the question as to whether the Legislature had the power to enact a statute that required the Detroit board of water commissioners to levy an assessment against lots within Detroit that fronted water lines, but whose owners did not pay for water service. *Id.* at 273. The Court held that the statute was in effect a tax and, therefore, subject to the limitations imposed on general taxes. *Id.* at 275. This, the Court noted, was in contrast to the rates paid by water consumers.

> The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water. 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. [*Id.* at 274.]

Because *Jones* concerned the validity of a general tax passed by the state Legislature rather than the validity of a regulatory ordinance enacted pursuant to a municipality's police power, it is inapplicable to the facts of this case. Further, taken in context, the *Jones* Court's statement that "[n]o one can be compelled to take water unless he chooses," merely recognized that water consumers ultimately have control over the amount of their water bill because they control the amount of water that they consume. *Id.* Consequently, *Jones* does not stand for the proposition that municipalities lack the authority to compel property owners to connect to a municipal water supply and consume only municipal water on the premises.[6]

Defendants also erroneously argue that, because the right to withdraw groundwater is a valuable property right, the City necessarily lacks the authority to compel defendants to cease using their groundwater. We agree that the right to use groundwater is a valuable property right. See *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 105; 709 NW2d 174 (2005) ("[T]his state has long recognized that private persons obtain property rights in water on the basis of their ownership of land."). However, we do not agree that home rule cities lack the authority to enact ordinances that affect property rights. It is well established that the police power allows the government to regulate land use. *Paragon Properties Co v Novi*, 452 Mich 568, 576; 550 NW2d 772 (1996). Hence, the fact that the City's ordinances affect a property right will not, absent more, render the ordinances invalid.

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[6] Likewise, each of the remaining cases cited by defendant dealt with determining whether a charge was a user fee or a tax. See *Preston v Bd of Water Comm'rs*, 117 Mich 589, 598; 76 NW2d 92 (1898) (holding that the water rates were not taxes), *Ripperger v Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585, 586-587 (1954) (holding that the sewage charges in question were not taxes), and *Bolt v Lansing*, 459 Mich 152, 158-159; 587 NW2d 246 (1998) (citing both *Ripperger*, *supra* and *Jones*, *supra* for the proposition that one factor relevant to determining whether an assessment was a user fee or tax is to determine whether the property owner is able to refuse or limit their use of the commodity or service). Therefore, they too are inapplicable to the facts of this case.

Furthermore, to the extent that defendants' argument could be interpreted as a challenge based on due process, that argument too is unavailing.

B. Substantive Due Process

Both the state and federal constitutions guarantee that no person will be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17; *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003). These constitutional provisions afford persons both substantive and procedural protections. *People v Sierb*, 456 Mich 519, 522-523; 581 NW2d 219 (1998). The substantive protections of the Due Process Clauses "secure the individual from the arbitrary exercise of governmental power." *Electronic Data Systems Corp v Flint Twp*, 253 Mich App 538, 549; 656 NW2d 215 (2002) (EDS). However, "courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose." *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000). In order to prevail under this test, "a challenger must show that the legislation is 'arbitrary and wholly unrelated in a rational way to the objective of the statute.'" *Id.*, quoting *Smith v Employment Security Comm*, 410 Mich 231, 271; 301 NW2d 285 (1981).

On appeal the City contends, as it did before the trial court, that the ordinances promote the public health, safety and general welfare by ensuring a safe water supply. Defendants counter that there is no rational connection between the requirement that they connect to the municipal water supply and the City's stated goal of ensuring a safe water supply because defendants' water supplies are currently safe. Simply stating that the public has an interest in clean water, defendants assert, "does not legally or logically justify depriving defendants of their right to use their own clean, uncontaminated groundwater." (emphasis removed). We disagree with defendants' assertion and hold that the ordinances are rationally related to the legitimate government purpose of ensuring a clean and safe supply of potable water.[7]

In Michigan, it is well-settled that a municipality may require property owners to connect to a public sewer system. See *Bedford Twp v Bates*, 62 Mich App 715, 717-718; 233 NW2d 706 (1975), *Renne v Waterford Twp*, 73 Mich App 685, 689-690; 252 NW2d 842 (1977), *Bingham Farms v Ferris*, 148 Mich App 212, 217-218; 384 NW2d 129 (1986). Such ordinances are a valid means of dealing with the *potential* as well as the actual health menaces posed by sewage, because even the failure of a few septic systems could have serious health consequences for the entire community. *Bedford Twp*, *supra* at 718, quoting *Sanitation District No 1 of Jefferson Co v Campbell*, 249 SW2d 767, 772 (Ky, 1952). For this reason, a municipality may rationally determine that it is in the best interests of the community as a whole to require property owners with septic systems to abandon those systems—even though the systems are properly functioning and the chances of failure are slight—and connect to public sewer as a prophylactic measure

[7] We note that defendants also argued that, as written, the ordinance requiring them to use the City's water for all water consumed on the premises is "grossly overbroad," because it could conceivably be a violation of the ordinance to consume bottled water on the regulated premises. However, because defendants failed to properly develop this argument, we decline to address it. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

against potential harms. See *Renne*, *supra* at 695-696 ("If the Legislature chooses to nip in the bud a potential for disease transmission rather than to utilize curative measures after the fact, we decline to second-guess its decision.") and *Bingham Farms, supra* at 217-218 ("The legislative policy has dispensed with the need for individual determinations by declaring that septic tanks pose a threat to the public health, and it is beyond the province of the judiciary to quarrel with that judgment."). This same rationale applies to the preservation of the public health through ordinances requiring property owners to connect to a municipal water supply.

It is a basic and legitimate function of government to promote the health of the community by ensuring a pure water supply. *Stern v Halligan*, 158 F3d 729, 732 (CA 3, 1998). Private wells are subject to an array of contaminates that may adversely affect the health of those persons who directly consume contaminated water and which may indirectly affect the health of the whole community.

> Potential dangers include: carcinogenic radon, radium-226, and radium-228; salt from road-salting stockpiles or saline aquifers; pesticides; fertilizers; explosive methane; MTBE (a gasoline additive); fuel from leaking underground tanks; bacteria-laden waste from leaking septic tanks, broken sewer lines, pets, farm animals, or wildlife; and chemical or other hazardous waste. Furthermore, private wells are generally shallower than public supply wells and thus more easily contaminated. [*Id.* (citation omitted).]

As with septic systems, the government may properly conclude that the best way to address the potential for harm is through prophylactic measures such as mandating connection to the public water supply. The court in *Stern* aptly noted that,

> [a] municipal water supply replaces a myriad of private water sources that may be unmonitored or, at best, difficult, expensive, and inefficient to monitor. Therefore, a legislature may rationally conclude that a public water supply is the simplest and safest solution for its citizenry as a whole without proof of danger to each and every affected person. [*Id.*]

Because promoting the public health by ensuring a safe and pure water supply is a legitimate government interest and the City could rationally believe that requiring its citizenry to connect to the municipal water supply would promote that objective, see *Hawaii Housing Authority v Midkiff*, 467 US 229, 242; 104 S Ct 2321; 81 L Ed2d 186 (1983), we conclude that the enactment of the ordinances was a proper exercise of the City's police power. *Crego, supra* at 259.[8]

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[8] We note that the majority of the courts that have addressed issues similar to those advanced by defendants have concluded that requiring a property owner to connect to a municipal water supply and abandon private wells is a legitimate exercise of the police power. See *Village of Algonquin v Tiedel*, 345 Ill App 3d 229; 802 NE2d 418 (2003), *Kusznikow v Twp Council of Twp of Stafford*, 322 NJ Super 323; 730 A2d 930 (1999), *Town of Ennis v Stewart*, 247 Mont 355; 807 P2d 179 (1991), *Tidewater Ass'n of Homebuilders, Inc v City of Virginia Beach*, 241 Va 114; 400 SE2d 523 (1991), *Rupp v Grantsville City*, 610 P2d 338 (Utah, 1980), *Lepre v*
(continued…)

IV. Takings

Defendants next argue that the ordinances constitute an unconstitutional taking of defendants' water rights. Specifically, defendants contend that the ordinances do not substantially advance a legitimate government interest and deny defendants an economically viable use of their land without compensation. Therefore, defendants argue, the ordinances are invalid and unenforceable. We disagree.

A. Takings Under the "Substantially Advances" Test

Both the state and federal constitutions prohibit the taking of private property for public use without compensation. *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 23; 614 NW2d 634 (2000), citing US Const, Am V, and Const 1963, art 10, § 2.[9] Although these constitutional provisions apply to formal condemnation through the state's inherent power of eminent domain, they also apply to cases involving regulatory takings. *Merkur Steel Supply v Detroit*, 261 Mich App 116, 129-130; 680 NW2d 485 (2004). "A regulatory taking occurs when the state effectively condemns, or takes, private property for public use 'by overburdening that property with regulations.'" *Dorman v Clinton Twp*, 269 Mich App 638, 646; 714 NW2d 350 (2006), quoting *K & K Construction Inc v Dep't of Nat'l Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998). In *K & K Construction*, our Supreme Court noted that, "[w]hile all taking cases require a case-specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land." *K & K Construction, supra* at 576, citing *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 485; 107 S Ct 1232; 94 L Ed 2d 472 (1987).

Relying on *K & K Construction*, defendants first contend that the ordinances in question effect an unconstitutional taking because they do not substantially advance a legitimate state interest. However, since the decision in *K & K Construction*, the United States Supreme Court has clarified that the "substantially advances" formula announced in *Agins v City of Tiburon*, 447 US 255; 100 S Ct 2138; 65 L Ed 2d 106 (1980) and recited by our Supreme Court in *K & K Constr Inc*, is not an appropriate test for determining whether a regulation effects a taking. *Lingle v Chevron USA, Inc*, 544 US 528, 531; 125 S Ct 2074; 161 L Ed 2d 876 (2005).

In *Lingle*, the Court clarified "that the 'substantially advances' formula was derived from due process, not takings, precedents." *Id.* at 540. The Court further characterized the selection of this due process language as "regrettably imprecise." *Id.* at 542. The problem, the Court explained, was that the "substantially advances" formula suggests a means-ends test. *Id.*

(…continued)

D'Iberville Water & Sewer Dist., 376 So 2d 191 (Miss, 1979) and *Shrader v Horton*, 471 F Supp 1236 (WD Va, 1979), but see *City of Midway v Midway Nursing & Convalescent Center, Inc*, 230 Ga 77; 195 SE 2d 452 (1973).

[9] The Takings Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment. *Penn Central Transportation Co v New York City*, 438 US 104, 122; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

> It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. See, e.g., *County of Sacramento v Lewis*, 523 US 833, 846[;118 S Ct 1708; 140 L Ed 2d 1043] (1998) (stating that the Due Process Clause is intended, in part, to protect the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective"). But such a test is not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment. [*Id.*]

The Court further explained that, instead of addressing the challenged regulation's effect on private property, "the 'substantially advances' inquiry probes the regulation's underlying validity." *Id.* at 543.

> But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "*for public use*." It does not bar government from interfering with property rights, but rather requires compensation "in the event of *otherwise proper interference* amounting to a taking." Conversely, if a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action. [*Id.* (citation omitted, emphases in original).]

For this reason, the Court determined that the "substantially advances" formula is not a valid method for identifying regulatory takings that require just compensation. *Id.* at 545. Hence, whether the ordinances in question substantially advance a legitimate government interest has no bearing on whether the ordinances effected a taking of defendants' property. Therefore, to the extent that defendants argue that the ordinances constitute an unconstitutional taking because the ordinances do not substantially advance a legitimate state interest, that argument must fail.

B. Takings Under the Balancing Test

Defendants next contend that the ordinances also constitute a regulatory taking under the traditional balancing test stated in *Penn Central Trans Co v New York*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). We disagree.

Under the balancing test, the reviewing court must engage in an ad hoc factual inquiry to determine whether the regulations deny the property owner economically viable use of his land. *K & K Construction*, *supra* at 576-577. This inquiry centers on three factors, "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *Id.* at 577, citing *Penn Central*, *supra* at 124. Further, when examining the effect of a regulation on a parcel of property under the balancing test, the reviewing court "must examine the effect of the

regulation on the entire parcel, not just the affected portion of that parcel." *K & K Construction*, *supra* at 578-579; see also *Penn Central*, *supra* at 130-131.

Defendants have failed to establish a taking under the balancing of these factors. Initially we note that, although defendants characterize the City's actions as mere attempt to obtain a monopoly over a "common commodity", as discussed above, we have found that the City's regulations are a legitimate exercise of its police power. Further, although defendants claim that the costs incurred in connecting and the periodic fees are "very significant," defendants failed to present any evidence that connection to the City's municipal water supply would reduce the value of their properties. Without such evidence, it is difficult to assess the economic effect of the regulations on defendants' properties. See *K & K Construction*, *supra* at 588 ("While there is no set formula for determining when a taking has occurred under this test, it is at least 'clear that the question whether a regulation denies the owner economically viable use of his land requires at least a comparison of the value removed with the value that remains.'"), quoting *Bevan v Brandon Twp*, 438 Mich 385, 391; 475 NW2d 37 (1991). Finally, although defendants have arguably invested in their current water supplies and expected a return on those investments, it is readily apparent that connecting to the municipal water system will not interfere with defendants' primary expectations concerning the uses of the affected parcels. See *Penn Central*, *supra* at 136. There is simply no evidence that connecting to the City's water system will interfere with defendants' current use of the properties or prevent them from developing their properties in the future. For these reasons, we cannot conclude that the ordinances effect a regulatory taking under the *Penn Central* balancing test.

Because the City did not need to demonstrate that the ordinances substantially advanced a legitimate government interest and there is no evidence that the ordinances deprived defendants of economically viable use of their properties, defendants have failed to establish that the ordinances effected an unconstitutional taking.

V. Headlee Amendment

Finally, defendants argue that the ordinances constitute a tax passed in violation of Const 1963, art 9, § 31 (the Headlee Amendment). Specifically, defendants contend that the costs associated with connecting to the City's water system and the periodic charges for the water provided by the City's water department constitute a tax rather than a fee. Therefore, because these ordinances were passed without complying with the requirements of the Headlee Amendment, defendants conclude, the ordinances are illegal. We disagree.

The Headlee Amendment states 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 qualified electors of that unit of Local Government voting thereon. [*Id.*]

It is undisputed that the ordinances were not approved by a majority of the qualified electors of the City. Accordingly, if the charges associated with the ordinances constitute a tax, the charges are in violation of the Headlee Amendment. However, if the charges are merely user fees, the

charges are not subject to the requirements of the Headlee Amendment. Whether the charges imposed by the ordinances constitute a "tax" or a "user fee" is a question of law that this Court reviews de novo. *Bolt v Lansing*, 459 Mich 152, 158; 587 NW2d 246 (1998).

In determining whether a charge is a user fee rather than a tax, three criteria are to be considered. *Id.* at 161. First, a user fee must serve a regulatory purpose rather than a revenue-raising purpose. Second, the user fee must be proportionate to the costs of the service provided. The third criterion is whether the persons subject to the charge are able to refuse or limit their use of the commodity or service. *Id.* at 161-162.

Defendants have presented no evidence that the City raises revenue through operation of its municipal water system. Likewise, defendants have presented no evidence that charges are disproportionate to the costs of the services provided. Finally, although the ordinances mandate connection to and use of the City's water supply for all water used or consumed on the affected premises, defendants have ultimate control over the amount of water used and, therefore, have ultimate control over the amount of their water bill.[10] Consequently, taking all these factors under consideration, we conclude that the charges are properly characterized as user fees rather than taxes.

VI. Conclusion

Pursuant to its general police power, the City has the authority to enact regulations that regulate public safety, public health, morality, and law and order. Requiring property owners to connect to a municipal water supply is rationally related to the legitimate government interest of promoting the public health by ensuring a safe and pure water supply. Therefore, the ordinances do not offend the limitations imposed by substantive due process. Further, the ordinances do not deprive defendants of economically viable use of their properties. Thus, the ordinances do not effect an unconstitutional taking. Finally, the charges imposed by the ordinances are properly considered user fees rather than taxes. Accordingly, the requirements of the Headlee Amendment are inapplicable to them.

Because the ordinances are valid and enforceable, the trial court did not err when it determined that summary disposition in favor of the City was appropriate.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

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[10] We reject defendants' contention that whether a charge is voluntary is a function of the affected persons' ability to refuse to use the service or commodity at all. The Court in *Bolt* stated that this factor hinged on whether the property owners "were able to refuse *or limit* their use of the commodity or service." *Bolt*, *supra* at 162 (emphasis added).