STATE OF MICHIGAN

COURT OF APPEALS

GRAND BLANC COMMUNITY SCHOOLS,

Plaintiff-Appellant/Cross-Appellee,

and

FLUSHING COMMUNITY SCHOOLS, CARMAN-AINSWORTH COMMUNITY SCHOOLS, LINDEN COMMUNITY SCHOOLS, LAKE FENTON COMMUNITY SCHOOLS,

Plaintiffs,

v

JEFFREY WRIGHT, Genesee County Drain Commissioner,

Defendant/Cross-Defendant/Appellee/Cross-Appellant,

and

CHARTER TOWNSHIP OF GRAND BLANC, and ARGENTINE TOWNSHIP,

Defendants/Cross-Plaintiffs/Appellees,

and

BENDLE PUBLIC SCHOOLS, BENTLEY COMMUNITY SCHOOLS, CARMAN-AINSWORTH COMMUNITY SCHOOLS, CLIO AREA SCHOOL DISTRICT, DAVISON COMMUNITY SCHOOLS, FLINT COMMUNITY SCHOOLS, FLUSHING COMMUNITY SCHOOLS, GENESEE INTERMEDIATE SCHOOL DISTRICT, GENESEE SCHOOL DISTRICT, KEARSLEY COMMUNITY SCHOOLS, LAKE FENTON COMMUNITY SCHOOLS, MOUNT MORRIS

UNPUBLISHED
March 19, 2013

No. 296389
Genesee Circuit Court
LC No. 05-082311-CZ

CONSOLIDATED SCHOOLS, WESTWOOD HEIGHTS SCHOOL DISTRICT, and MICHIGAN ASSOCIATION OF SCHOOL BOARDS,

Amicus Curiae.

Before: JANSEN, P.J., and FITZGERALD and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff Grand Blanc Community Schools (GBCS) appeals as of right from an order granting summary disposition in favor of defendants, the Genesee County Drain Commissioner (County[1]), the Charter Township of Grand Blanc, and Argentine Township, pursuant to MCR 2.116(C)(5) and (C)(10). GBCS brought this action under § 31 of the Headlee Amendment, Const 1963, art 9, § 31, arguing that defendants' method in calculating its water and sewerage fees amounted to an illegal tax imposed without voter approval. The trial court dismissed the complaint because it found that GBCS did not have standing to bring the claim and, alternatively, the County Capital Improvement Fee ("CCIF") and other township fees were not an illegal tax, but regulatory fees. We conclude that, contrary to the trial court's decision, GBCS had standing to bring this action. However, we further conclude that the trial court correctly determined that the action must fail on its merits. We therefore affirm summary disposition in defendants' favor.

I. BASIC FACTS AND PROCEDURAL HISTORY

Numerous school districts filed a complaint against Jeffrey Wright as the County's elected Drain Commissioner. The County owned and operated a county-wide municipal water system and county-wide sanitary sewer collection and transmission system, operated under the County Public Improvement Act of 1939, MCL 46.171 *et seq*. The County established a system for charging connection fees to non-residential users, like the school districts, incorporating the Table of Unit Factors (the Table or TUF). Fees for non-residential users were based on "unit factors" (also referred to as "equivalent use factors" or "residential equivalent units" (REU's)). The County's systems extended up to several townships, which also incorporated the County's fee structure, including the use of the Table.

GBCS built two new schools and each school had 69 classrooms. The County concluded that each "classroom" in school buildings was the equivalent of the use of between 1.5 and 2.5 typical single-family homes. Utilizing the TUF, the number of units attributable to each of the new buildings was 172.5 (69 classrooms x 2.5 units) each for water and sewer. Stated otherwise, the Table equated each of the new facilities to 172.5 single-family homes. GBCS alleged that the County's projected use of the systems by the school buildings, as calculated by the Table,

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[1] Although Jeffrey Wright is the named defendant, he was sued in his capacity as County Drain Commissioner.

overestimated the actual use of the systems, resulting in fees that were at least eight times in excess of actual use. Count I of GBCS's complaint alleged violations of MCL 46.175, which requires that fees be measured by equitable methods. Counts II and III alleged violations of due process and equal protection, respectively. Count IV alleged violation of § 31 of the Headlee Amendment, Const 1963, art 9 § 31. GBCS argued that in using and compelling municipalities to use the Table's "unit factors" and "classrooms" as measuring devices for the schools, the County charged fees "far in excess of the costs of providing the services to" the school districts and "far in excess of the value of the benefits received or to be received by" GBCS. GBCS later amended the complaint at the behest of the trial court to add the townships to the action because the townships, and not the County, provided annual usage fees.

Upon the County's argument that GBCS had failed to exhaust its administrative remedies, the trial court ordered the parties to appear before the Township Commissioner's Board of Review (Board) for a final determination of fees. GBCS could seek an adjustment of the initial fee before the Board based on a two-year analysis of actual metered data. GBCS argued that there was no need to appear before the Board because it had voluntarily dismissed Count I of its complaint. It stressed that it was not challenging the amount of the CCIF or the constitutionality of the CCIF, but only the constitutionality of the Table as applied to schools. GBCS argued that the Board had no jurisdiction over the constitutional issues, nor did it have any authority over the townships. The trial court disagreed:

> I really think we need to go through the Board of Review as a part of this process. That's not going to answer the ultimate question, and the Board of Review will not address constitutional issues. They're just going to look at a simple issue, and that is how much to charge. This Court's not going to decide this issue, this case, until that administrative process is exhausted.

The Board conducted a four-day hearing on August 3 and 5, and October 20 and 21, 2009. The Board concluded that the Table was used to measure the capacity of the system to accommodate a user's potential peak flow (as argued by the County and townships) and not the user's actual use (as argued by GBCS). Actual data logger information had been gathered at each of the two schools for two years. The Board concluded:

> 36. Analysis of the metered data for the Grand Blanc District shows that the peak hour use for Grand Blanc Middle School West was 1,164 gallons per hour, and the peak hour use for Grand Middle Blanc School East was 1,061 gallons per hour during the two school years.
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> 37. These peak flows occurred when the buildings were not fully occupied. Only 907 students were occupying the District's West building and 928 students were occupying the District's East building. These flows must be adjusted to reflect the number of persons who potentially could occupy the buildings.
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> ***
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> 40. The Board credits the testimony of Mr. Smith and finds that 4,537 persons is the maximum occupancy of each of the two buildings. Using this occupancy

would yield 99 units for Grand Blanc Middle School East and 111 units for Grand Blanc Middle School West. However, the County Agency has historically allocated REUs to schools based on classrooms of students. The Board finds that for purposes of adjusting the schools' REUs, it is just and equitable to use the maximum student load rather than the maximum occupant load for the buildings.

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43. Based on the metered data and the potential occupancy of each building, the Board determines the number of REUs for Grand Blanc Middle School West is 57 units (peak hourly usage ÷ 52.5 ÷ percentage of occupancy). The percentage of occupancy is obtained by dividing the student occupancy at the time the usage was measured (907 as to Middle School West and 928 as to Middle School East) by the potential occupancy (2,332 for each school). This calculation produces 51 units for the East building and 57 units for the West building. The CCIF for each building shall be calculated accordingly.

44. The County's final CCIF is determined to be $57,000.00 (57 units x $1,000 each for water and sewer connection) for Grand Blanc Middle School West, and $51,000.00 (51 units x $1,000 each for water and sewer connection) for Grand Blanc Middle School East.

45. We recommend that Grand Blanc Township similarly adjust its connection fees for the District's buildings, based upon 57 units for Grand Blanc Middle School West and 51 units for Grand Blanc Middle School East. . . .This would result in a water connection charge of $81,600 and a sewer connection charge of $81,600 for Grand Blanc Middle School East, and a water connection charge of $91,200 and a sewer connection charge of $91,200 for Grand Blanc Middle School West.

Following the Board's report, the parties filed competing motions for summary disposition. The County argued that, as political subdivisions of the state, the school districts did not have the privileges and immunities given to individual and private entities to raise its constitutional claims nor was it given the right to enforce the Headlee Amendment. While a school may bring suit to enforce § 29 of the Headlee Amendment (prohibiting unfunded mandates), no such right exists under § 31 (prohibiting unauthorized taxes). As such, the school districts did not have the legal capacity to sue. The County also argued that it was entitled to summary disposition on the merits of the school districts' claims. The CCIF did not raise revenue and the fees charged were proportionate to the use of the system by measuring actual peak flows. While a user might not be satisfied with the Table's estimate of fees, a process was in place to ensure that fees were reasonable, including a two year "look back" period utilizing actual data from the buildings. The school districts simply refused to participate in the administrative process available to it. The townships joined in the County's motion.

GBCS argued that the Board's findings were not final or binding on any party because the Board lacked jurisdiction to hear the matter. GBCS argued that the new ordinance adopted in 2006, which provided a three-step review process, did not vitiate the constitutional deficiencies

of the Table. The ordinance did not exist when the initial fees were charged and did nothing to change the offending Table. Further, the school districts maintained that they had the ability to bring a § 31 claim, otherwise they would be without remedy in the face of an illegal tax. It argued that the fees were actually taxes in disguise. The County focused on "peak flow" when, in reality, the focus of the Table was on average daily usage. The amount of fees charged under the Table exceeded both the costs of the services and the benefits received.

The trial court issued its opinion and order on January 25, 2010. On the issue of "standing," the trial court concluded that the school districts, as local units of government, were not "a taxpayer" who could bring suit under § 32 of the Headlee Amendment. The trial court rejected application of *Wayne Co v Governor*, 230 Mich App 258; 583 NW2d 512 (1998), because *Wayne Co* involved a unit of government bringing a Headlee action under § 29 and not § 31. The trial court noted, however, that GBCS might be able to proceed if they joined taxpayers as co-plaintiffs. Accordingly, the trial court dismissed the claims against GBCS without prejudice. The trial court then proceeded with an analysis as to the merits of GBCS's claims.

The trial court was perplexed by GBCS's argument that the issue before the court was not about the *amount* of fees. "[T]here is no section under the Headlee Amendment which provides an attack against the mere units from which fees or taxes may be derived;" instead, "the Headlee Amendment allows an attack on the charge, not on the means of determining the charge." The trial court went on to conclude:

> Plaintiffs also argue that there is a question of fact as to whether or not the Table is based on peak flows. While this Court agrees that such a question of fact exists, this Court further determines that it is not a material question of fact. This Court determines that it simply does not matter whether the Table is based on peak flows, average flows, or minimum flows. *What matters is that the Table is not the fee imposed.* It would simply be impossible for a preliminary standard such as the Table to know *a priori* how much water the various urinals, shower heads, and faucets would use. Accordingly, it makes sense that occasionally the CCIF initially reflected by the Table will be inaccurate.
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> Plaintiffs also argue that the Defendants are "free to adjust their per-Unit fees and charges as they see fit without limit." This Court simply does not understand how that accusation is objectionable or relevant in this case. Certainly there could be a hypothetical instance where the Defendants could adjust their per-Unit fees to such a limit where the resulting CCIF would be a source of revenue and disproportionate to the services provided. But that has not occurred in this case. In this case Plaintiff Grand Blanc does not argue that the adjusted CCIF imposed against it is a source of revenue or is disproportionate to the services provided.
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> Based on the forgoing, this Court determines that Plaintiff Grand Blanc's arguments against the imposed CCIF are without merit. It simply does not matter that the ordinance allowing the Board of Review was adopted after this lawsuit was filed. It simply does not matter whether the review was untimely. And

> lastly, it simply does not matter whether the Plaintiffs did not file their case to reduce or adjust the CCIFs imposed. *What matters to this Court is solely the CCIF actually charged against the Plaintiff.* This Court will not waste judicial resources on a hypothetical question regarding whether the initial fee determined by the Table is unconstitutional, *when it is not the actual CCIF demanded to be paid by Plaintiff*. [Emphasis added.]

On January 27, 2010, the trial court corrected a clerical error in its opinion to "reflect that it is a final order, resolves the last pending claim, and closes the case." The parties now appeal as of right.

II. STANDING AND CAPACITY TO SUE

Under MCR 2.116(C)(5), summary disposition is appropriate when a plaintiff lacks the capacity to sue. We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We also review de novo the question of GBCS's standing because it is a question of law. *Young v Independent Bank*, 294 Mich App 141, 143; 818 NW2d 406 (2011).

In *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), the Michigan Supreme Court addressed the issue of standing and reversed the long-applied standing principles in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001). At issue in *Lansing Schools* was whether teachers had standing to sue the school board for failing to comply with its statutory duty to expel students who physically assaulted teachers. The Court held "that Michigan standing jurisprudence should be restored to a limited, prudential approach that is consistent with Michigan's long-standing historical approach to standing," which was to "assess whether a litigant's interest in the issue is sufficient to 'ensure sincere and vigorous advocacy.'" *Lansing School Ed Ass'n*, 487 Mich at 352-353, 355, quoting *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995). The Court explained that, prior to *Lee* and its progeny:

> standing historically developed in Michigan as a limited, prudential doctrine that was intended to "ensure sincere and vigorous advocacy" by litigants. If a party had a cause of action under law, then standing was not an issue. But where a cause of action was not provided at law, the Court, in its discretion, would consider whether a litigant had standing based on a special injury or right or substantial interest that would be detrimentally affected in a manner different from the citizenry at large, or because, in the context of a statutory scheme, the Legislature had intended to confer standing on the litigant. It was not necessary to address the merits of the case in order to address standing. [*Id.* at 359.]

There was a deviation from these principles when the Court decided *Lee* and adopted the federal standing test. *Id.* at 359-360, n 7. In overruling *Lee* and its progeny, the Michigan Supreme Court declared that:

> Under [the proper approach to standing], a litigant has standing whenever there is a legal cause of action. . . .Where a cause of action is not provided at law, then a

> court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [*Id.* at 372 (footnotes omitted).]

Applying this "proper approach" to the case before it, the Court concluded that the teachers had standing to bring the action to enforce the statute that mandated expulsion of students who assaulted teachers. The statute was targeted to protect school personnel and not the citizenry at large; thus, teachers had a substantial interest in its enforcement. *Id.* at 374.

Utilizing the standing principles set forth in *Lansing School Ed Ass'n*, we conclude that GBCS had standing to bring this claim. It certainly had a substantial interest in the case and was detrimentally affected in a manner that was different from the citizenry at large. The fees charged for water and sewer necessarily impacted its budget. Because of the alarmingly high initial assessment, GBCS might have had to divert funds from other areas, impacting its ability to serve its students and the community. As demonstrated by zealous counsel, GBCS sincerely and vigorously advocated its position.

The County and townships complain that the trial court erroneously referred to "standing" instead of "capacity." See *Lansing Schools Ed Ass'n*, 487 Mich at 555, (standing inquiry addresses whether a litigant has an interest in an issue such that he is a proper party to pursue it) and *Leite v Dow Chemical Co*, 439 Mich 920; 478 NW2d 892 (1992) (discussing the legal-capacity-to-sue defense). However, we conclude that GBCS also had the capacity to bring the action by virtue of MCL 380.11a(3), which provides, in relevant part:

> (3) A general powers school district has all of the rights, powers, and duties expressly stated in this act; may exercise a power implied or incident to a power expressly stated in this act; and, except as provided by law, may exercise a power incidental or appropriate to the performance of a function related to operation of the school district in the interests of public elementary and secondary education in the school district, including, but not limited to, all of the following:
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> (c) Acquiring, constructing, maintaining, repairing, renovating, disposing of, or conveying school property, facilities, equipment, technology, or furnishings.
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> ***
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> (e) Receiving, accounting for, investing, or expending school district money; borrowing money and pledging school district funds for repayment; and qualifying for state school aid and other public or private money from local, regional, state, or federal sources.

The statute not only explicitly grants school districts the right to construct facilities, but also grants school districts the authority to bring any action that necessarily arises from such

construction, including an assurance that the schools are built at a reasonable cost. GBCS had the power to protect its funds in the execution and operation of new projects.

Nevertheless, the County and the Township both argue that only a "taxpayer" may bring an action under § 31 of the Headlee Amendment. Section 32 of the Amendment provides:

> Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.

The County and the Township argue that *only* a taxpayer may bring suit under § 32, whereas GBCS argues that a Headlee plaintiff is not required to be a taxpayer. "The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). The language is read according to its "ordinary and generally accepted meaning." *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 599; 575 NW2d 751 (1998). "Where the language of a statute is clear," it must be enforced as written "because the Legislature must have intended the meaning it plainly expressed." *Id*.

Though GBCS acknowledges that it is generally a tax exempt "tax receiver," not a taxpayer, it cites *Wayne Co Chief Executive v Governor*, 230 Mich App 258; 583 NW2d 512 (1998) and *Saginaw Co v Buena Vista School Dist*, 196 Mich App 363, 493 NW2d 437 (1992) for the idea that the Headlee amendment applies to a broader category than taxpayer. In *Saginaw Co*, the county sued the school district under the Headlee Amendment, after the school district raised its property tax rate without approval of a majority of qualified electors in the district. *Saginaw Co*, 196 Mich App at 364. This Court rejected the school district's attack on the county's standing: "We are satisfied that plaintiff has sufficient interest in the outcome to have standing to bring this action. Plaintiff alleges that defendant's action will result in its losing over a million dollars in tax revenues." *Id.* at 366 (citation omitted). In *Wayne Co Chief Executive*, the county sued the state, alleging that implementation of certain legislative acts affecting probate courts caused it to incur additional administrative and operating expenses in violation of § 29 of the Headlee Amendment requiring state financing of necessary increased costs of activities or services required of local government by state law. *Wayne Co Chief Executive*, 230 Mich App at 262-263. Again, this Court found that "because plaintiffs are effectively representing the interests of taxpayers, § 32 properly grants plaintiffs standing to bring this suit pursuant to § 29 of the Headlee Amendment. Several cases of this Court have found that both entities and persons bringing a claim for relief under § 29 should be treated similarly." *Id.* at 271 (citations omitted).

The County and Township argue that *Wayne Co Chief Executive* is inapplicable because it involved a § 29 action based on unfunded mandates and not a § 31 action based on illegal taxes. The trial court agreed. However, we conclude that this is a distinction without a difference. The statute clearly groups § § 25-31 together and does not parse out the different sections. In light of the *Saginaw Co* and *Wayne Co* cases, we conclude that GBCS had standing to bring this action.

III. TAX OR FEE?

Having concluded that GBCS had standing to bring this action, we now turn to the merits of its claims. GBCS argues that the water and sewage fees violate § 31 of the Headlee Amendment. Whether an item is a tax or a fee for purposes of the Headlee Amendment is a question of law that is reviewed de novo on appeal. *Bolt v City of Lansing*, 459 Mich 158; 587 NW2d 264 (1998).

The County and townships argue that the charges for water and sewer were not taxes, but fees. Section 31 provides, in relevant part:

> Units of Local Government are hereby prohibiting 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.

"Generally, a 'fee' is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A 'tax,' on the other hand, is designed to raise revenue." *Bolt*, 459 Mich at 161 (citations and quotations omitted). Under *Bolt*, there are three criteria to consider when determining whether an assessment is a user "fee" as opposed to a "tax." "The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose.... A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service." *Id.* at 161–162. A court must presume that the amount of the fee is reasonable, unless the contrary appears on the face of the law itself or is established by proper evidence. *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 665-666; 697 NW2d 180 (2005). The third criterion is voluntariness, that is: the ability to limit or refuse the commodity. *Bolt*, 459 Mich at 162. However, a "lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler*, 265 Mich App at 666.

In *Bolt*, the Michigan Supreme Court struck down a storm water rain charge as an illegal tax:

> In instituting the storm water service charge, the city of Lansing has sought to fund fifty percent of the $176 million dollar cost of implementing the CSO control program over the next thirty years. A major portion of this cost (approximately sixty-three percent) constitutes capital expenditures. This constitutes an investment in infrastructure as opposed to a fee designed simply to defray the costs of a regulatory activity. Consequently, the ordinance fails both the first and second criteria. [*Id.* at 163 (footnotes omitted).]

Quoting the Court of Appeals dissenting opinion (Markman), the *Bolt* Court added:

> "This is not to say that a city can never implement a storm water or sewer charge without running afoul of art 9, § 31. A proper fee must reflect the bestowal of a corresponding benefit on the person paying the charge, which benefit is not generally shared by other members of society. Where the charge for

> either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component, sewerage may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax." [*Id.* at 164-165.]

The Court concluded that "[i]n this case, the lack of correspondence between the charges and the benefit conferred demonstrates that the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public." *Id.* at 166.

As noted by the trial court, this Court has previously concluded that the CCIF imposed by the County was not an illegal tax, but a regulatory fee. *Tobin Group LLP v Genesee Co*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2004 (Docket No. 248663).[2] In *Tobin*, the County's CCIF was challenged under § 31 of the Headlee Amendment.

> In the present case, property owners of new construction in Genesee County sewer districts 1, 2, 5 and 6, are charged the disputed CCIF, $1,000 per unit for connecting to the county water system and another $1,000 per unit for connecting to the county sewer system. The money raised by the CCIF is used to increase the capacity of the county's water and sewer systems which were being operated at or beyond their capacity. Without an increase in capacity, no new customers could connect to the systems, and all new development would have to stop or, where permitted, construct wells and septic systems. [*Id.* at unpub op at 2.]

This Court concluded that, unlike in *Bolt*, the CCIF was imposed on new customers, only, and that the fees served the purpose of "regulating and controlling the use and distribution of water provided by the municipal system." *Id.* The Court also concluded that the mere fact that there was some incidental benefit to current users did not transform the fee into a tax. *Id.* The Court then addressed the calculation of the fee:

> Regarding proportionality, defendant initially calculated the sewer CCIF by determining the actual present cost of adding the necessary capacity, plus debt service, and dividing that by the number of new hookups anticipated. This produced a cost per unit of $988, which defendant rounded up to $1,000. Using similar methods, defendant estimated the cost of water hookups at $1,157 per unit, which defendant rounded down to $1,000. Later, Victor Cooperwasser, whose company is in the business of preparing water, sewer, and stormwater rate studies, applied a calculation method that apportioned to current users the amount of the new system's debt service that they will likely pay in the future. He determined that the buy-in cost for the sewer and water systems was slightly

[2] Although unpublished opinions are not binding precedence under the rule of stare decisis, they may be instructive or persuasive. MCR 7.215(C)(1); *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n3; 783 NW2d 133 (2010).

> lower than originally calculated: $1,028 for sewer and $955 for water. He therefore concluded that the $1,000 CCIF per system amount was fair and reasonable. We agree.

The Court did not find the mandatory nature of the hook-up fees dispositive. *Id.* at unpub op at 3-4.

GBCS does not dispute the ability of the County and townships to collect water and sewer fees; instead, it challenges the method in which the fees are computed. GBCS complains that the Table and its unit of factors should not be utilized in determining the fees owed by the school districts. However, as the trial court noted, "there is no section under the Headlee Amendment which provides an attack against the mere units from which fees or taxes may be derived;" instead, "the Headlee Amendment allows an attack on the charge, not on the means of determining the charge." And, while GBCS complained about the initial assessment, it "does not argue that the adjusted CCIF imposed against it is a source of revenue or is disproportionate to the services provided." We agree with the trial court that "[w]hat matters is that the Table is not the fee imposed."

This Court has previously noted:

> [A]ffidavits and deposition testimony that both Scales and Mauricio Kohn provided reflect their good-faith attempts, and hence the city's good-faith attempts, to determine a reasonable fee on the basis of the information then existing and available to them. The evidence also suggests that the source of any disproportionality in the fees that the city actually charged is not an intent on the part of the city to generate a revenue stream outside its taxing power by subterfuge. Rather, the evidence suggests that the city's lack of preparedness to implement the solid waste disposal inspection process and its resulting inept launching of the inspection process caused any such disproportionality. [*Wolf v Detroit*, 287 Mich App 184, 209; 786 NW2d 620 (2010).]

Thus, although the initial fee was grossly out of step with the ultimate metered readings, there is simply no evidence that the initial charges were based on anything other than a reasonable attempt to apportion costs to classified users. There is no evidence to support a finding that the initial fees were purposely inflated to generate revenue. In fact, the record suggests that both the County and the townships acknowledged and understood that the Table would lead to inconsistent results. That is the reason they attempted to work with GBCS and the other school districts to adjust the initial fee by utilizing two years of actual metered data. The County and townships at all times demonstrated a good-faith attempt to determine a reasonable fee.

As the trial court aptly noted: "What matters to this Court is solely the CCIF actually charged against the Plaintiff. This Court will not waste judicial resources on a hypothetical question regarding whether the initial fee determined by the Table is unconstitutional, when it is not the actual CCIF demanded to be paid by Plaintiff." GBCS fails to challenge the fee actually imposed and, instead, challenges the method of calculating the initial fees. *Bolt* requires that a fee must be proportionate to the necessary costs of the service. The "fee" in this case is the adjusted rate set by the Board of Review – a rate that is not challenged by the GBCS. In

addition, fees are to be assumed valid unless the evidence clearly demonstrates otherwise. While there was a remarkable disparity between the initial and final fees, there is no reason to question the method by which the initial fees were assessed. Utilizing the Table (whether to measure potential usage *or* peak flow), was a reasonable attempt to predict each class of users' strain on the system. Accordingly, GBCS's claims fail as a matter of law.

IV. DID THE TRIAL COURT IMPERMISSIBLY DELEGATE ITS DUTY TO AN ADMINISTRATIVE TRIBUNAL?

GBCS argues that its claims were improperly assigned to and addressed by the Board of Review. Whether the trial court impermissibly delegated its duty to the Board of Review is a question of law that we review de novo on appeal. *Myland v Myland*, 290 Mich App 691, 702; 804 NW2d 124 (2010).

GBCS initially sought review in the Board of Review regarding the reasonableness of the initial fees. However, it did not follow up on the matter. Instead, it filed a complaint against the County that would later include the townships. Sensing that Count I of its complaint would be subject it to review before the Board, GBCS voluntarily dismissed the count. In allowing GBCS to voluntarily dismiss the complaint, the trial court nevertheless noted:

> THE COURT: Count I is dismissed with prejudice. I'm not sure about the exhausting of administrative remedies, but I think you better do it.
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> MR. HOPPER [counsel for the school districts]: Better?
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> THE COURT: I think you better do it because I'm not sure; so, your remaining claims need to go to the Board of Review before they show up in this court.

GBCS failed to follow through on the court's order and even sought to terminate the administrative proceedings, arguing that there was no longer a statutory basis for administrative review after the dismissal of Count I. The trial court continued to believe that review before the Board was necessary. It explained:

> The bottom line comes down to a lawsuit was filed because the schools thought they were being charged too much. Now, I don't know if the charge came out of units or if the excessive charge came out of the price per unit, but . . .I'm going to declare that the Court cannot decide a constitutional issue unless it has all of the facts, both the numbers of units and the prices per units, before it would know whether an amount is arbitrary or capricious. And I don't know how we can decide whether fees bear a reasonable relationship to the actual use of the systems unless we know the final amount of the fee. And I don't know how a fee results in the schools being charged far and excess to the value of the benefits unless I know the final amount of the fee. And I don't know if the schools have overpaid in relation to the connection and user fees unless I know the final amount. And I don't know if the schools are entitled to a declaratory judgment as to future fees without knowing the final amount of the future fees.

> I really think we need to go through the Board of Review as a part of this process. *That's not going to answer the ultimate question, and the Board of Review will not address constitutional issues. They're just going to look at a simple issue, and that is how much to charge. This Court's not going to decide this issue, this case, until that administrative process is exhausted.* [Emphasis added.]

The trial court, in ordering the parties to appear before the Board of Review, did not impermissibly delegate its responsibility to hear the controversy;[3] instead, its actions were necessary in order to ripen GBCS's claims. If a party may apply for an administrative remedy, judicial review is premature and the matter is not ripe. See *Paragon Props Co v City of Novi*, 452 Mich 568, 571; 550 NW2d 772 (1996) (in the context of land-use planning). Forcing a party to exhaust its administrative remedies allows the parties and the administrative body to develop a complete record for review while also allowing the body to apply its expertise and correct its own errors. *Bonneville v Michigan Corrections Org, Service Employees Int'l Union*, 190 Mich App 473, 476; 476 NW2d 411 (1991); *Compton Sand & Gravel Co v Dryden Twp*, 125 Mich App. 383, 397; 336 NW2d 810 (1983), citing 2 Am Jur 2d, Administrative Law, § 595, p. 428.

> Exhaustion of administrative remedies serves several policies: (1) an untimely resort to the courts may result in delay and disruption of an otherwise cohesive administrative scheme; (2) judicial review is best made upon a full factual record developed before the agency; (3) resolution of the issues may require the accumulated technical competence of the agency or may have been entrusted by the Legislature to the agency's discretion; and (4) a successful agency settlement of the dispute may render a judicial resolution unnecessary. [*IBM* v *Dept of Treasury*, 75 Mich App 604, 610; 255 NW2d 702 (1977).]

While the foregoing cases dealt with the Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq*, and GBCS might argue that the APA is inapplicable,[4] the principles are sound and relevant to the case at bar.

Much as GBCS would like this Court to believe otherwise, this case is about the reasonableness of the fees imposed. GBCS argues that the method of calculating fees was unconstitutional and challenged the initial assessment in the trial court as an "as applied" claim.

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[3] To the extent GBCS and amicus curiae argue that the Board had no authority over the townships, this writer notes that, while a trial court may not delegate its statutory duty, it may be assisted by an administrative body in an advisory capacity. See *People v Kendall*, 142 Mich App 576, 579-580; 370 NW2d 631 (1985) ("a court may not delegate its statutory authority to the probation department" but "[t]he probation department may act in an advisory capacity to the court.")

[4] Municipal agencies, even if authorized by statute, are not necessarily state administrative agencies subject to the terms of the APA. See *Manuel v Gill*, 481 Mich 637, 652-654; 753 NW2d 48 (2008).

The trial court correctly referred the parties to the Board of Review under MCL 46.176, which provides, in relevant part:

> The board of supervisors shall designate either a committee selected from its membership or the board of auditors, in counties having boards of auditors, to be constituted a board of review for the purpose of hearing and reviewing rates, charges and/or assessments. At the request of any unit of government, person, firm or corporation, charged for services rendered by any county acting under the provisions hereof, and on sufficient cause being shown, or upon information presented to or obtained by said board of review of the respective county, the action of the county agency in fixing or adjusting charges and/or assessments *shall be reviewed and finally determined by said board of review*: Provided, That such charges and/or assessments shall in all cases be sufficient to pay operating expenses of the system and to meet sinking fund and interest requirements on bonds and to meet principal and interest payments on notes if any, and any other requirements under which such bonds or notes may be issued. The board of review shall adjust and correct rates, charges and/or assessments in order that the same shall be *just and equitable*.

The evidence before the Board was highly technical in nature and the Board applied its expertise in order to determine a just and equitable rate. It did not simply rubber-stamp the initial assessment; instead, the Board concluded that actual meter readings were now available and that the initial fees were remarkably out of step with those readings. Accordingly, the Board substantially reduced the actual fee. It was the Board's final determination of fees that was subject to review. The trial court, in ordering the parties to appear before the Board, correctly recognized that, absent such a final determination, there was nothing for it to review. The trial court did not consider the Board to review the constitutional issues at the heart of the matter, but the trial court could not decide the constitutional issues without first having a final fee assessment.

V. THE 2006 ORDINANCE

GBCS argues that the county's 2006 ordinance, which created a three-step process to review fees, should not have applied in this case. Whether the trial court erred in considering the county's 2006 ordinance is a question of law that is reviewed de novo on appeal. *Myland*, 290 Mich App at 702.

As the County points out, the parties were ordered to appear before the Board of Review, not because of the ordinance, but because of MCL 46.176. Additionally, contrary to GBCS's claim, the ordinance does not seek to apply a retroactive defense.

GBCS cites *Willingham v City of Dearborn*, 359 Mich 7; 101 NW2d 294 (1960). In *Willingham*, the plaintiff applied for a building permit. The city denied the permit because the application did not include a 160-foot setback from the property line to the front of the building. However, at that time, there was no ordinance in place requiring such a setback. After the plaintiff filed a petition for mandamus, the city amended its ordinance and sought to interpose the newly-amended ordinance as an additional defense. *Id.* at 8-9. The Michigan Supreme Court

affirmed the trial court's decision to grant mandamus, holding that "injustice to plaintiff might have resulted from any such last-minute order providing a defense which did not exist when the petition was filed." *Id*. at 10. Unlike *Willingham*, in this case the ordinance was enacted very early in the proceedings. In *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154; 667 NW2d 93 (2003), this Court explained:

> In determining which version of a zoning ordinance a court should apply, the general rule is that the law to be applied is that which was in effect at the time of decision.
>
> There are two exceptions to the general rule: (1) A court will not apply an amendment to a zoning ordinance where ... the amendment would destroy a vested property interest acquired before its enactment ...; and (2) a court will not apply the amendment where the amendment was enacted in bad faith and with unjustified delay. Here, plaintiffs do not claim a vested property right in this case and our analysis must focus on the second exception. The test to determine bad faith is whether the amendment was enacted for the purpose of manufacturing a defense to plaintiff's suit. [*Id.* at 161 (internal quotations and citations omitted.]

Assuming that the trial court was relying on the ordinance when it ordered the parties to appear before the Board of Review, it correctly applied the version of the ordinance in effect at the time of its decision. The amendment did not destroy a vested property interest and made no substantive change to GBCS's rights. In fact, the amended ordinance had "wide applicability" to citizens at large. *Id.* at 162. Accordingly, application of Ordinance 06, if at all, was not erroneous.

VI. JUDICIAL DISQUALIFICATION

Although GBCS's Statement of Questions includes an allegation that the trial court committed "error in denying Appellant's Motion for Disqualification," the focus of GBCS's argument is on what to do should the matter be remanded to the trial court for additional proceedings. GBCS writes:

> Appellant seeks the admittedly unusual remedy of disqualification of a trial judge based on his continued adverse rulings, on the mandatory (and very expensive) diversion of the case to a panel of biased County Commissioners and the repeated refusal to grant a trial to the plaintiff. These facts, plus the question of political gravity of Appellee Wright warrant the disqualification of the trial court from hearing any further proceedings in this matter and also warrant the extraordinary step of assignment of this matter for trial, after remand, to a non-Genesee County Circuit Judge.

As we have just discussed, GBCS's claims fail as a matter of law and there is nothing left to remand.

To the extent GBCS argues that the trial court erred in failing to disqualify itself, we note that the matter has not been preserved for appellate review, nor has it been adequately briefed.

The grounds and procedure for the disqualification of a judge are provided in MCR 2.003. *In re MKK*, 286 Mich App 546, 564; 781 NW2d 132 (2009). The procedure set forth in MCR 2.003 is exclusive and must be followed. *In re Moroun*, 295 Mich App 312, 341; 814 NW2d 319 (2012). A motion to disqualify a trial court judge must be filed within 14 days after the moving party discovers the ground for disqualification. MCR 2.003(D)(1)(a); *Kloian v Schwartz*, 272 Mich App 232, 244; 725 NW2d 671 (2006). The motion must include all grounds for disqualification that are known and be accompanied by an affidavit. MCR 2.003(D)(2); *Kloian*, 272 Mich App at 244.

A motion for disqualification must first be decided by the challenged judge. MCR 2.003(D)(3)(a). If the challenged judge denies a motion for disqualification, upon request of a party the motion must be referred to the chief judge for decision de novo. MCR 2.003(D)(3)(a)(i); *In re Contempt of Steingold*, 244 Mich App 153, 160; 624 NW2d 504 (2000). If the challenged judge is the only judge in the court, or is the chief judge, the motion must be referred to another judge as designated by the state court administrator. MCR 2.003(D)(3)(a)(ii).

GBCS did not preserve this issue for appellate review because it did not pursue the claim of disqualification in the trial court. GBCS raised a half-hearted motion on June 30, 2009, titled "Motion to Establish Trial Date or, in the Alternative, for Disqualification of the Court." This only occurred after it received a letter from the trial court threatening to administratively close the case unless the Board's review took place before a certain date. GBCS complained that it was denied the right to a trial and that the judge was biased against it. However, this claim was not pursued. GBCS was satisfied that the trial court set the matter for trial and that a hearing was pending before the Board. By effectively withdrawing the motion for disqualification, GBCS indicated, at a minimum, tacit approval of the judge. See *Reno v Gale*, 165 Mich App 86, 91; 418 NW2d 434 (1987).

Even if GBCS's claim was decided on the merits, it has failed to show any actual or even perceived bias. A trial judge is presumed to be unbiased, and GBCS bears the heavy burden of overcoming that presumption. MCR 2.003(B); *Mitchell v Mitchell*, 296 Mich App 513, 523; 823 NW2d 153. GBCS must do more than just show that the trial court judge ruled against it, even if the ruling were erroneous. *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). There is simply no support for GBCS's contention that the trial court judge was biased against it. In fact, the opposite is true. The judge took pains to ensure that GBCS could pursue its claims, even when it violated the judge's order to submit the matter to the Board of Review. The trial court initially dismissed the complaint, but then granted reconsideration and decided that dismissal was too extreme of a sanction. The trial court judge at times expressed frustration with GBCS's counsel, but it is clear from a review of the record that the trial court judge was not predisposed or biased against GBCS.

Affirmed.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly