STATE OF MICHIGAN

IN THE COURT OF CLAIMS

OAKLAND COUNTY WATER RESOURCES COMMISSIONER, as County Agent for the County of Oakland, GREAT LAKES WATER AUTHORITY, CITY OF DETROIT, by and through its Water and Sewerage Department, AND CITY OF LIVONIA,

Plaintiffs,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

Honorable Christopher M. Murray

Case 2018-000259-MZ

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PLAINTIFFS' 08/21/2019 RESPONSE TO DEFENDANT MDEQ'S 08/07/2019 MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(8) ON PLAINTIFFS' HEADLEE AMENDMENT CLAIM (COUNT VI OF THE FIRST AMENDED COMPLAINT)

I. INTRODUCTION

MDEQ moved for summary disposition under MCR 2.116(C)(8), asserting that Plaintiffs' Headlee Amendment unfunded mandate challenge fails to state a claim upon which relief can be granted. (MDEQ's 08/07/2019 Motion for Summary Disposition Under MCR 2.116(C)(8) on Plaintiffs' Headlee Amendment Claim (Count VI of the First Amended Complaint ("Motion"), p 2). Plaintiffs asserted a valid claim for relief because the Rules[1] require additional and increased level of activity and services, which must be accompanied by State funding. There is no State funding. This violates Article 9, Sections 25 and 29 (and specifically the "second sentence" of Section 29) of the Michigan Constitution. The Rules require additional and increased level of activity for the following reasons:

1. The Home Rule City Act, MCL 117.1 *et seq.* ("HRCA") mandates that Plaintiffs provide for the public health. Safe drinking water is a necessary element in the provision of public health. To provide for the public health, there has never been a requirement for Plaintiffs to make improvements to private property, especially through the replacement of private lead service lines. The replacement of private lead service lines historically has been illegal. The Rules impose an added and new requirement to provide for the public health by making improvements to private property through the replacement of private lead service lines absent State funding. The fact that the Rules require such replacement is undeniable evidence that the public health mandate under the HRCA has been expanded.

2. The only argument to avoid the HRCA's mandate is to claim that Plaintiffs do not have to provide any safe drinking water at all. This argument ignores the specific facts as alleged and presented by Plaintiffs that they have been providing drinking water for decades, approaching 100 years; that their respective cities have relied on such provision of water; and that there is no option to abandon that obligation. It borders on the absurd to assert that, for example, all homeowners suddenly dig their own wells. Moreover, there is no consideration of this in the Rulemaking record or State funding for such a turbulent change. The specific facts as alleged in the

[1] "Rules" refers to Michigan Administrative Rules 325.10604f(6), Rule 325.10401a, Rule 325.11604(c) and Rule 325.10410(7).

First Amended Complaint make Plaintiffs' provision of drinking water and, consequently, compliance with the added requirements, mandatory.

3. The burden of the Water Advisory Council is a separate basis for denying MDEQ's Motion because it is also an added unfunded mandate that applies to Plaintiffs irrespective of their provision of drinking water.

Further, the case law relied upon by MDEQ is inapposite, namely, *Livingston County v Dept of Management & Budget,* 430 Mich 635; 425 NW2d 65 (1988). MDEQ has failed to show that Plaintiffs' claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, therefore, MDEQ's Motion should be denied.

II. STATEMENT OF FACTS

In the wake of the Flint water crisis, on June 14, 2018 MDEQ enacted revised lead and copper rules (the "Rules") mandating, among other things, that Plaintiffs replace every single lead service line in their systems. (08/06/2019 First Amended Verified Complaint for Declaratory Judgment Invalidating MDEQ's Revised Lead and Copper Rules, Promulgated Pursuant to Michigan's Safe Drinking Water Act, and For Declaratory and Injunctive Relief Under the Headlee Amendment Because the Rules Constitute an Unfunded Mandate ("Amend. Compl."), ¶165). The purpose of the Rules, according to MDEQ, is the protection of public health. (*Id.* at ¶¶167-170). In fact, both MDEQ and other state officials have made statements alluding that the provision of drinking water in general is a human right, necessary for the public health. (*Id.* at ¶163, ¶167). Accordingly, the Rules implicate Plaintiffs' obligation to provide for the public health pursuant to their respective charters. (*Id.* at ¶¶152-162). This Court is well aware of the events leading up to the adoption of the Rules and the arguments on both sides with respect to the Rules' many deficiencies. What is pertinent for purposes of MDEQ's Motion, however, are the factual circumstances surrounding Plaintiffs' provision of drinking water and MDEQ's proposed solution to this dispute.

Plaintiffs, through their respective water supplies, provide water to hundreds of thousands of Michigan residents. (*Id.*) They have done so for decades, approaching a century. Each one of these residents depends upon the delivery of that water, as it is necessary for their health and wellbeing. (*Id.* at ¶163, ¶167). Even a temporary lapse in the provision of water results in a danger to the public health because secondary sources of water are simply not available for all individuals. This fact was apparent throughout the Flint water crisis. Thus, Plaintiffs recognize, and are dedicated to, the provision of safe drinking water to their residents and they do not intend to shirk this responsibility under any circumstances.

It is surprising, given Plaintiffs' commitment to the well-being of their residents, and MDEQ's purported goal of ensuring the provision of safe drinking water to *all* Michigan residents, that MDEQ's primary argument for dismissal of Plaintiffs' claims is that Plaintiffs are simply not required to operate water supplies. (Motion, p 9). In fact, the absurdity of this argument is apparent when one glances at MDEQ's list of proposed solutions, which includes **requiring Plaintiffs' residents to provide water for themselves**. (Motion, p 9). In no way can this be rationalized with MDEQ's purported dedication to the provision of safe drinking water to all Michigan residents. MDEQ's assertion represents a shaky legal argument at best given Plaintiffs have alleged that the HRCA *does* mandate the provision of safe drinking water, and when examined with any semblance of common sense, MDEQ's proposed solution quickly appears factually impossible. MDEQ, however, insists that Plaintiffs are not required to operate a water supply because Michigan citizens can simply go dig their own wells, thus ending this lawsuit and solving Michigan's problem with respect to the provision of safe drinking water. (Motion, p 9). This is certainly not a factual reality and Plaintiffs should not be deprived of the opportunity to develop the many factual deficiencies with respect to MDEQ's argument for dismissal.

III. STANDARD OF REVIEW

"A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the claim on the basis of the pleadings alone." *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). In reviewing the motion, this Court accepts as true "[a]ll factual allegations supporting the claim, and any reasonable inference or conclusions" drawn therefrom, *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998), and construes the facts "in a light most favorable to the non-movant" Plaintiffs. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "The motion should be denied unless the alleged claims are so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recover." *Troutman v Ollis*, 164 Mich App 727, 731; 417 NW2d 589 (1987); see also *Maiden*, 461 Mich at 119. Moreover, if it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2).

IV. ARGUMENT

A. Requiring Plaintiffs to replace private lead service lines is an expansion of the HRCA's public health mandate without any additional funding, therefore, the Rules constitute an unfunded mandate.

Plaintiffs have alleged that the HRCA, MCL 117.1 *et seq*, including MCL 117.3(j), mandates that "[e]ach city charter shall provide for...[t]he public peace and health and for the safety of persons and property. . . . (Am. Compl., ¶¶151-162). MDEQ argues for dismissal of this claim based on an outdated and erroneous interpretation of the word "shall" and by asserting that Plaintiffs' obligation to provide for the public health is permissive, rather than mandatory. (Motion, p 11-12). This draconian argument is disconcerting because MDEQ's proposed alternative plan for supplying drinking water to Plaintiffs' constituents is simply to have the people of Michigan obtain water for themselves. (Motion, p 9). The HRCA is, in fact, mandatory,

however, and Plaintiffs *are* obligated to provide for the public health, which in this case, also includes ensuring safe drinking water for their constituents. In addition, Plaintiffs have never before been required to replace private lead service lines. In fact, it has been illegal for them to do so in the past. Accordingly, the only legal avenue for requiring Plaintiffs to replace private lead service lines is through an expansion of the HRCA's mandate that Plaintiffs provide for the public health of their communities by entering into previously forbidden private property to replace privately owned water lines. Plaintiffs have stated a valid claim for relief on these grounds, therefore, MDEQ's Motion pursuant to MCR 2.116(C)(8) should be denied.

1) The HRCA requires Plaintiffs to provide for the public health

i. MDEQ's interpretation of the word "shall" is erroneous and ignores the title of MCL 117.3

MDEQ attempts to attack Plaintiffs' argument that MCL 117.3(j) of the HRCA mandates that Plaintiffs provide for the public health and safety of their constituents by asserting that the word "shall" is to be construed as permissive rather than mandatory. In doing so MDEQ disregards that the title of MCL 117.3 reads "Mandatory Charter Provisions." No amount of creative statutory interpretation can override the fact that the Legislature has clearly issued a mandate that every city charter must provide for the public health and safety of the city's constituents. MCL 117.3(j). The statute goes on to provide certain means for carrying out such obligation, however, this does not change the fact that the provision of public health and safety is a necessary component of any city charter under the HRCA.

Not only does MDEQ's reading directly contradict the title of the statute, it relies on outdated case law from the 1800s. (See Motion, pp 11-12) (citing *Railroad Co v Hecht*, 95 US 168, 170 (1877)). Contrary to MDEQ's assertion, "shall" means exactly what it reads to mean,

home rule cities are obligated to provide for the public health and safety through a charter provision. It is well-settled that "the Legislature's use of the word 'shall' indicates a mandatory and imperative directive." *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005) (internal citation omitted); *Oakland Cty v State*, 456 Mich 144, 154-55; 566 NW2d 616 (1997) (requirement that "[t]he county department shall administer a public welfare program" constituted mandate requiring state funding under the Headlee Amendment because "[t]here is a presumption that 'shall' is mandatory"). MDEQ's proposed interpretation of the word "shall" defies law and, in the context of MCL 117.3, common sense, thus, it should not form the basis for dismissing Plaintiffs' Headlee Amendment claim.

ii. The cases MDEQ cites in support of the assertion that MCL 117.3(j) is permissive are not applicable

MDEQ cites cases standing for the proposition that, as a whole, the HRCA has generally granted certain powers to home rule cities that they otherwise would not possess. (See Motion, p 12) (citing *Butcher v Detroit*, 131 Mich App 698, 702-04; 347 NW2d 702 (1984); *People v Strobridge*, 127 Mich App 705, 710; 339 NW2d 531 (1983); and *Belle Isle Grill Corp v. City of Detroit*, 256 Mich App 463; 666 NW2d 271 (2003)(). Not one of these cases directly addresses whether the provision for health and safety by a home rule city is mandatory or permissive. Rather, they all address whether a particular city ordinance is a valid exercise of the city's power to provide for the public health. See *Butcher*, 131 Mich App at 701 (plaintiff sued alleging city was without authority to regulate home sales and demand inspection fee); *Strobridge*, 127 Mich App at 712-13 (plaintiff sued alleging a dog-limitation ordinance was an unconstitutional use of the city's police power); *Belle Isle Grill Corp*, 256 Mich App at 480-82 (finding that breach of contract action could not be based upon city's valid use of police power).

The claims addressed in these cases all make the same general assertion: the respective city's actions exceeded its constitutional authority. Naturally, in determining the validity of such claims, the court will frame the analysis in terms of whether the city was "allowed" or "not allowed" to pass a particular ordinance or take a particular action. This framing of the issue is consistent with the language MDEQ recites with respect to the "grant" of police power, however, not one of these cases directly assesses whether "shall" for purposes of MCL 117.3(j) is permissive or mandatory.[2] As discussed above, "shall" constitutes a mandatory directive and the title of MCL 117.3 is "Mandatory Charter Provisions." Interpretive gymnastics cannot change the clear legislative directive that home rule cities must provide for the public health and safety through their respective city charters and the case law MDEQ cites in its Motion does not apply to this argument.

iii. MDEQ's additional arguments with respect to its interpretation of MCL 117.3(j) are similarly misplaced

MDEQ also asserts that, if MCL 117.3(j) is mandatory, MCL 117.4f(a) would be rendered superfluous. (See Motion, p 13). This is untrue. MCL 117.4f(a) provides, "[a] city may in its charter *allow for a contract*...to purchase, operate, and maintain any existing public utility property for supplying water, heat, light, power, or transportation to the city and the city's inhabitants." (emphasis added). MCL 117.3(j) mandates that home rule cities provide for the public health. MCL 117.4f(a) merely delineates the means by which a city can enter into a contract with respect to the provision of water, heat, light, power, or transportation services. MCL 117.4f(a)

[2] Further, there are numerous cases which describe MCL 117.3(j) as a requirement. See, e.g., *Rental Property Owners Ass'n of Kent County v City of Grand Rapids*, 455 Mich 246; 566 NW2d 514 (1997) ("The home rule cities act specifically requires home rule city charters to provide for the public peace and health and for the safety of persons and property"); *Dickey v Fluhart*, 146 Mich App 268; 380 NW2d 76 (1985) ("[A] home rule city, by virtue of constitution and statute, is mandated by law to provide in its charter for the public peace, health and safety of persons and property") (citing MCL 117.3(j), internal citations omitted)).

does not undermine the fact that MCL 117.3 provides a mandatory obligation on the part of a home rule city to provide for the public health of its residents. Further, MDEQ's assertion that statutes should be read "as a whole," only supports the conclusion that the legislature meant what it said when it enacted *mandatory* charter provisions (MCL 117.3). This is especially compelling when it also enacted other *permissive* charter provisions (MCL 117.4b-k, MCL 117.4n-o).

MDEQ also asks this Court to take the word of an amici brief, filed in a different case, for the proposition that "many essential services of cities and townships...are not mandated by state law..." (Motion, p 13) (citing *Livingston County*, 430 Mich at 645). As if it was not already apparent, Plaintiffs disagree with this notion and assert that ensuring safe drinking water through mandated lead line replacement, unlike many other optional services, is essential to the public health. Thus, by way of the HRCA, Plaintiffs are obligated to replace the lead service lines in order to provide safe drinking water for their constituents. The amici in *Livingston County* did not address this argument and the quotation set forth by MDEQ is merely an attempt to side step the crux of Plaintiffs' Headlee unfunded mandate claim.

Plaintiffs are required to provide for the health and safety of their citizens under MCL 117.3(j). This obligation encompasses the requirement to replace lead lines that arguably jeopardize the availability of safe drinking water.[3] (Amend. Compl., ¶¶163, 167, 169). MDEQ acknowledges this. (*Id*). Thus, Plaintiffs have set forth a valid claim for relief based upon a Headlee Amendment unfunded mandate challenge and MDEQ's Motion should be denied.

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[3] Plaintiffs recognize that there is case law discussing whether safe drinking water is, in fact, a fundamental right, however, this case law is inapposite. See *Guertin v State*, 912 F3d 907, 921-22 (6th Cir 2019) (quoting *Golden v City of Columbus*, 404 F3d 950, 960 (6th Cir 2005)). These cases discuss a state's obligation to provide safe drinking water in the context of a fundamental right, whereas our current case involves a legislative mandate to provide for the public health through, in this case, the replacement of all lead service lines (including those that are privately-owned). Further, to the extent that our case does implicate the assertion that water is a fundamental right, the government has admitted as much. (See Amend. Compl. ¶163), Accordingly, these cases do not provide a defense to Plaintiffs' Headlee Amendment unfunded mandate claim.

2) The mandate to replace private lead service lines is only legal as an expansion of Plaintiffs' existing obligation to provide for the public health

The Rules require the replacement of every single lead or galvanized service line in the state including the replacing the portion of the service line that is located on private property and owned by private persons. (Amend. Compl., ¶165). Plaintiffs have never before been required to test, inspect, or replace the private service lines located on property owned by private persons. But now, under the aegis of the Plaintiffs' obligation to provide for the public health of its citizens, this is precisely what the Rules require, all without providing any additional funding to do so. The replacement of each private service line creates additional cost with respect to materials and labor and this is without even taking into consideration the cost of simply obtaining access to the private property. As such, the Rules have expanded Plaintiffs' obligation to provide for the public health, which involves increased cost, without any additional funding. Accordingly, the Rules violate the Headlee Amendment.

This only becomes clearer when one considers the legal context within which MDEQ promulgated the Rules. Specifically, the fact that mandating Plaintiffs replace the portion of lead service lines located on private property conflicts with several provisions of the Michigan Constitution and statutory law. (Amend. Compl., ¶114). Article 9, § 18 of the Michigan Constitution prohibits local governments from giving to their residents something of value without receiving consideration and Article 7, § 26 prohibits cities and villages from giving away something of value without receiving consideration *unless it serves a public purpose*. *Id.* The mandate with respect to private service lines similarly violates MCL 141.118 of the Revenue Bond Act, MCL 141.101 *et seq.*, which prohibits water supplies from providing free services. *Id.*

Bearing the cost for replacing private lead service lines, located on a private person's property, constitutes the provision of a free service without receipt of consideration. Accordingly,

the Rules require Plaintiffs to act contrary to the Michigan Constitution and the Revenue Bond Act, *unless* replacing the private lead service lines serves a public purpose, for example, the public health. Article 7, § 26. This further reinforces the assertion that the Rules serve as an expansion of Plaintiffs' obligation to provide for the public health of their constituents. Because the Rules were passed with no additional funding, and they constitute an expansion of services required of Plaintiffs, the Rules violate the Headlee Amendment and MDEQ's Motion should be denied.

B. MDEQ's counterargument that Plaintiffs are not required to supply water to their residents fails to address the factual reality surrounding Plaintiffs' provision of drinking water

In recognizing the enormous cost associated with this expansion of Plaintiffs' obligation to provide for the public health, MDEQ has suggested that Plaintiffs are simply not required to provide drinking water. MDEQ has asserted this argument because it is the only way around the Rules' clear mandate that Plaintiffs replace all lead service lines without receiving any additional funding. MDEQ's argument does not address Plaintiffs' many factual assertions made with respect to their provision of drinking water.

Plaintiffs' provision of safe drinking water for their residents is entrenched in the very fabric of their communities, and has been so for close to 100 years. Plaintiffs' residents depend on the provision of that drinking water every single day and the disruption of that service for even a short period necessarily threatens the public health. The Flint water crisis provides a glaring example of this fact. As such, Plaintiffs vehemently disagree with MDEQ's assertion that they are not required to provide safe drinking water for their residents because other communities choose to do so differently. (Motion, p 9).

Not one of MDEQ's proposed solutions makes practical sense given the factual circumstances already set in motion within Plaintiffs' communities. Moreover, no determination

regarding the feasibility of these proposed solutions (both economic and practical) has ever been made, not through factual development or discovery in the current matter nor during the rulemaking process. Thus, MDEQ cannot foreclose the argument that Plaintiffs are, in fact, required to operate their own water supply in order to insure the provision of safe drinking water for their residents.

One, however, can theorize with respect to the feasibility of these proposed solutions and several issues become quickly apparent. First, it is unclear whether Plaintiffs can simply contract with a private utility with respect to the provision of drinking water in a manner that is both economically and practically feasible. To do so likely requires a change in infrastructure that would certainly create additional cost on the part of Plaintiffs. Further, because of the mandate that all lead service lines be replaced, it will be even more challenging and expensive for Plaintiffs to attempt contracting with a private entity. With knowledge of the Rules' various requirements, any private utility negotiating with Plaintiffs is likely to use the Rules as leverage to increase the cost of their services and to reach an agreement that is more favorable to the utility. The same is true for contracting with a neighboring municipality. Thus, it is not apparent that Plaintiffs can even reach an agreement that is economically feasible and does not increase the cost of providing water *beyond* what the Rules would require.

Perhaps the most unreasonable solution (though likely the simplest) is for Plaintiffs to simply turn off the water supply, tell their constituents to dig their own wells and find their own water. (Motion, p 9). It is factually impossible, however, for Plaintiffs to pursue this alternative while still upholding their obligation to provide for the public health under the HRCA. As discussed, even a short-term disruption in the provision of clean drinking water threatens the public health because not all individuals have reasonable access to alternative water sources. Further, if

Plaintiffs place the cost of constructing and implementing a well system upon their individual citizens, there is no telling how long it could take before all individuals have a running well on their property and access to safe drinking water. This is true even absent any consideration of the practical problems involved with switching from a city system to a well system, all of which the residents themselves would have to address without the assistance of their respective municipality. Moreover, MDEQ's reasoning simply does not comport with its purported goal of passing the Rules in order *to advance* public health and safety as this proposed solution almost certainly threatens both.

The practical reality of the current situation is that Plaintiffs currently provide safe drinking water to their constituents and any change to this system necessarily disrupts the public health. The questionable viability of MDEQ's proposed alternatives, particularly that residents themselves can bear this burden, only serves to reinforce that Plaintiffs are, in fact, mandated to provide drinking water for their citizens. Plaintiffs have alleged that they simply have no alternative to operating their own water supplies in order to fulfil their obligation to provide for the public health under the HRCA. (Amend. Compl., ¶¶158, 161, 162). On MDEQ's Motion pursuant to MCR 2.116(C)(8), the Court must find that no factual development could possibly justify a right to recovery. Where, as here, Plaintiffs have alleged specific factual circumstances under which the Rules constitute an unfunded mandate in violation of the Headlee Amendment, MDEQ's Motion must be denied.

C. The mandatory creation of a water system advisory council without any additional funding constitutes an unfunded mandate in violation of the Headlee Amendment

Irrespective of MDEQ's argument that Plaintiffs are not mandated to act as water suppliers, the Rules mandate the creation of a water system advisory council without providing any

additional funding, therefore violating the Headlee Amendment's prohibition on unfunded mandates. Rule 325.10410(7). The Rules provide, "[e]ach water supply that serves a population of 50,000 or more, *and* each consecutive water system that serves a population of 50,000 or more, *shall* create a water system advisory council." *Id.* (emphasis added). The Rules define a "consecutive water system" as a "public water supply that receives some or all of its finished water from 1 or more wholesale supplies." Rule 325.10103(o).

Even taking MDEQ's argument as true, if Plaintiffs were to outsource responsibility for operating the primary water supply to a private party or neighboring government, they would still qualify as a consecutive water system. Thus, Plaintiffs must create a water system advisory council with multiple responsibilities, including: developing plans for continued public awareness about lead in drinking water, reviewing public awareness campaign materials, advising the water supply on the development of a plan for remediation and public education, and advising and consulting the water supply on efforts to replace private lead service lines at locations where the owner declined service line replacement. See Rule 325.10410(7)(f). All of these responsibilities will require additional expense on the part of the consecutive water system (expense that was not previously required) without any additional funding. Thus, this provision alone constitutes a violation of the Headlee Amendment as an unfunded mandate and MDEQ's Motion should be denied.

D. *Livingston County* does not bar Plaintiffs' Headlee Amendment unfunded mandate challenge

MDEQ relies heavily on *Livingston County v Dept of Mgmt and Budget*, 430 Mich 635; 425 NW2d 65 (1988) in its Motion as though *Livingston County* acts as a direct bar to Plaintiffs' Headlee Amendment unfunded mandate challenge, however, this is not the case. (Motion, pp 7-8, 14).

1) Plaintiffs' Headlee Amendment unfunded mandate challenge differs from that addressed in *Livingston County*

In *Livingston County*, the court addressed whether the Headlee Amendment was implicated by the Legislature's passage of the Solid Waste Management Act ("SWMA"), which provided additional requirements for sanitary landfills, both public and private, operated within the state. *Livingston County*, 430 Mich at 637-38. The SWMA set forth, "[a] municipality or county shall assure that all solid waste is removed from the site of generation, frequently enough to protect the public health, and...delivered to licensed solid waste disposal areas." *Id.* at 649. In turn, the court found that the SWMA "clearly places upon a county the responsibility to ensure that 'all solid waste is removed from the site of generation...and...delivered to licensed or solid waste disposal areas." *Id.* at 652. While "the state presumably would be required to reimburse for the cost of [removal and delivery]," the SWMA did not mandate the ownership or operation of a waste disposal site. *Id.* Thus, on appeal, the court found that Livingston County's Headlee Amendment unfunded mandate challenge with respect to the additional requirements placed upon landfills must fail.[4] *Id.*

A closer look at the case illustrates that the arguments advanced in *Livingston County* are different from those Plaintiffs propose in the current matter. First, the SWMA did not mandate that Livingston County enter private property and replace privately owned fixtures. In addition, Plaintiffs are not attempting to bring within the purview of a statute mandating the delivery of drinking water, the independent obligation to operate a water supply. Instead, Plaintiffs argue that the HRCA itself mandates that Plaintiffs both operate a water supply and deliver water to their

[4] Livingston County did not challenge the mandate on removal and delivery, however, the court did indicate this would have formed the basis for a Headlee Amendment challenge. *Livingston County*, 430 Mich at 652 ("the state presumably would be required to reimburse for the cost of that which is required.").

residents where both actions are necessary for the public health and safety. Plaintiffs' argument is that they "shall provide for the public health and safety" under the HRCA, similar to the SWMA's mandate that a municipality "shall assure that solid waste is removed from the site of generation," an obligation the court in *Livingston County* found would have substantiated a Headlee Amendment unfunded mandate claim. One can see why the holding in *Livingston County* is such an attractive argument for MDEQ, however, that case does not act as a bar to Plaintiffs' Headlee Amendment challenge. Plaintiffs' claim differs from that advanced in *Livingston County* in a crucial respect: unlike the operation of a landfill, the provision of safe drinking water *is* mandated by law under the public health provisions of the HRCA. Accordingly, obligating Plaintiffs to replace private service lines (an act not previously necessary for the public health) constitutes an additional service without any funding, therefore, violating the Headlee Amendment.

2) The Concurrence in *Livingston County* directly addressed the absence of a factual determination with respect to an argument similar to Plaintiffs' argument in this case

Not only is Plaintiffs' Headlee Amendment unfunded mandate claim different from that which plaintiffs advanced in *Livingston County*, the court in that case directly addressed the absence of a factual determination with respect to an argument very similar to that which Plaintiffs advance in this case. In *Livingston County*, plaintiffs filed their Headlee Amendment challenge in the Court of Claims, which granted summary judgment in their favor. *Livingston County*, 430 Mich at 652 n 6. Defendant appealed that decision to the Michigan Court of Appeals, which affirmed the Court of Claims' decision. *Id.* at 639. Only at the Michigan Supreme Court level was this decision reversed. *Id.*

In its opinion, the Court made note of this procedural circumstance with respect to Livingston County's argument that, because it operated the only landfill in the county, the mandate to remove and transport waste to a waste disposal area effectively obligated it to continue operating the landfill. *Id.* at 652. "While the record does not indicate the degree of difficulty plaintiff would encounter in disposing of solid waste if it did not continue operation of its landfill, we have no reason to gainsay the fact that its continued operation would be beneficial." *Id.* In doing so, the Court recognized that Livingston County was never able to factually develop their claim with respect to whether it has no alternative to operating its own landfill because they prevailed on summary judgment at the trial court level. *Id.* at 652-53 n 6.

The concurrence in part and dissent in part issued by Justice Levin in *Livingston County* addresses this exact circumstance, "the question whether the county was required to continue operation of its sanitary landfill to meet its statutory obligation to remove solid waste was resolved by partial summary judgment in the Court of Claims." *Id.* at 654-55 (Levin, J dissenting). "Since that question was resolved in favor of Livingston County as a matter of law, the county was not called upon to offer evidence to show that the only way it could realistically meet its statutory obligation...was through the continued operation of its sanitary landfill facility." *Id.* at 655 (Levin, J dissenting).

Justice Levin recognized that "the SWMA, in requiring that the county assure that waste finds its way from the point of generation to a licensed waste disposal area, does not require that the county operate its own waste disposal facility." *Id.* at 656 (Levin, J dissenting). However, "[t]he record does not show whether Livingston County could reasonably meet its statutory obligation by pursuing an alternative to the continued operation of its sanitary landfill." *Id.* Further, "it might appear on remand...that no private entity could be found to operate a facility in

Livingston County at commercially feasible rates and that facilities in neighboring counties would refuse…to dispose of Livingston County's waste." *Id.* at 656-57 (Levin, J dissenting). If that were the case, "then it might appear that the county's statutory obligation could only be met – as a matter of fact – by the continued operation of this sanitary landfill." *Id.*

This factual development, notably absent from the record in *Livingston County* is exactly what MDEQ is seeking to deprive Plaintiffs of in our current case. MDEQ asserts that Plaintiffs are not mandated to provide safe drinking water (despite their insistence that it is, in fact, a matter of public health), instead, they have several provided alternative options: 1) contract with another government, 2) participate in an "authority" established for providing water, 3) contract with a private company for the provision of water, or 4) leave residents to supply water for themselves. (Motion, p 9).

As discussed in Section (IV)(B), absolutely no attention has been paid to the assertion that none of these options are viable for Plaintiffs where the HRCA obligates them to provide for the public health and any lapse in the provision of safe drinking water necessarily threatens the public health. As Justice Levin indicated in his dissenting opinion, it might be that no private entity is capable of providing water at a commercially reasonable rate, or that facilities in neighboring municipalities cannot share their own facilities. In this scenario, Plaintiffs' statutory obligation to provide for the public health "can only be met – as a matter of fact – by the continued operation" of their own water supplies. The argument Justice Levin discusses is identical to one that Plaintiffs intend to pursue. Accordingly, MDEQ has failed to show that no factual development could possibly justify relief on Plaintiffs' Headlee Amendment challenge because the factual circumstances recognized by the dissent in *Livingston County* remain to be developed, therefore, MDEQ's Motion should be denied.

V. CONCLUSION

Plaintiffs have alleged a valid claim that the Rules constitute an unfunded mandate and, therefore, violate the Headlee Amendment. Contrary to MDEQ's assertion that the relevant provision of the HRCA is permissive, the HRCA mandates that Plaintiffs provide drinking water because it is necessary for the public health and provided for in their city charters. Because Plaintiffs have never before been required to replace private service lines pursuant to their obligation to provide for the public health, the Rules mandate an additional service. Accordingly, because the Rules were passed without any additional funding, they constitute an unfunded mandate prohibited by the Headlee Amendment.

MDEQ's assertion that Plaintiffs are not required to provide water for their residents fails to address the factual circumstances surrounding Plaintiffs' provision of drinking water and MDEQ's proposed alternatives to Plaintiffs' provision of drinking water lack practical or economic viability. Accordingly, summary disposition under MCR 2.116(C)(8) is inappropriate. Even taking MDEQ's arguments as true, the Rules still constitute an unfunded mandate because of the water system advisory council provision. Lastly, *Livingston County* does not act as a bar to Plaintiffs' Headlee Amendment claim as MDEQ suggests because Plaintiffs' have pled a different claim and the facts are distinguishable. Plaintiffs have stated a valid claim for relief and summary disposition is inappropriate at this stage because it remains to be seen, given Plaintiffs' obligations under the HRCA, whether they have any reasonable alternative to operating their own water supply. Accordingly, MDEQ's Motion should be denied.

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Dated: August 21, 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2019, I served a copy of the above document in this matter on all attorneys of record via e-mail.

Alma Sobo