STATE OF MICHIGAN
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.

No. 2018-000259-MZ

HON. CHRISTOPHER M. MURRAY

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)

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INTRODUCTION

As a prerequisite for a Headlee Amendment, "prohibition on unfunded mandates" claim, a claimant must point to a legal mandate where the State has required local governments to engage in a particular activity. It is not enough that state regulations add costs to an activity. Nor is it enough that such activity is very important—or even essential—as a practical matter. The point of the Headlee Amendment's prohibition is to prevent the State from upsetting the established balance of funding and responsibility as between the State and its constituent local governments by shifting activities *off* the State and *on* to local governments without attendant funding to pay for those activities. So, the *sine qua non* of a "prohibition on unfunded mandates" violation is a state law that mandates local governments to engage in the activity in the first place.

In the context of this litigation, that means that the State must have legally mandated municipalities to act as water suppliers. It is not enough that supplying water is important—even crucial—to public health. The State agrees that water supplies are important to public health. Indeed, the revised rules challenged here are premised on the recognition that public water supplies play an important role in public health. Nor is it enough that certain local governments, as a practical matter, *must* provide water because other means of ensuring adequate public water supply are impractical or unavailable. Without a state mandate to supply water, the legal regime of the Headlee Amendment is simply not implicated.

No such mandate exists. Cities "*may*" act as water supplies. MCL 117.4f(a). No law says they *must* do so. For that reason alone, Plaintiffs' Headlee claim fails. This Court should grant summary disposition to EGLE under MCR 2.116(C)(8).

STATEMENT OF FACTS

The Court is acquainted with the general facts of this case from the paper heaps of the parties' prior briefing.[1] Just a few are relevant to this motion.

[1] To add to those heaps, Defendant MDEQ initially filed this motion on August 1, 2019 in response to the First Amended Complaint as attached to Plaintiffs' motion for leave to amend (and as accepted by this Court on July 23). Plaintiffs indicated that the First Amended Complaint had not been formally filed and they had until August 6 to do so. While Defendant is loath to lengthen an already substantial court file for the sake of formalism, it nonetheless agreed to withdraw this motion and refile it upon the formal filing of the First Amended Complaint to permit a cleaner record, as noted in Defendant's Notice of Withdrawal on August 2, 2019.

First, the Michigan Department of Environmental Quality—now the Michigan Department of the Environment Great Lakes & Energy (EGLE)[2]—promulgated revisions to the State's lead-and-copper rule that were finalized in June 2018. (First Am Compl, ¶ 27.) Among the changes, the revised rules require the replacement of lead service lines. Mich Admin Code, R 325.10604f(6); (First Am Compl, ¶ 28). The revised rules require water suppliers to conduct water distribution system material inventories. Mich Admin Code, R 325.11604(c); (First Am Compl, ¶ 30). And the revised rules require larger water systems to create water system advisory councils staffed by citizen-volunteers to advise water systems on response to lead-action level exceedances, public education materials, and other matters. Mich Admin Code, R 325.10410(7); (First Am Compl, ¶ 30).

Second, Plaintiffs moved to amend their complaint on May 28, 2019 to add a Headlee Amendment claim. That claim asserts that these requirements of the revised rules "are new and/or additional requirements that were not" previously placed on water suppliers, thereby requiring state funding under Headlee. (*Id.*, at ¶¶ 166 & 171.) It is alleged that no funding has been provided. (*Id.*, at ¶ 165.) Plaintiffs assert they are mandated to act as water supplies either because of the Home Rule Cities Act's general provisions regarding providing for public health or

[2] Pursuant to Executive Order 2019-06, effective April 22, 2019, the Department of Environmental Quality was renamed the Department of Environment, Great Lakes, and Energy. Therefore, DEQ is referred to throughout this pleading by its new name. But, per MCR 2.202, the action continues in the name of the original parties.

because it is important and thus, "for all practical purposes, mandatory." (*Id.* at ¶¶ 151, 158 & 161.) Therefore, Plaintiffs assert this violates Headlee. (*Id.*, at ¶ 172.)

Third, the Safe Drinking Water Act's legal scheme against which these revised rules were promulgated gives EGLE authority over "public water supplies." MCL 325.1003. Those are *all* "waterworks system[s] that provide water for drinking or household purposes to persons other than the supplier of water," have more than "1 living unit," and consist of more than "solely . . . customer site piping." MCL 325.1002(p). And those can include private individuals, private corporations, and governmental entities. MCL 325.1002(m) & (t).

Finally, as a procedural matter, this Court granted Plaintiffs' motion to amend its complaint to add this Headlee Amendment, "prohibition on unfunded mandates" claim on July 23, 2019. But, on July 26, 2019, it dismissed all other claims brought by Plaintiffs. Plaintiffs formally filed their First Amended Complaint on August 6, 2019, which recognizes that the Headlee Claim is the sole remaining pending claim. (First Am Compl, n 1.) EGLE now moves for summary disposition, seeking to dismiss this claim, too.

STANDARD OF REVIEW

Under MCR 2.116(C)(8), summary disposition is appropriate if the plaintiff fails to state a claim on which relief can be granted. The Court accepts facts alleged in the complaint as true–but only if they are well pleaded. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). The Court grants the motion if the alleged claims are "so clearly unenforceable as a matter of law that no factual development could possibly

justify recovery." *Id.* (quotation omitted). In other words, setting aside whether the facts alleged are true or false, does some legal defect preclude recovery? If so, the claim must be dismissed.

ARGUMENT

I. Plaintiffs' Headlee Amendment, unfunded mandate claim fails.

A violation of the Headlee Amendment's "prohibition on unfunded mandates" clause requires that the State legally mandate local governments to engage in an activity without providing funding. But Plaintiffs' "prohibition on unfunded mandates" claim does not arise from any *legal* mandate. Rather, Plaintiffs assert there is a mandate "for all practical purposes." (First Am Compl, ¶¶ 158 & 161.) That is not enough. Therefore, their claim fails and must be dismissed.

A. Plaintiffs cannot base a "prohibition on unfunded mandates" claim on added costs for an activity that is not legally mandated.

In 1978, Michigan voters amended the State's constitution to add article IX, sections 25 through 34, which were passed under the name of the "Headlee Amendment." The Headlee Amendment "was proposed as part of a nationwide 'taxpayer revolt' in which taxpayers were attempting to limit legislative expansion of the requirements placed on local government, to put a freeze on what they perceived was excess government spending, and to lower their taxes both at the local and state level." *Durant v State Bd of Ed*, 424 Mich 364, 378 (1986).

Relevant here, article IX, section 25 provides that "[t]he state is prohibited from requiring any new or expanded activities by local governments without full state financing, from reducing the proportion of state spending in the form of aid to local government, or from shifting the tax burden to local government." Const, 1963, art IX, § 25.[3] Moreover, article IX, section 29 proscribes that "[a] new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature of any state agency or units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary costs." Const, 1963, art IX, § 29.

One type of Headlee claim that may be brought, arising out of the second sentence of article IX, section 29, is a claim that a state law is a prohibited "unfunded mandate." *Adair v State*, 497 Mich 89, 103 (2014). That is the type of claim Plaintiffs bring here. They assert that the requirements imposed on suppliers of water by the revised rules created "new and/or additional requirements that were not placed on water supplies until" after Headlee's effective date and are, therefore, prohibited. (First Am Compl, ¶¶ 165, 166, 171–172.)

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[3] While Plaintiffs ground their claim in part on Article IX, § 25 of the Michigan Constitution, (First Am Compl, §§ 171 & 172), the Michigan Court of Appeals recently reaffirmed that "§ 25 is *an introductory paragraph to the Amendment that summarizes the revenue and tax limits imposed on the State and local governments* by other provisions of the Amendment." *Taxpayers for a Mich Constitutional Gov't, et al v Dep't of Technology, Mgt, and Budget*, __ Mich App __; slip op at 1, n 1 (Docket No. 334663). That section is "not intended 'to be given the substantive effect of creating specific rights and duties.'" *Id.*, quoting *Waterford School Dist v State Bd of Educ (After Remand)*, 130 Mich App 614, 620 (1985).

1. Headlee only applies to activities that are legally required of local governments.

Importantly, because Headlee involves a tradeoff between restrictions on local government's taxing powers with limitations on the State's ability to impose mandatory activities on local governments without supplying funding, *Durant v State Bd of Ed*, 424 Mich 364, 378 (1986), an unfunded mandate claim cannot exist unless the activity itself is legally mandated. *Livingston Co v Dep't of Mgt & Budget*, 430 Mich 635, 637 (1988). The Michigan Supreme Court has explained this tradeoff, noting: "[h]aving placed a limit on state spending, it was necessary to keep the state from creating loopholes" such as "by shifting more programs to units of local government without funds to carry them out . . . ." *Oakland Co v State*, 456 Mich 144, 149 (1997), quoting *Livingston Co*, 430 Mich at 644; *Taxpayers for Mich Constitutional Gov't*, __ Mich App __; slip op at 10 ("State funding under the second sentence of §29 is intended to offset the necessary costs of new burdens placed on units of local government . . . .")

But even if the State imposes a legal mandate that makes a certain activity more costly, if there is no underlying legal mandate for local governments to engage in that activity then any "unfunded mandate" claim fails. *Livingston Co*, 430 Mich at 652–53. Accordingly, such a claim focuses on whether local governments are mandated *as local governments* to provide new or additional services. *Id.* at 653.

So, for example, in *Livingston County*, the Michigan Supreme Court rejected a claim that Headlee required the State to appropriate funds for additional requirements imposed on the operation of sanitary landfills because the "operation

of a sanitary landfill is not a required service or activity" of local government. *Id.* at 637. The Court explained that "the [S]tate can, and sometimes does, mandate higher standards" for an activity, but "it does not necessarily profit from increasing these standards, and, therefore, the kind of escape hatch for the state that the Headlee Amendment was intended to head off is not created." *Id.* at 645. Instead, the prohibition focuses on "the shifting of traditional state functions to units of local government . . . ." *Id.* Such shifting happens where increased requirements are added to mandatory activities of local governments. *Id.* It does not occur where increased costs are added to "services that are currently performed predominantly by units of local government . . . ." *Id.*

The Court in *Livingston County* held that operating a sanitary landfill was not required by law. *Id.* at 649–52. The Court explained that "[t]he heightened requirements for licensure [of a landfill] were not directed solely to public owners." *Id.* at 653. Instead, the law was "a regulatory measure, like many others . . . that applies new technology to everyday activities in the private and public sector." *Id.* And, as it merely added to the cost of a service that local governments could lawfully choose not to perform, no unfunded mandated claim could be brought under Headlee. *Id.*

Thus, the question in this case for Headlee purposes is not simply whether the revised rules place new or additional mandatory duties on "suppliers of water" as defined by the Safe Drinking Water Act (SDWA), MCL 325.1001 *et seq.* See

MCL 325.1002(t). It is whether local governments are legally required to be "suppliers of water" in the first place. *Id.* They are not.

2. The revised rules do not violate Headlee because local governments are not mandated to operate public water supplies.

Nothing in the Safe Drinking Water Act, the Home Rule Cities Act, or anywhere else in Michigan law requires local governments to act as suppliers of water. Indeed, many local governments choose not to do so. And many private entities (some mobile home parks and apartment complexes, for instance) are regulated "public water supplies" equally subject to the Act and the revised rules.

In deciding how to meet the needs of its residents to obtain water for household uses, a city or township has several options. It may choose to: (1) supply water itself, MCL 325.1002(m), (o), & (t); (2) contract with another government for the provision of water, MCL 123.141(1); (3) participate in an "authority" established for providing water, MCL 124.282(1); (4) contract with a private company for the provision of water, MCL 117.3(j); or (5) leave residents to supply water themselves such as through private wells. No single choice is legally mandated.

Because Plaintiffs challenge the revised rules—promulgated under the SDWA—as an unfunded mandate, the first question should be whether the SDWA mandates that local governments supply water. Unequivocally, it does not. The SDWA broadly applies to "public water suppl[ies]" and "supplier[s] of water." MCL 325.1003. The SDWA defines a "supplier of water" as "a *person* who owns and operates a public water supply." MCL 325.1002(t) (emphasis added). The Act

includes as "persons" individuals and private corporations as well as governmental entities. MCL 325.1002(m). And a "public water supply" is merely "a waterworks system that provides water for drinking or household purposes to persons other than the supplier of water," MCL 325.1002(p)—regardless of whether that "supplier of water" is a government entity or privately owned. Thus, the SDWA, by its own terms, recognizes that those acting as "suppliers of water" can include municipalities but also that such a function is by no means exclusive to local governments. Nor does the SDWA anywhere require local governments to take on such a function.

Perhaps recognizing this weakness, Plaintiffs make no attempt to ground their Headlee claim challenging these SDWA-promulgated rules in a mandate *of the SDWA*. Instead, the complaint attempts to find a "mandate" to supply water in some broad generalities of the Home Rule Cities Act, MCL 117.1 *et seq*. That route fares no better.

MCL 117.4f(a) says that "[a] city *may* in its charter allow for a contract, upon the terms . . . and upon conditions in the manner as the city considers proper, 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.) The word "may" is generally permissive and not mandatory. *People v Gaston*, 496 Mich 320, 328 (2014). Consequently, the Home Rule Cities Act permits, but it does not require, cities to be suppliers of water.

Ignoring the expressly permissive nature of MCL 117.4f, Plaintiffs attempt to string together a syllogism: home-rule cities must promote the public health and welfare, MCL 117.3(j); Plaintiffs are home-rule cities; water is necessary to promote the public health; therefore, Plaintiffs are under a mandate to provide water meeting SDWA specifications. (First Am Compl, ¶¶ 151–171.) The syllogism stumbles on its first step.

Plaintiffs' interpretation of MCL 117.3(j) as mandating cities to undertake any specific activity is inconsistent with the text of and the case law explaining that provision. Section 3(j), by its terms, requires only that "[e]ach *city charter shall provide* for all of the following: . . . (j) [t]he public peace and health and for the safety of persons or property. In providing for the public peace, health, and safety, a city may expend funds or enter into contracts with a private organization, the federal or state government, a county, village, or township for another city for services considered necessary by the legislative body." (Emphasis added.) So, subsection 3(j), at most, requires only charter provisions to address how a city will exercise what is known as the "police power"—the general governing authority to care for the needs of its citizens—which is delegated to cities by that subsection. *Central Advertising Co v Ann Arbor*, 391 Mich 533, 550–51 (1974). It does not mandate cities to perform any particular activity.

To that point, the word "shall" is generally not read as mandatory (and instead understood as permissive) when it is directed at governments. Garner & Scalia, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West,

2012), p 114, quoting *Railroad Co v Hecht*, 95 US 168, 170 (1877)) ("If a duty is imposed on the government, 'the word 'shall' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest.'") Thus, reading subsection 3(j) as mandating anything (even charter terms) is questionable; a better reading may simply be reading it as permitting local governments to exercise police power; however, they deem fit. And, in fact, the next sentence of subsection 3(j) expressly permits cities to delegate any allowable exercise of police power to another government or to a private entity. *Id.*

Plaintiffs' reading of subsection 3(j) is also contrary to longstanding precedents interpreting the Home Rule Cities Act. Those cases recognize that subsection 3(j) reflects a permissive *grant* of the police power to home-rule cities rather than a *mandate* to conduct any particular activity. For example, in *Butcher v Detroit*, 131 Mich App 694, 702–04 (1984), the Court explained that cities were unable to exercise a general police power before the Michigan Constitution of 1908, but—citing subsection 3(j)—the Court noted that due to that constitution "and our home-rule cities act, cities may exercise substantially greater powers essential to local self-government than they were previously allowed to exercise." *Id.* at 702–03. Similarly, in *People v Strobridge*, 127 Mich App 705, 710 (1983), citing MCL 117.3(j), the Court explained that "[a] city . . . has the power to adopt ordinances for the promotion of public welfare." And in *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463 (2003), the Court again coupled subsection 3(j) with a statement that cities have been granted the "police power." *Id.* at 481; see also

Central Advertising Co, 491 Mich at 550–51 (explaining "that integral attribute of sovereignty known as police power . . . has been delegated to cities by the home-rule act." See MCL 117.3(j)). These holdings are consistent with the Michigan Supreme Court's description of the Home Rule Cities Act as a system "of general *grant of rights and powers* [to municipalities], subject only to certain enumerated restrictions . . . ." *City of Pontiac v Ducharme*, 278 Mich 474, 480 (1936) (emphasis added).

Plaintiffs' reading is also inconsistent with the directive to read statutes as a whole. *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370 (2014) (noting that "statutory interpretation requires a holistic approach" and statutes must be "read . . . as a whole"). If, as Plaintiffs suggest, subsection 3(j) already mandates the performance of all manner of activities that promote the public health, then why did the Legislature deem it necessary to permit operation of a water utility in subsection 4f(a)? Doing so would be a superfluous addition to an already clear mandate that should render section subsection 4f(a) unnecessary.

Moreover, Plaintiffs' reading proves far too much. If subsection 3(j) is read as they assert, then anything that promotes "[t]he public peace and health and . . . the safety of persons or property" is not only permitted but required of cities. MCL 117.3(j). Clearly, that is not the case. As *amici* in *Livingston County* noted, "many essential services of cities and townships, such as fire protection services, are not mandated by state law . . . ." 430 Mich at 645. How so? If MCL 117.3(j) requires everything that promotes the public peace, health, and safety, how does

local firefighting escape such a mandate? It cannot. That proves only that Plaintiffs' reliance on this provision is misplaced.

Accordingly, Plaintiffs fail to ground their Headlee Amendment claim in a legally mandatory activity. Because nothing mandates cities to be a "supplier of water" under either the SDWA or the Home Rule Cities Act, the Headlee Amendment is not implicated by mere increased costs added to this activity. *Livingston Co*, 430 Mich at 653.

Plaintiffs seek to circumvent the need to point to a legal mandate by claiming that "for all practical purposes" providing water to its residents is necessary. (First Am Compl, ¶¶ 158 & 161.) But Headlee violations do not arise from municipalities' practical needs; they arise only from state-given legal mandates. *Livingston Co*, 430 Mich at 637 ("Const 1963, art 9, § 29 applies only to services and activities required by state law . . . .") Thus, these assertions—even if true—make no difference.

Their Headlee "unfunded mandate" claim does not concern the performance of a state-mandated activity. Their claim therefore fails. This Court should grant EGLE's motion to dismiss that claim per MCR 2.116(C)(8).

CONCLUSION AND RELIEF REQUESTED

For those reasons, this Court should grant EGLE's motion for summary disposition and dismiss Plaintiff's Headlee Amendment, "prohibition on unfunded mandates" claim.

Respectfully submitted,

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Dated: August 7, 2019

LF: Oakland County Water Resources (DEQ)/AG* 2018-0226537-B/ Motion – for Summary Disposition Headlee 2019-08-07

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PROOF OF SERVICE

The undersigned certifies that on August 7, 2019, a copy of the 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) was served on the attorneys of record in the above-captioned case via email.

Judith L. Gibson, Legal Secretary

LF: Oakland County Water Resources (DEQ)/AG* 2018-0226537-B/Proof of Service – Email 2019-08-07