STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Double Z Development, LLC,
Petitioner,

v MTT Docket No. 15-001494

Dalton Township, Tribunal Judge Presiding
Respondent. Steven H. Lasher

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

INTRODUCTION

On February 17, 2016, Respondent filed a motion requesting that the Tribunal enter summary judgment in its favor in the above-captioned case. More specifically, Respondent contends that the appeal does not involve a special assessment and the charge in dispute is regarding connection fees and water rates under a 2009 contract. Petitioner has not filed a response to the Motion. The Tribunal has reviewed Respondent's Motion for Summary Disposition and the evidence submitted and finds that Respondent's Motion shall be granted under MCR 2.116(C)(4).

RESPONDENT'S CONTENTIONS

In support of its Motion, Respondent states Petitioner entered into a Water Connection Agreement in 2009 to connect, Duck Creek RV Resort, the subject property, to Respondent's water system. The agreement provided for the payment of a direct connection fee to the water system for 21.98 REUs at the 2009 rate of $6,200 per REU. Petitioner also elected to enter an installment agreement allowing it to pay the fee over a period of 15 years with an interest rate of 6%.

In 2013, Respondent amended the Water Rate Ordinance which included a reduction in the connection fee. Respondent contends that there is nothing in the parties' agreement that indicates that the charge should be modified if there is a subsequent modification to the charges. Further, Respondent contends that the connection fee is similar to the fee in *Graham v Kochville Twp*,[1] which is neither a tax nor subject to the Headlee Amendment. Respondent, therefore, contends that the Tribunal does not have jurisdiction as the fee is not a tax or special assessment. In the alternative, Respondent contends that if the Tribunal finds that the fee at issue is a tax or special assessment, Petitioner's appeal is untimely. Given Petitioner's contention that the special assessment hearing was the Township Board meeting on October 14, 2013, Petitioner's May 22, 2015, appeal is untimely as it was not within 35 days of the hearing. Respondent further contends that the issue at hand is a contractual claim over which the Tribunal also lacks jurisdiction. Finally, Respondent contends that if the Tribunal finds that the fee is a timely appealed special assessment, Petitioner cannot meet its burden of proof to demonstrate that the amount charged is disproportionate to the increase in value as Petitioner provided notice that it would not be filing a valuation disclosure.

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[2] In this case, Respondent moves for summary disposition under MCR 2.116(C)(4), (8) and (10).

[1] *Graham v Kochville Twp*, 236 Mich App 141; 599 NW2d 793 (1999).
[2] See TTR 215.

Dismissal under MCR 2.116(C)(4) is appropriate when the "court lacks jurisdiction of the subject matter." When presented with a motion pursuant to MCR 2.116(C)(4), the Tribunal must consider any and all affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties.[3] In addition, the evidence offered in support of, or in opposition to, a party's motion will "only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6). A motion under MCR 2.116(C)(4) is appropriate where the plaintiff has failed to exhaust its administrative remedies.[4]

Motions under MCR 2.116(C)(8) are appropriate when "[t]he opposing party has failed to state a claim on which relief can be granted." Dismissal should be granted when the claim, based solely on the pleadings, is so clearly unenforceable that no factual development could possibly justify a right to recovery.[5] In reviewing a motion under this subsection, the court must accept as true all factual allegations in support of a claim, as well as all inferences which can fairly be drawn from the facts.[6]

Summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[7] In the event, however, it is determined

[3] *Id.*
[4] See *Citizens for Common Sense in Gov't v Attorney Gen*, 243 Mich App 43; 620 NW2d 546 (2000).
[5] See *Transamerica Ins Group v Michigan Catastrophic Claims Ass'n*, 202 Mich App 514, 516; 509 NW2d 540 (1993).
[6] See *Meyerhoff v Turner Construction Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).
[7] See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

that an asserted claim can be supported by evidence at trial, a motion under (C)(10) will be denied.[8]

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party.[9] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[10] The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[11] Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleadings but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.[12] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[13]

CONCLUSIONS OF LAW

The Tribunal has carefully considered Respondent's Motion under MCR 2.116(C)(4), (8), and (10) and finds that the Motion should be granted, as Petitioner is appealing a fee that is not within the jurisdiction of the Tribunal. In the alternative, Petitioner's 2015 filing is untimely, as it was not filed within 35 days of the October 14, 2013, board meeting. Further, Petitioner's claim appears to be regarding a contractual installment agreement over which the Tribunal has no authority.

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[8] See *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).
[9] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[10] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[11] *Id.*
[12] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[13] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

Respondent contends the Tribunal has no jurisdiction over this appeal, as it involves a regulatory connection fee imposed under the Water Rate Ordinance, and not a special assessment. The Tribunal finds that it has exclusive jurisdiction over special assessment disputes but does not have authority over regulatory fees.[14] Respondent cites *Bolt v City of Lansing*[15] regarding whether a charge is a tax or a user fee. The Court in *Bolt* set forth the following three criteria: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose;" (2) a user fee "must be proportionate to the necessary costs of the service;" and (3) a user fee is voluntary.[16]

In *Bolt*, the Michigan Supreme Court determined a storm water service charge under a City of Lansing ordinance was a tax, and not a user fee. The ordinance at issue related to the creation of a fund " 'to help defray the cost of the administration, operation, maintenance, and construction of the stormwater system . . . ' "[17] and was financed through an annual storm water service charge against each parcel in the city, based on a formula that estimated each parcel's storm water runoff. In reaching this determination, the Supreme Court found that in general, "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' " while "a 'tax,' on the other hand, is designed to raise revenue."[18] The Supreme Court found the ordinance at issue failed both the first and second criteria, as the city was seeking to fund nearly 50% of the total cost of the program over 30 years by implementing the storm water service charge; 63% related to capital expenditures, which the Supreme Court found "constitutes an

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[14] See MCL 205.731.
[15] *Bolt v City of Lansing,* 459 Mich 152; 587 NW2d 264 (1998).
[16] *Id.* at 161-162.
[17] *Id*. at 155.
[18] *Id*. at 161 (citations omitted).

investment in infrastructure, as opposed to a fee designed simply to defray the costs of a regulatory activity."[19] The Supreme Court further reasoned the charges did not correspond to the benefits conferred, as 75% of the property owners were already served by another system that was paid for through special assessments. In addition, the Supreme Court found that the charges were being applied to all property owners, and not just to those who actually benefitted from the system; "[a] true 'fee,' however, is not designed to confer benefits on the general public, but rather to benefit the particular person on whom it is imposed."[20] The Supreme Court further found the ordinance lacked any significant element of regulation and the charge was effectively compulsory, as the property owners have no choice whether to use the service and no ability to control the extent to which the service is used.

In *Graham v Kochville Twp*[21] the Court of Appeals held:

> As with the fee/tax distinction . . . there is also no bright-line test for distinguishing between a connection/use fee and a special assessment. "Generally, a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between amount of the fee and the value of the service or benefit.'" A special assessment is a "specific levy designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area."[22]

The *Graham* Court further indicated that the fee/tax test set forth in *Bolt* is equally applicable to the fee/special assessment analysis. In *Graham*, the Court of Appeals found that a water line connection charge is a fee, and not a tax, because it meets the three criteria set forth in *Bolt.* The connection charge served a regulatory purpose, despite the construction being paid for by the charge, because the main purpose of the charge was regulatory, in that without connection to the

[19] *Id*. at 163.
[20] *Id*. at 165 (citations omitted).
[21] *Graham*, 236 Mich App 141.
[22] *Id*. at 150 (citations omitted).

water line, there would be no access to the water; therefore, the charge regulated access to the water. There was no evidence showing the charge in *Graham* to be unrelated to the costs of regulation; therefore, it was presumed to be reasonably related to those costs. Finally, the connection charge was voluntary because "those who decide to connect must pay the fee and those who choose not to connect are not required to pay the fee."[23]

In applying the relevant case law, the Tribunal finds Petitioner is appealing the fee for connecting to Respondent's water system. Generally, a charge for connection to a public utility is a fee, and not a tax or special assessment.[24] Further, a service charge is generally a valid user fee, and not a tax or special assessment; service charges are simply the price paid for a commodity and are intended to regulate the use of the commodity.[25]

Under the first criterion in *Bolt,* the Tribunal finds the fee is a connection fee, like in *Graham*. The amount charged to Petitioner is to further a regulatory purpose, rather than a revenue raising purpose. It is undisputed that the water system fee at issue is used for no other purpose than to fund the construction, operation, maintenance, repair, replacement, and upgrade costs of the water system. This type of cost is clearly to regulate public health, safety, and welfare under MCL 333.12752.[26] There is no indication that the charges serve a revenue-raising purpose. Therefore, the Tribunal finds the charges further a regulatory purpose.

With regard to the second criterion under *Bolt*, the Tribunal finds that there was no evidence presented by Petitioner to show that the benefits conferred from the disputed charge do not bear a reasonable relationship to the value of the service. "[W]e presume 'that the amount of

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[23] *Id*. at 155.
[24] *Graham*, 236 Mich App 141.
[25] *Ripperger v Grand Rapids*, 338 Mich 682; 62 NW2d 585 (1954).
[26] See also *Wheeler v Shelby Twp*, 265 Mich App 657, 664; 697 NW2d 180 (2005).

the fee is reasonable, unless the contrary appears upon the face of the law itself, or is established by proper evidence,' and we find no evidence that the charge here is unreasonable."[27] There is no evidence that the charges imposed are disproportionate to the costs of connecting the subject property to the water system and to the value of the benefit conferred. Accordingly, the Tribunal finds that the charges are proportionate and reasonably relate to the costs of the connection.

With regard to the final criterion, the Tribunal finds that the fee for connecting to Respondent's water system is not compulsory. Similar to *Graham,* there is no evidence on record that the fees would be charged if the property was not developed or if the property had a well, and as such, the fee is voluntary and only applicable to those who wish to connect to the water system.[28]

Given the above, the Tribunal finds that the charge under appeal is a regulatory user fee that meets all criteria under *Bolt*. The present charges are similar to those reviewed by the Court of Appeals in *Graham*. As stated above, an appeal of a regulatory user fee, and not a special assessment, *does not* fall within the exclusive jurisdiction of the Tribunal and the Tribunal has no authority over Petitioner's claim.

The Tribunal similarly finds that it does not have jurisdiction over any dispute regarding the parties' installment contract. The installment contract at issue is entitled "Waiver and Consent to Special Assessment and Lien by Dalton Township." This title alone, however, does not change the analysis above and render the fee at issue a special assessment. The Tribunal has reviewed the content of this document and finds that it truly is an installment agreement with regard to the connection fee. This agreement allows Petitioner to pay the connection fee in 14

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[27] *Graham*, 236 Mich App at 154-55, citing *Vernor v Secretary of State*, 179 Mich 157, 168; 146 NW 338 (1914).
[28] *Graham*, 236 Mich App at 155.

annual installments with an interest rate of 6%. Any dispute regarding these terms, is a contract claim over which the Tribunal does not have authority.

In the alternative, if the fee at issue was a special assessment, the Tribunal still lacks jurisdiction over the appeal. As clearly indicated in the Petition, "[t]he hearing held to confirm the change in special assessment for water connection charges was held on October 14, 2013."[29] Thus, Petitioner's May 22, 2015 filing is untimely as it was not filed within 35 days of the confirmation.[30]

Given the above, the Tribunal finds that Respondent has shown good cause to justify granting its Motion for Summary Disposition under MCR 2.116(C)(4) as the Tribunal does not have jurisdiction over Petitioner's claim.[31]

JUDGMENT

IT IS ORDERED that Respondent's Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that the case is DISMISSED.

This Final Opinion and Judgment resolves the last pending claim and closes the case.

APPEAL RIGHTS

If you disagree with the Tribunal's final decision in this case, you may either file a motion for reconsideration with the Tribunal or a claim of appeal directly to the Michigan Court of Appeals ("MCOA").

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[29] Petition at 1.

[30] MCL 205.735a.

[31] While Respondent contends summary disposition is appropriate under MCR 2.116(C)(8) and (10), the most appropriate standard is MCR 2.116(C)(4). Respondent's claim under 2.116(C)(8) is similar to the claim under (C)(4) in that Respondent is claiming that the Tribunal lacks authority to grant relief; however, this is an issue of jurisdiction and not Petitioner's claim itself. Respondent's claim under MCR 2.116(C)(10) is not appropriate as the Tribunal finds the charge is a fee and not a special assessment. Thus, the Tribunal is unwilling to speculate as to whether a genuine issue regarding material fact remains.

A motion for reconsideration with the Tribunal must be filed, by mail or personal service, with the $50.00 filing fee, within 21 days from the date of entry of this final decision.[32] A copy of a party's motion for reconsideration must be sent by mail or electronic service, if agreed upon by the parties, to the opposing party and proof must be submitted to the Tribunal that the motion for reconsideration was served on the opposing party.[33] However, unless otherwise provided by the Tribunal, no response to the motion may be filed, and there is no oral argument.[34]

A claim of appeal to the MCOA must be filed, with the appropriate entry fee, unless waived, within 21 days from the date of entry of this final decision.[35] If a claim of appeal is filed with the MCOA, the party filing such claim must also file a copy of that claim, or application for leave to appeal, with the Tribunal, along with the $100.00 fee for the certification of the record on appeal.[36]

By: Steven H. Lasher

Entered: April 1, 2016
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[32] See TTR 257 and TTR 217.
[33] See TTR 225.
[34] See TTR 257.
[35] See MCR 7.204.
[36] See TTR 213 and TTR 217.