STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR AND ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Northport Public Schools,
Petitioner,

v

MTT Docket No. 368062

Leelanau Township, Northport Village,
And the Northport/Leelanau Township
Utilities Authority,
Respondents.

Tribunal Judge Presiding
Kimbal R. Smith III

ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DISPOSITION

I. INTRODUCTION

This appeal involves the assessing of charges by Respondents to assist in financing the acquisition and construction of sewage collection and treatment facilities to serve the Township of Leelanau and the Village of Northport.

On June 25, 2009, Respondents filed Respondents' Motion for Summary Disposition asserting that there are no issues of material fact, that the Tribunal lacks jurisdiction because Petitioner's Petition is untimely, and that the Petition does not state a claim upon which relief may be granted because it does not raise a dispute arising under the property tax laws of the State of Michigan. Therefore, Respondents request that the Petition be dismissed under MCR 2.116(C)(4), (C)(8) and (C)(10). On July 9, 2009, Petitioner filed Northport Public Schools' Response to Respondents' Motion for Summary Disposition.

II. FINDINGS OF FACT

Petitioner, a Michigan general powers school district, owns three parcels of real property located in the Village of Northport. On May 7, 2007, the Township of Leelanau and the Village

of Northport ("Respondents") adopted a resolution for the financing of a project designed to acquire and construct sewage collection and treatment facilities to serve Respondents.

Ordinance No. 5, adopted June 12, 2007, provides that the estimated $13,290,000 cost of the sewage project was approved to be financed by a bond issue payable over 20 years. The bond indebtedness then being satisfied through special assessments, connection fees, use fees and debt service fees assessed to each property; the amount of any special assessment paid by a property owner under the Ordinance to be credited against the applicable user fee assessed to that owner.

The Ordinance provides that users will be charged use fees proportionately using a "flat charge, based on REUs, calculated annually on the basis of the amount of use in the previous year, to classes of users divided according to annual quantity of use." The connection fees are designed to "defray and recover the cost of the system" and will be charged to "[e]very person seeking to connect to the System, to modify an existing connection to the System, to change the use of the property or structure, or to reconnect previously connected property to the System." The debt service fees, intended to "pay principal, interest and administrative costs of retiring the debt incurred for construction of the System" are to be charged based on an REUs equivalency table established in the Ordinance. Further, the Ordinance also provides that "[n]o free service shall be allowed for any user of the System. The System shall not furnish free service to the Township or to any individual, firm or corporation, public or private, or to any agency or instrumentality."

The connection fee was set at $15,950 per REU, the debt service fee at $12 per month per REU, and the commodity charge at $456 per year per REU. As of May 29, 2009, Petitioner was assigned 13.5 REUs, resulting in a connection fee of $215,325, an annual debt service fee of $1,944, and an annual commodity charge of $6,156.

Petitioner appealed the assessment of said charges to the Township Board of Review on March 9, 2009. The Board of Review denied Petitioner's appeal and Petitioner appealed to the Tribunal on May 29, 2009. Respondents concede that Petitioner is exempt from special assessments under MCL 380.1141.

III. RESPONDENTS' CONTENTIONS

In support of its Motion, Respondents contend that the Tribunal lacks jurisdiction to act on Petitioner's Petition because the Petition is untimely and does not give rise to a dispute under the property tax laws of the State of Michigan, and that "Respondents are entitled to judgment as a matter of law, because the connection charges are a fee – not a tax – and townships and villages have authority to enact ordinances to protect the public health, safety and welfare."

Respondents contend that the Petition is untimely under MCL 205.735a because the Petition was not filed within 35 days after the final special assessment roll was set by the adoption of Resolution No. 5, on August 17, 2006. Respondents state that "Petitioner appeared at the March 2009 Board of Review to appeal . . . . However, [under MCL 211.29(2),] the Board of Review . . . does not have authority to change the amount of fees charged for connection to the sewer system, or to hear objections to special assessments." As such, Respondents contend that "[f]iling an untimely petition 'deprives the Tax Tribunal of jurisdiction to consider the petition other than to dismiss it.'" *Leahy v Orion Township*, 269 Mich App 527, 532; 711 NW2d 438 (2006) (interpreting the predecessor to MCL 205.735a(6) – MCL 205.735(2)).

Respondents also contend that the Tribunal lacks jurisdiction because "Petitioner's challenge does not relate to the amount of a special assessment or a tax," and, therefore, "does not arise under the General Property Tax Act." Further, Respondents contend that "the Tax Tribunal does not have jurisdiction over constitutional questions," such as, "whether the

connection fee is really a disguised tax in violation of the Headlee Amendment." *WPW Acquisition Co v City of Troy*, 254 Mich App 6, 8; 656 NW2d 881 (2002).

Finally, Respondents contend that the assessments in question fall under Respondents' police powers "to regulate the public health, safety, and welfare." Respondents state that MCL 41.411 – 41.413; MCL 42.31; MCL 67.24 – 67.26; and MCL 69.5 "do not preclude the Village of Northport or Leelanau Township from adopting ordinances that provide for imposition of a connection fee, debt service fee or usage fee when the parcel connects to the sewer system." In support of this contention, Respondents cite *Grunow v Township of Frankenmuth*, unpublished opinion per curiam by the Court of Appeals, issued October 22, 2002 (Docket No. 226094) and *Graham v Township of Kochville*, 236 Mich 141, 143-44; 599 NW2d 793 (1999). Respondents contend that they, as public corporations under MCL 141.103(a), are "authorized to own, operate and maintain one or more public improvements and furnish the services, facilities, and commodities of any such public improvements to users," under MCL 141.104, and that under MCL 141.103(b) "public improvements include sewage disposal and water supply systems," the type of improvements in question here. Additionally, Respondents contend that they are "entitled to set rates and collect revenue for use of the improvements" under MCL 141.103(e), and that "a connection fee . . . constitutes a rate" as provided by *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 21; 575 NW2d 56 (1997).

IV. PETITIONER'S CONTENTIONS

In response to the Motion, Petitioner contends that its Petition was timely because some or all of the fees assessed by Respondents "are actually disguised taxes or special assessments," that Petitioner is "exempt from paying . . . pursuant to MCL 211.7m and MCL 380.1141." As such, the jurisdiction of the Tribunal is "properly invoked by . . . petitioner . . . filing a written

petition on or before May 31 of the tax year involved." MCL 205.735a(6). Further, Petitioner contends that the August 17, 2006 adoption of Resolution No. 5 was not the "final decision, ruling or determination" giving rise to Petitioner's right to appeal under MCL 205.735a(4)(a) because Petitioner had no reason to appeal the special assessment roll from which it was exempt under MCL 380.1141. Instead, Petitioner contends that it was not made aware that it would be assessed costs until it received a tax bill in late 2008 or early 2009, and, therefore, had no reason to appeal until that time. Petitioner appealed to the Board of Review at that time and contends that its May 29, 2009 Petition was timely "because it raises an exemption dispute and was filed before May 31st."

Petitioner argues that fees in question are disguised taxes under *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998) (establishing a three-prong, conjunctive test for determining whether a charge is a valid user fee or a disguised tax. A valid user fee (1) serves a regulatory purpose rather, as opposed to a revenue-raising purpose; (2) is proportionate to the necessary costs of the service; and (3) is voluntary). Petitioner contends that the fees are "designed to raise revenue and are not proportionate to the necessary costs of the sewer system," that "Respondents are using the fees to pay for investments in infrastructure that have a useful life far beyond 15 years (the time period over which property owners are allowed to finance the connection fee)," and that Petitioner was forced to connect to the sewer and incur the applicable fees. Further, Petitioner argues that the fees in question are designed to "benefit the community as a whole rather than . . . the particular property owners who are paying for it." Therefore, Petitioner contends that the fees do not meet the three-prong test set forth in *Bolt* for determining whether a fee is a valid user fee rather than a tax.

Petitioner distinguishes its case from that in *Graham v Kochville Twp*, a case upon which Respondents rely, because in *Graham*, unlike here, "the 'tap-in' fee was payable over 20 years,

which was exactly the useful life of the public system; [t]he extended water line did not provide any benefit to the general public, but instead only provided a benefit to those property owners who [would] benefit from the extension of the public water line; [and] the 'tap-in' fee was voluntary – no one was required to pay the 'tap-in' fee unless they wanted to connect to the public water system." Instead, Petitioner contends that "[t]he sewer system is designed to have a useful life beyond the 15-year financing term of the connection fee," that "[i]n their ordinances and resolutions, Respondents concede that the sewer system is designed to benefit the entire community," and that "the debt service fee, connection fee, and commodity charge are not voluntary." Therefore, Petitioner states that the Tribunal has jurisdiction in this case because Petitioner "has raised genuine issues of fact, which, if construed in [Petitioner's] favor, establish a legitimate legal question, i.e., whether the sewer fees are disguised taxes. Accordingly, summary judgment is not appropriate."

Petitioner denies Respondents' claim that the Tribunal lacks jurisdiction in this case because the case raises a constitutional question. Petitioner states that "the gravamen of [Petitioner's] claim is that it is exempt from the disguised property taxes," and that Petitioner's "reliance on *Bolt*, [which answered a constitutional question], is limited to the distinction . . . between a property tax and a user fee." Therefore, Petitioner contends that the Tribunal has exclusive jurisdiction over this property tax exemption case.

V. APPLICABLE LAW

Respondents move for summary disposition pursuant to MCR 2.116(C)(4). This statute states that a Motion for Summary Disposition is appropriate where the "court lacks jurisdiction of the subject matter." MCR 2.116(C)(4). When presented with a motion for summary disposition 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. MCR

2.116(G)(5). 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 for summary disposition pursuant to MCR 2.116(C)(4) is appropriate where the plaintiff has failed to exhaust administrative remedies. *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43; 620 NW2d 546 (2000). Furthermore:

> A motion under MCR 2.116(C)(4), alleging that the court lacks subject matter jurisdiction, raises an issue of law. The issue of subject matter jurisdiction may be raised at any time, even for the first time on appeal. *McCleese v Todd*, 232 Mich App 623, 627; 591 NW2d 375 (1998) ("Lack of subject matter jurisdiction may be raised at any time."); *Phinney v Perlmutter*, 222 Mich App 513, 521; 564 NW2d 532 (1997) ("Although the jurisdictional issue here was never resolved by the trial court, a challenge to subject-matter jurisdiction may be raised at any time, even for the first time on appeal."). When a court lacks jurisdiction over the subject matter, any action it takes, other than to dismiss the case, is absolutely void. *McCleese*, 232 Mich App at 628; 591 NW2d at 377. The trial court's determination will be reviewed de novo by the appellate court to determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether affidavits and other proofs show that there was no genuine issue of material fact. *See Cork v Applebee's of Michigan, Inc*, 239 Mich App 311; 608 NW2d 62 (2000) ("When reviewing a motion for summary disposition under MCR 2.116(C)(4), we must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show that there was no genuine issue of material fact."); *Walker v Johnson & Johnson Vision Products, Inc*, 217 Mich App 705; 552 NW2d 679 (1996); *Faulkner v Flowers*, 206 Mich App 562; 522 NW2d 700 (1994); *Department of Natural Resources v Holloway Construction Co*, 191 Mich App 704, 478 NW2d 677 (1991).

1 Longhofer, Michigan Court Rules Practice § 2116.12, p 246A.

Respondents also move for summary disposition pursuant to MCR 2.116(C)(8). Motions for summary disposition under MCR 2.116(C)(8) are appropriate when the opposing party has failed to state a claim on which relief can be granted. Summary disposition 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. *Transamerica Ins Group* v *Michigan Catastrophic Claims Ass'n*, 202 Mich App 514, 516; 509 NW2d 540 (1993). In reviewing a

motion for summary disposition 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. *Meyerhoff v Turner Construction Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).

Finally, Respondents move for summary disposition pursuant to MCR 2.116(C)(10). A motion for 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. *Smith* v *Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius* v *Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

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. *Quinto* v *Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider. *Neubacher* v *Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. 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. *McCart* v *J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion

is properly granted. *McCormic* v *Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

The Michigan Supreme Court has established a three-prong, conjunctive test for determining whether a charge is a valid user fee or a disguised tax. *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998). A valid user fee (1) serves a regulatory purpose, as opposed to a revenue-raising purpose; (2) is proportionate to the necessary costs of the service; and (3) is voluntary. *Id.* The determination is to be made by considering all three prongs as a whole; as such, a weakness as to one prong does not prevent the charge from being a fee. *Id*.

Generally, a charge for connection to a public utility is a fee and not a tax or special assessment. *Graham v Township of Kochville*, 236 Mich App 141; 599 NW2d 793 (1999). 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 prongs set forth in *Bolt*. *Id*. at 156. 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 water line, there would be no access to the water; therefore, the charge regulated access to the water. *Id*. at 153. The court stated that a charge is presumed to be reasonably related to the costs of the regulation it provides unless there is proper evidence showing otherwise. *Id*. at 154. 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. *Id*. 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." *Id*. at 155.

Additionally, a service charge is generally a valid user fee, and not a tax or special assessment. *Ripperger v Grand Rapids*, 338 Mich 682; 62 NW2d 585 (1954). Service charges

are simply the price paid for a commodity, therefore, they are intended to regulate the use of the commodity. *Id*.

Under MCL 205.731, the Tribunal has exclusive jurisdiction where either "the subject matter of the proceeding . . . or the type of relief requested" relates to "assessments and refunds under the property tax laws." *Elm Investment Co. v City of Detroit*, unpublished opinion per curium of the Court of Appeals, issued August 6, 2009 (Docket No. 285835) (*quoting Wikman v City of Novi*, 413 Mich 617, 631; 322 NW2d 103, 107 (1982)). MCL 205.731 provides, in relevant part:

> The tribunal has exclusive and original jurisdiction over all of the following:
>
> (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state.
>
> (b) A proceeding for a refund or redetermination of a tax levied under the property tax laws of this state.

Wikman v City of Novi 413 Mich 617, 631; 322 NW2d 103, 107 (1982).

> MCL 205.735a(6) provides, in relevant part, that
>
> The jurisdiction of the tribunal in an assessment dispute as to property classified under section 34c of the general property tax act . . . as commercial real property . . . is invoked by a party in interest, as petitioner, filing a written petition on or before May 31 of the tax year involved . . . . In all other matters, the jurisdiction of the tribunal is invoked by a party in interest, as petitioner, filing a written petition within 35 days after the final decision, ruling, or determination.

(emphasis added). An "assessment dispute" only refers to valuation disputes or exemption claims; special assessment disputes are not "assessment disputes" and are subject to the 35-day rule. *See Szymanski v City of Westland*, 420 Mich 301; 362 NW2d 224 (1984), *Anderson v Selma Township, Wexford County*, 95 Mich App 112; 290 NW2d 97 (1980), and *Sisbarro v City of Fenton*, 90 Mich App 675; 282 NW2d 443 (1979) (interpreting the 30-day rule under MCL

205.735, the predecessor to current MCL 205.735a(6). A special assessment must be protested at the hearing held to confirm the special assessment roll. A "jurisdictional claim . . . should be determined not by how the plaintiff phrases its complaint, but by the relief sought and the underlying basis of the action." *Colonial Village Townhouse Co-op v City of Riverview*, 142 Mich App 474, 478; 370 NW2d 25, 27 (1985). Finally, a Board of Review's authority is limited to correcting "the assessed value or tentative taxable value of the property." MCL 211.30.

VI. CONCLUSIONS OF LAW

The Tribunal has carefully considered the motion for summary disposition and finds that granting this motion is appropriate.

The Tribunal finds that the charges in question are proper fees and not disguised taxes. Petitioner contends that the connection fee, use fees, and debt service fees are disguised taxes under the *Bolt* test. Petitioner argues that the charges are taxes because they are designed to raise revenue, are not proportionate to the necessary costs of the sewer system, and are being used to pay for investments in infrastructure that have a useful life far beyond the 15 years of financing, and because Petitioner was forced to connect to the sewer system and incur the charges.

Respondents argue that "[l]ike the fee at issue in *Graham*, the connection fee . . . is 'proportionate to the necessary costs of the service.' *Graham*, 236 Mich App at 151. The charge of a connection fee for the sewer system is designed to regulate and control the use of the sewer system." Respondents also contend that a weakness in the voluntary prong of the *Bolt* test does not require the charge to be deemed a tax or a special assessment and that unless Petitioner has shown otherwise, the charge is proportionate to the cost of the service of connecting the sewer.

However, Petitioner distinguishes the current facts from those in *Graham*, contending that "[t]he sewer system is designed to have a useful life beyond the 15-year financing term of the connection fee," that "[i]n their ordinances and resolutions, Respondents concede that the

sewer system is designed to benefit the entire community," and that "the debt service fee, connection fee, and commodity charge are not voluntary."

The connection charge here, like the connection charge in *Graham*, is properly classified as a fee and not a tax. Petitioner's arguments regarding the useful life of the system and the system's benefit to the entire community are not controlling. These arguments relate to the system as a whole and not to the charge established for connecting to the system. The connection fee has a regulatory purpose because it regulates the use of the system, in the same way that the connection fee in *Graham* did, by charging a fee to connect to the system. Also like in *Graham*, there is no evidence to support a finding that the connection charge is not reasonably related to the cost of connecting to the system. Like the connection charge in *Graham*, the connection charge here appears to be voluntary because it does not apply if no connection is made to the system. It is unclear whether Petitioner voluntarily connected to the system; however, a finding that Petitioner's connection was involuntary would be insufficient to tip the scales in favor of finding this charge to be a tax. Looking to the totality of the facts relating to the charge, the connection charge in this case is a fee and not a tax or special assessment under the *Bolt* test.

Like the charge in *Ripperger*, the use charge is simply a commodity charge; therefore, it is a fee and not a tax. The use or commodity fee serves a regulatory purpose because it regulates the use of the system. Additionally, there is nothing in the record to indicate that the use fee is not reasonably related to the cost of the commodity being used; therefore, it is presumed to be reasonably related. Finally, the use fee is voluntary as it is only incurred by voluntarily using the system and can be avoided by not using the system. Therefore, the use charge meets the requirements set forth in *Bolt*, and is properly classified as a fee.

Similarly, the debt service charge is a fee and not a tax. There is nothing in the record to indicate that the debt service charge has a revenue raising purpose and the charge is based on estimated usage of the system; therefore, the facts weigh in favor of finding a regulatory purpose. Additionally, like the connection charge and use charges, there is nothing to indicate that the debt service fee is disproportionate to the necessary costs of the service; therefore, the charge is presumed to be proportionate to those necessary costs. Finally, because the debt service charge is based on the REUs set forth in Ordinance No. 96, which are determined by estimated usage, the debt service charge has a voluntary nature in that it can be avoided or reduced by non-use of the system. The facts surrounding the imposition of the debt service charge weigh in favor of finding that the charge is a fee under the *Bolt* test.

Applying the *Bolt* test to the facts surrounding all three charges in question, the Tribunal finds that, considering all the facts and circumstances, those facts weigh in favor of finding that the connection charge, use charge, and debt service charge are properly classified as fees and not as disguised taxes.

The Tribunal further finds that it lacks jurisdiction over the above-captioned case due to Petitioner's untimely filing of its Petition. In that regard, because the charges in question are fees and not taxes, there is not an "assessment dispute" in this matter. Because there is no "assessment dispute" the Tribunal's jurisdiction could only have been invoked by "[P]etitioner, filing a written petition within 35 days after the final decision, ruling, or determination" as provided by MCL 205.735a(6).

The final determinations in this case were the enactment of Ordinance No. 5 by the Township and Ordinance No. 96 by the Village establishing the charges in question on June 7, 2007 and June 21, 2007, respectively. Petitioner's appeal to the Board of Review has no impact on the Tribunal's jurisdiction because the Board of Review was without authority to hear the

Petition as "[a] Board of Review's authority is limited to correcting the assessed value or tentative taxable value of the property." MCL 211.30. Petitioner's appeal, almost two years after the charges were established, was untimely; therefore, the Tribunal lacks subject matter jurisdiction over this matter.

Given the above, the Tribunal concludes that it has carefully considered Respondents' Motion for Summary Disposition and determines that granting the Motion is appropriate, based on the pleadings and other documentary evidence filed with the Tribunal. More specifically, Summary Disposition is appropriate under MCR 2.116(C)(4) because the Tribunal lacks subject matter jurisdiction over the above captioned case.

VII. JUDGMENT

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

IT IS FURTHER ORDERED that this case is DISMISSED.

This Order resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: November 30, 2009 By: Kimbal R. Smith III