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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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PROPOSED BRIEF OF AMICI CURIAE ENVIRONMENTAL GROUPS IN SUPPORT OF DEFENDANT MDEQ'S 08/07/19 MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(8) ON PLAINTFFS' HEADLEE AMENDMENT CLAIM

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SUMMARY OF ARGUMENT

This Court should grant the motion of the Michigan Department of Environmental Quality ("MDEQ") for summary disposition under MCR 2.116(C)(8) on Plaintiffs' Headlee Amendment claim, the sole outstanding claim in this action. The Headlee Amendment bars only state laws that mandate new or additional expenditures by local governments *qua* local governments without any accompanying funding. Practical considerations undoubtedly prompt certain local governments to become suppliers of water, but that is not relevant to the legal inquiry. Because state law does not "mandate[ ] in the first instance" that local governments serve that function, *Livingston County v. Department of Management & Budget*, 430 Mich. 635, 643 (1988), Plaintiffs fail to state a claim.

ARGUMENT

A motion for summary disposition under MCL 2.116(C)(8) "tests the legal sufficiency of the claim as determined from the pleadings alone." *Formall, Inc. v. Cmty. Nat'l Bank*, 166 Mich. App. 772, 777 (1988). Even accepting all Plaintiffs' allegations as true, Count VI of the operative complaint—the Headlee Amendment claim—fails as a matter of law.

THE LEAD AND COPPER RULE DOES NOT IMPOSE AN UNFUNDED MANDATE BECAUSE NO LAW REQUIRES LOCAL GOVERNMENTS TO SUPPLY WATER.

One of the "Headlee Amendments" ratified in 1978 is Article IX, Section 29 of the State Constitution. At issue here is the second sentence of that Section, known "as the 'prohibition on unfunded mandates.'" *Adair v. State*, 486 Mich. 468, 478 (2010). That sentence reads:

> 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 or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.

Mich. Const. art. IX, § 29. A plaintiff invoking this sentence bears the burden to establish that a state law *requires* local governments to engage in a new activity or service or increase the level of

their activity or service beyond that mandated by existing law. *Adair*, 486 Mich. at 480. The term "state requirement" excludes state laws that grant local governments the option not to perform an activity or service, *see* MCL 21.234(5)(i), however unpalatable that option may prove in practice.

It is important to note at the outset that this case does not present the question whether *the State of Michigan* has a legal obligation—imposed by, for example, Article IV, Section 52 of the Michigan Constitution—to ensure the provision of safe and clean drinking water to its citizenry. Rather, the question is whether state law places such a duty on the *local governments* of Michigan. It does not.

Plaintiffs' Count VI does not carry its burden to allege an unfunded-mandate violation, for the simple reason that no state law mandates in the first instance that any local government own, operate, or fund the "public water supplies" affected by the LCR. Mich. Code Admin. R. ("Rule") 325.10604f(1)(a).[*] The *public* in "public water supply" does not refer to a water supply's owner or operator; any "person" may fill that role. MCL 325.1002(t) (defining a "supplier of water"). The LCR applies to two types of water supplies: "community supplies" (*i.e.*, year-round supplies) and "nontransient noncommunity supplies" (*i.e.*, partial-year supplies). Rule 325.10604f(1)(a); *see also* MCL 325.1002(c), (*l*). Local governments are among the "persons" able to own or operate those water supplies, *see* MCL 325.1002(m), but several local governments do not supply water, and only a minority of the supplies subject to the LCR are run by local governments, FAC, Exh. C, at 9. As the legislature has explained, the Headlee Amendment does not bar a "requirement of

[*] Plaintiffs are simply wrong to suggest (at 2) that the LCR mandate for "Water Advisory Council[s]" applies to local governments "irrespective of their provision of drinking water." The only entities that must establish advisory councils are "water suppl[ies]" and "consecutive water system[s]" serving at least 50,000 people. Rule 325.10410(7). "Consecutive water systems" are themselves a subset of "public water suppl[ies]" that provide drinking water. Rule 325.10103(o).

state law which applies to a larger class of persons or corporations and does not apply principally or exclusively to a local unit or units of government." MCL 21.234(5)(g).

Plaintiffs allege that the Home Rule Cities Act of 1909, when read in conjunction with the Michigan Safe Drinking Water Act, "for all practical purposes" requires some home-rule cities to own, operate, or fund public water supplies. FAC ¶¶ 158, 161. That claim fails as a matter of law, for several reasons. The sole provision of the Home Rule Cities Act that Plaintiffs invoke is merely a general directive to provide in city charters for "[t]he public peace and health and for the safety of persons and property." MCL 117.3(j). That provision does not require that home-rule cities run public water supplies. *Cf. City of Ann Arbor v. State*, 132 Mich. App. 132, 136 (1984) (declining to construe MCL 117.3(j) to require home-rule cities to provide fire protection). Even if the statute could be interpreted to mandate water service, it gives cities the choice to "expend funds *or* enter into contracts" with outside parties. MCL 117.3(j) (emphasis added). A state statute that explicitly affords local governments the option *not* to expend funds cannot be the linchpin of a claim under the Headlee Amendment that state law requires local governments to expend funds.

Nor can Plaintiffs premise such a claim on "practical" considerations that have prompted particular home-rule cities to become water suppliers. The unfunded-mandate prohibition applies only to "services and activities that state law mandates [of local governments] *in the first instance*." *Livingston Cty.*, 430 Mich. at 643 (emphasis added). *Accord Kramer v. City of Dearborn Heights*, 197 Mich. App. 723, 726 (1992) (holding that local governments are not required to dispose of sewage); *Saginaw Firefighters Ass'n, Local 422, Int'l Ass'n of Firefighters, AFL-CIO v. City of Saginaw*, 137 Mich. App. 625, 630 (1984) (same for fire protection).

It cannot be gainsaid that certain local governments are best suited to supply water to their residents, or that the "continued operation" of those public water supplies will "be beneficial,"

Livingston Cty., 430 Mich. at 652, so long as they comply with the LCR and all other federal and state laws designed to ensure safe drinking water. But even if Plaintiffs could demonstrate that it is "*functionally* … mandatory" for particular local governments to become water suppliers based on individual circumstances, FAC ¶ 23 (emphasis added), Count 6 nonetheless would fail under well-established law. *See* MCL 21.234(5)(i). Courts considering Headlee Amendment claims are not entitled to probe "[t]he practical reality of the current situation" faced by particular localities. Pls.' Mot. at 12. To the extent that practical reality does not align with the letter of the law, "[t]he Headlee Amendment simply does not … address [those] perceived inequities." *Judicial Attorneys Ass'n v. State*, 460 Mich. 590, 604 (1999). Parties in Plaintiffs' position "may seek relief through the political process" rather than the courts. *Ibid.*

In response to MDEQ's motion for summary disposition, Plaintiffs advance a remarkable argument that the LCR itself has broadened the scope of the Home Rule Cities Act to encompass an obligation to replace all lead service lines that traverse private property "(an act not previously necessary for the public health)." Pls.' Resp. at 15. *See also id.* at 9 ("[T]he Rules have expanded Plaintiffs' obligation to provide for the public health."). The legislature has delegated to MDEQ the power to administer certain statutes, but even if the Home Rule Cities Act were among them, "agencies cannot exercise legislative power by … changing the laws enacted by the Legislature." *In re Compl. of Rovas Against SBC Mich.*, 482 Mich. 90, 98 (2008). *Cf.* Mich. Const. art. IV, § 1. If Plaintiffs were correct that the Home Rule Cities Act required home-rule cities to replace lead service lines in public water supplies serving their citizens, then that mandate necessarily issued from the state legislature long before the LCR was promulgated.

CONCLUSION

The Court should grant the motion for summary disposition and enter judgment for MDEQ.

Respectfully submitted,

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