STATE OF MICHIGAN

COURT OF CLAIMS

OAKLAND COUNTY WATER RESOURCES COMMISSIONER, GREAT LAKES WATER AUTHORITY, CITY OF DETROIT, and CITY OF LIVONIA,

Plaintiffs,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.
_____/

OPINION AND ORDER GRANTING MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY'S AUGUST 7, 2019 MOTION FOR SUMMARY DISPOSITION.

Case No. 18-000259-MZ

Hon. Christopher M. Murray

Presently before the Court is defendant Michigan Department of Environmental Quality's (MDEQ) August 7, 2019 motion for summary disposition pursuant to MCR 2.116(C)(8). That motion seeks dismissal of plaintiff's remaining claim, a Headlee Amendment claim, set forth within Count VI of the first amended complaint. Plaintiffs have filed a response to defendant's motion, and defendant has filed a reply to the response. Additionally, the Court has received a brief of amici curiae environmental groups in support of the MDEQ's motion for summary disposition. The Court will not be holding oral argument on this motion pursuant to LCR 2.119(A)(5).

The factual background in this opinion is contained in this Court's July 26, 2019 Opinion on defendant's February 1, 2019 motion for summary disposition. The sole issue now before the Court is whether plaintiffs have pled a viable Headlee Amendment claim. That claim challenges

the same lead and copper rule changes that were challenged in the initial complaint, but the legal challenge is now that those revised rules constitute state mandates that place either new and/or additional requirements on plaintiffs, which were not accompanied by state funding.

The parties agree that plaintiffs' Headlee Amendment claim is premised upon the second sentence within article IX, § 29 of the 1963 Constitution, which provides as follows:

> A new activity or service or 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. [1]

In their motion, defendants argue is that there is no state law or rule requiring municipalities to operate public water systems, and therefore any increased costs necessitated by the new lead and copper rules are not related to a state mandate, and therefore cannot be the basis for a claim under article IX, § 29. As defendant argues, plaintiffs' Headlee Amendment claim fails as a matter of law because plaintiffs have not established any state statute or rule that mandates that these plaintiffs, or any municipalities, actually provide a "public water supply." In fact, according to state law, a municipality has several options with respect to the provisioning of drinking water for its residents, only one of which is for the municipality to supply the water itself. See MCL 325.1002(m), (o), (q) and (t); MCL 123.141(1); MCL 124.282(1), and MCL

[1] Defendants correctly argue that § 25 of the Headlee Amendment, Const 1963, Art IX, § 25, does not provide substantive rights or duties, *Waterford Sch Dist v State Bd of Ed* (*After Remand*), 130 Mich App 614, 620; 344 NW2d 19 (1983), affirmed 424 Mich 364 (1985), as it is merely an introductory paragraph summarizing the revenue and tax limits imposed on the state and local governments by other provisions within the amendment. See *Taxpayers for Mich Constitutional Gov't v Dep't of Technology, Mgt and Budget*, ___ Mich App ___, n 1; ___ NW2d ___ (2019).

1(j). Nothing in any of these statutes *requires* that a municipality implement any of these options, and plaintiffs have not pointed to any provision within the Safe Drinking Water Act, MCL 325.1001, *et seq*., that contains such a mandate.

Instead, plaintiffs point to provisions of the Home Rule Cities Act, MCL 117.1 *et seq*., and in particular MCL 117.3(j) and MCL 117.4f(a). The former provision sets forth that a city charter must provide for a municipality's "police power," while MCL 117.41(a) states 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 in the city's inhabitants." However, this provision does not require a city to provide a water system for its residents, it only allows it to enter into contracts if it chooses do so. Absent such a mandatory provision, MCL 117.4f simply does not contain a mandate that would support a Headlee Amendment claim.

Nor does MCL 117.3(j), which provides that "each city charter shall provide for . . . the public peace and health and for the safety of persons and 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 or another city for services considered necessary by the legislative body." This statutory provision does not contain a state mandate to provide drinking water. Rather, all MCL 117.3(j) requires is that a city charter provide that the municipality provide for the health and safety of its residents and their property. In other words, the statute requires that the charter contain a provision acknowledging the "police power" afforded to cities. See, e.g., *Central Advertising Co v Ann Arbor*, 391 Mich 533, 550-551; 218 NW2d 27 (1974). Although this statutory provision provides municipalities with a

general police power (or, more accurately, for the city charter to provide for the police power to the city), a municipality's acting pursuant to that police power does not invoke the mandate requirements of the Headlee Amendment.

The Court of Appeals has so concluded in a couple of analogous decisions. In *City of Ann Arbor v Michigan*, 132 Mich App 132, 136-137; 347 NW2d 10 (1984), the Court rejected the city's reliance on the Home Rule Cities Act in its challenge under the Headlee Amendment to providing fire resources to state property, holding that

> Although charter townships and townships are authorized by statute to provide fire protection, MCL 41.181, MCL 41.801, MCL 42.13, each of these statutes is clearly permissive rather than mandatory.
>
> The home rule cities act, MCL 117.1 *et seq*., requires that such cities provide in their charters "[f]or the public peace and health and for the safety of persons and property". MCL 117.3(j). Nothing in the act, however, specifically requires that home rule cities provide fire protection. Indeed, fire protection has long been considered a purely local matter. *Davidson v Hine*, 151 Mich 294; 115 NW 246 (1908). This conclusion is also supported by other statutes which recognize that it is optional for cities to have fire departments.

Thus, when a municipality *chooses* to provide a service to its residents-in *Ann Arbor* fire protection services-pursuant to the city's police power, Headlee Amendment protections are not implicated when new state regulations require additional services from the local fire department. See, also, *Saginaw Firefighters Assoc v Saginaw*, 137 Mich App 625, 630; 357 NW2d 908 (1984).

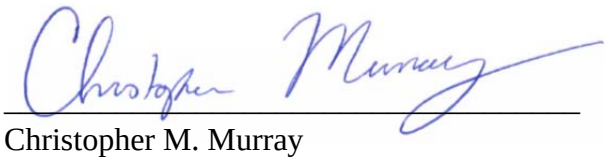
It was for this same reason that the Court of Appeals held that Article 9, § 29 was not implicated when new rules were mandated on sewage disposal systems-no state law required local units of government to operate these systems, so any new rule did not implicate Headlee. *Kramer v Dearborn Heights*, 197 Mich App 723, 726; 496 NW2d 301 (1992)("The providing of

a sewage disposal system is optional under the home rule cities act, MCL 117.4f. Because sewage disposal by a home rule city is a permissive rather than a mandatory activity, the costs associated with implementing state requirements relative to sewage disposal systems operated by a home rule city are not subject to the provision of the Headlee Amendment.").

For this reason, plaintiffs have not established a legal mandate to support their Headlee Amendment claim, and therefore it fails as a matter of law. Accordingly, defendant's August 7, 2019 motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(8), and plaintiffs' Headlee Amendment claim is DISMISSED with prejudice.

This is a final order that closes this case.

Date: October 9, 2019



Christopher M. Murray
Chief Judge, Court of Claims