STATE OF MICHIGAN

COURT OF APPEALS

SHELDON FUTERNICK, d/b/a HOLIDAY WEST MOBILE HOME PARK,

Plaintiff-Appellant,

v

SUMPTER TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED
March 26, 2002

No. 221697
Wayne Circuit Court
LC No. 98-813196-CZ

Before: Talbot, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

This action concerns the validity of defendant township's Resolution 96-11, revising sewer rates. The trial court was presented with and decided three separate motions for summary disposition. As a result of the trial court's ruling on the first motion for summary disposition, plaintiff was precluded from challenging the constitutionality of Resolution 96-11 based on the theory that revenues generated from the rate revision were being used to fund a Phase II sewer. As a result of the trial court's second ruling, defendant's claim that the instant action was barred by a 1994 federal action (involving enforcement of a settlement agreement between the parties relative to the construction of the Phase II sewer) was denied, with prejudice. In its third ruling, the trial court denied plaintiff's motion for summary disposition, granted defendant's motion for summary disposition, and dismissed the case, with prejudice, but preserved an earlier order compelling defendant to produce certain documents. Plaintiff appeals as of right. We affirm.

I

Plaintiff first argues that the trial court erred in holding that Resolution 96-11 was not an illegal tax prohibited by the Headlee Amendment, Const 1963, art 9, § 31. We review the trial court's ruling on this issue de novo to determine whether summary disposition was properly granted to defendant pursuant to MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Our review is limited to the record presented to the trial court. *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 305; 486 NW2d 351 (1992); *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Also, we must evaluate the motion in light of the substantively admissible evidence actually proffered to the trial court. *Maiden, supra.*

As a threshold matter, we note that plaintiff characterizes Resolution 96-11 as an "ordinance," subject to the same standard of judicial construction as a statute, in support of his position that it establishes a tax, but plaintiff has failed to cite any authority in support of this position. A mere statement of position is insufficient to bring an issue before this Court. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

In any event, an ordinance generally has a legislative character and will be construed in the same manner as a statute. *Brandon Charter Twp v Tippett*, 241 Mich App 417, 422; 616 NW2d 243 (2000). Taxation and ratemaking are generally viewed as legislative functions. *City of Novi v Detroit*, 433 Mich 414, 427; 446 NW2d 118 (1989); *Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93, 112; 422 NW2d 186 (1988). The establishment of a rate means the "making of a rule for the future." *Pennwalt Corp v Public Svc Comm*, 166 Mich App 1, 8; 420 NW2d 156 (1988), quoting *Prentis v Atlantic Coast Line Co*, 211 US 210, 226-227; 29 S Ct 67; 53 L Ed 150 (1908). By comparison, a resolution has been defined as the "formal expression of the opinion or will of an official body, adopted by a vote." *Gorney v Madison Heights*, 211 Mich App 265, 271; 535 NW2d 263 (1995), quoting Black's Law Dictionary (5th ed). It usually refers to an adoption by motion where the subject matter would not properly constitute a statute. *Id.* at 271. Administrative matters, such as budgetary matters, may generally be accomplished by resolution. See *Detroit v Detroit United Railway*, 215 Mich 401; 184 NW 516 (1921).

On its face, Resolution 96-11 purports to be a vote, by motion, of defendant's Board of Trustees on a "resolution" to add one dollar per one thousand gallons of use for "sewer system debt retirement." Although the authority to revise rates is itself found in an ordinance governing defendant's combined water supply and sewer disposal facilities, namely, Ordinance No. 66, we reject plaintiff's assertion that the character of the resolution is itself an ordinance. As a matter of law, we will treat Resolution 96-11 according to its specified character as a resolution.[1]

We also note that the trial court, when making its third summary disposition ruling, granted summary disposition of plaintiff's claim that Resolution 96-11 established a tax, but that part of plaintiff's argument on appeal also implicates the trial court's first summary disposition ruling concerning whether Resolution 96-11 should be construed as establishing a one-dollar debt service charge for a Phase II sewer. Giving due regard to the admission of plaintiff's attorney at the hearing on the first motion for summary disposition that Phase II had not been constructed, we hold that the trial court correctly precluded plaintiff from proceeding on the theory that the revised rate in Resolution 96-11 for "sewer system debt retirement" was for the Phase II sewer.

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[1] Our holding that Resolution 96-11 is a resolution should not be construed as precluding its treatment as an "ordinance" for certain purposes in this appeal. As an example, we note that Ordinance 67, the ordinance addressing bonds issued under the Revenue Bond Act of 1933, MCL 141.101 *et seq.*, specifically defines ordinance as "this ordinance and any ordinance or resolution . . . ," for purposes of Ordinance 67, unless the context or use indicates another or different meaning or intent. The character of the Board of Trustee's official action in adopting Resolution 96-11 nevertheless remains that of a resolution.

Examined in the context of the proofs then before the trial court with regard to plaintiff's 1994 federal action concerning defendant's intent to use its landfill royalty revenues to secure bonds for the planned Phase II sewer, we are unpersuaded that the statement in Resolution 96-11 regarding defendant's wishes to construct the Phase II sewer reasonably supports an inference that the one-dollar debt service charge was to be used for Phase II. Indeed, we note that plaintiff's position, advanced throughout the proceedings in this case, was that defendant's landfill royalty revenues were used to fund the existing debt for the Phase I sewer. Although plaintiff claimed an entitlement to have $300,000 applied to the Phase I sewer, § 20 of the ordinance upon which he relied, namely, Ordinance 67, designates the ordinance as a "contract between the Township and the bondholders." Section 11 precludes free use of the system, or "use of the System at less than cost," while § 13 authorizes rate revisions. Although Ordinance 67, § 11, contains a pledge of "annual landfill revenues" for operating costs, the specified sum is an "amount not to exceed $300,000." Construing Ordinance 67 in accordance with its clear and unambiguous language, we reject plaintiff's claim that it binds defendant to annually allocate a full $300,000 of landfill royalty revenues to the Phase I sewer for the benefit of users. *Brandon Charter Twp, supra* at 422. Section 67, § 11, clearly contains only defendant's pledge of an amount not exceeding $300,000 to meet its obligations.

Examined in this context, we must determine if the added one-dollar debt retirement charge in Resolution 96-11 is a "tax" subject to the Headlee Amendment or a valid "user fee" unaffected by the Headlee Amendment. Our determination of this issue is guided by the three primary factors set forth in *Bolt v Lansing*, 459 Mich 152; 587 NW2d 264 (1998).

The first factor is that the "user fee must serve a regulatory purpose rather than a revenue-raising purpose." *Bolt, supra* at 161. In light of our determination that the debt retirement charge is for the existing Phase I sewer and our rejection of plaintiff's claim of entitlement to have $300,000 in landfill royalty revenues allocated to the Phase I sewer, we find that the first factor weighs in favor of finding a user fee. The fact that Resolution 96-11 does not specify an ending date for the debt retirement charge does not establish a revenue-raising purpose, given defendant's authority to revise the charge.

The second factor is that "user fees must be proportionate to the necessary costs of the service." *Bolt, supra* at 161-162. In view of the evidence that the debt retirement charge is a use-based charge, as well as plaintiff's failure to argue or otherwise establish factual support for the proposition that revenues generated from the Phase I sewer exceed its costs, independent of any consideration of landfill royalty revenues, we hold that this second factor also weighs in favor of finding a user fee.

The third factor is one of voluntariness. *Bolt, supra* at 162. Ignoring for purposes of our analysis the record evidence that plaintiff wanted to connect to the sewer system, we hold that plaintiff's claim of involuntariness still fails. There is an element of volition because users may refuse, or at least limit, water use (and the corresponding use of the sewer that would dispose of the water). *Id.*

Upon considering all three primary factors set forth in *Bolt, supra*, we hold that the trial court correctly granted summary disposition under MCR 2.116(C)(10). Plaintiff failed to show either a genuine issue of material fact or demonstrate that he, rather than defendant, should have been granted summary disposition under MCR 2.116(C)(10). *Maiden, supra* at 120-121. As a

matter of law, Resolution 96-11 did not establish a tax. Hence, the Headlee Amendment is not applicable.

II

Plaintiff next challenges the trial court's ruling denying summary disposition in his favor and granting summary disposition in favor of defendant regarding the validity of Resolution 96-11 based on various statutory, ordinance, and constitutional grounds.

Addressing first the statutory bases of plaintiff's argument, we note that plaintiff cites MCL 123.741 in support of his claim of error, but plaintiff has failed to address the trial court's ruling that this statute was not applicable to defendant, a township. Having failed to brief this necessary issue, plaintiff's reliance on MCL 123.741 provides no basis for declaring Resolution 96-11 invalid. See generally *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (failure to address a necessary issue precludes appellate relief).

We further find that plaintiff has demonstrated no basis for disturbing the trial court's ruling that § 121 of the Bond Revenue Act, MCL 141.121, was not violated. We decline to consider plaintiff's claim regarding MCL 141.122, given plaintiff's failure to show that he challenged the validity of Resolution 96-11 on this basis or that exceptional circumstances now exist to warrant consideration of this statute. Issues raised for the first time on appeal ordinarily are not subject to review. *Booth v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Further, we are not persuaded that MCL 141.126 provides any basis for disturbing the trial court's decision to grant summary disposition in favor of defendant.

Turning to the ordinances relied on by plaintiff in his argument, we note as a threshold matter that plaintiff has not established any basis for relief based on the proposition that Resolution 96-11, as applied, violates Ordinance No. 67. As we have previously discussed, Ordinance No. 67 contains only a pledge of landfill royalty revenues in an amount not exceeding $300,000.

With regard to plaintiff's claim that Resolution 96-11 violates Ordinance No. 66, we note that plaintiff cites §§ 3, 7(A)(1) and (8)(B)(1) of Article XI in support of his argument.

Because plaintiff has failed to adequately brief the applicability of § 3, or to show that this issue was presented to the trial court, we conclude that his argument concerning this section is not properly before us. *Booth*, *supra* at 234; *Goolsby*, *supra* at 655 n 1. We note that the essence of § 3 is that defendant's Board of Trustees may revise rates and charges, by resolution, "as necessary to ensure sufficiency in meeting operation, maintenance and replacement costs, as well as debt service." It lends no support to plaintiff's position that defendant was bound to use a full $300,000 in landfill royalty revenues for the Phase I sewer.

With regard to plaintiff's claim that Resolution 96-11 was adopted in violation of § 7(A)(1), we note that the trial court's specific ruling regarding this section was that "[i]t is clear to this Court that this section has no application to sewer system debt retirement." Because plaintiff has not addressed the basis for the trial court's ruling, we hold that plaintiff has not demonstrated entitlement to relief. *Roberts & Son Contracting, Inc*, *supra* at 113. Also, any

error in the trial court's unchallenged use of a defective affidavit, when analyzing whether § 7(A)(1) was violated (on the assumption that § 7(A)(1) would apply), was harmless because it was not the dispositive issue.[2] MCR 2.613(A); *Harris v Univ of Michigan Bd of Regents*, 219 Mich App 679, 693 n 3; 558 NW2d 225 (1996).

With regard to plaintiff's assertion that § 8(B)(1) was violated because Resolution 96-11 did not specify an amortization period, we note that the trial court's specific ruling with regard to § 8(B)(1) was that "[t]he theory was never pled in the first amended complaint. It will not be considered here." Again, plaintiff does not address the basis for the trial court's ruling on this issue and, therefore, plaintiff's claim does not provide a basis for relief. *Roberts & Son Contracting, Inc*, *supra* at 113.

Turning to the constitutional claims raised by plaintiff on appeal, we note that plaintiff claims that Resolution 96-11 violates both due process and equal protection, but does not address the latter claim. The equal protection guarantee is a measure of constitutional tolerance in a governmental classification scheme. *Doe v Dep't of Social Services*, 439 Mich 650, 661; 487 NW2d 166 (1992). Having failed to brief the validity of any classification scheme, we conclude that plaintiff's argument is insufficient to invoke appellate review of his equal protection claim. *Goolsby*, *supra* at 655 n 1.

With regard to defendant's due process claim, we note that the trial court granted defendant's motion with regard to this claim under both MCR 2.116(C)(8) and (C)(10), based on its determination that plaintiff failed to explain his due process claim in the first amended complaint, motion for summary disposition, or answer to defendant's motion for summary disposition. A motion under MCR 2.116(C)(8) is tested by the pleadings alone to determine if a claim upon which relief may be granted was stated. *Spiek*, *supra* at 337. Because plaintiff has not briefed the basis for the trial court's decision under MCR 2.116(C)(8), appellate relief is again precluded. *Roberts & Son Contracting, Inc*, *supra* at 113.

Furthermore, even if we were to examine plaintiff's due process claim under MCR 2.116(C)(10), we would not reverse the trial court's decision. A legitimate claim of entitlement is an essential part of a substantive due process claim. *Slocum v Holton Bd of Ed*, 171 Mich App

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[2] We note that the defective affidavit was filed by defendant in response to plaintiff's motion for summary disposition and, in particular, concerned a transcript of a purported meeting held by defendant's Board of Trustees on the same day that Resolution 96-11 was adopted, which was qualified by a notation that, "board members did not identify themselves and much of the proceeding was unintelligible." Although plaintiff places weight on a statement in the transcript, plaintiff has failed to establish that it would be substantively admissible evidence to prove the truth of the matter asserted. Even if admissible to prove the truth of the matter asserted, the inference that plaintiff seeks to draw from the statement about the lack of "scientific studies" is speculative. Giving due consideration to the principle that the reasonableness of a utility rate is not subject to mathematical computation with scientific exactitude, but rather, depends on an examination of all factors involved, keeping in mind the objective sought, *City of Novi v Detroit*, *supra* at 426-427, we are unpersuaded that the transcript, purportedly incomplete and inaccurate on its face, aids plaintiff's position that Ordinance No. 66 was violated, even assuming that § 7(A)(1) did apply to a debt service charge.

92, 99-100; 429 NW2d 607 (1988). When the matter is subject to discretionary action, rather than an application of rules to facts, a claim of entitlement fails. See *Bayview-Lofberg's, Inc v Milwaukee*, 905 F2d 142 (CA 7, 1990). See also *Spruytte v Dep't of Correction*, 184 Mich App 423, 427; 459 NW2d 52 (1990). Because plaintiff did not establish evidence of an entitlement, as a sewer user, to having sewer charges subsidized by landfill royalty revenues, we hold that plaintiff may not predicate his substantive due process claim on any reallocation by defendant of landfill royalty revenues from the sewer system to other uses.

Examined in this context, plaintiff's claim that he has factual support for a denial of substantive due process fails. Challenge to an ordinance on substantive due process grounds requires a consideration of whether the ordinance falls within the range of powers conferred by the Legislature and is reasonable, that is, rationally related to a municipality's exercise of police power and the public health, safety, morals and general welfare. *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1997); see also *Valot v Southeast Local Sch Dist Bd of Ed*, 107 F3d 1220, 1228 (CA 6, 1997). Where the validity of the ordinance itself is not at issue, but rather, the manner in which it is executed, the proper focus is whether the ordinance was reasonably exercised. *Delta Charter Twp v Dinolfo*, 419 Mich 253, 270; 351 NW2d 831 (1984). The result of the legislative body's action, and not the motive, is generally of concern to the courts. See *Straus v Governor*, 459 Mich 526, 531; 592 NW2d 53 (1999), and *Kuhn v Dep't of Treasury*, 384 Mich 378, 383; 183 NW2d 796 (1971). But see *Sheffield Development Co v City of Troy*, 99 Mich App 527, 531; 298 NW2d 23 (1980).

Because plaintiff did not show that defendant lacked the authority, by ordinance, to revise the debt service charge, the relevant inquiry, for purposes of the substantive due process claim in this case, is whether defendant acted reasonably in setting the debt service charge, independent of any discretion that it might have available in allocating landfill royalty revenues to the debt. Upon de novo review of the record submitted to the trial court, we hold that plaintiff has failed to show a genuine issue of material fact on this issue or any other basis for disturbing the trial court's grant of summary disposition in favor of defendant on the substantive due process claim.

III

Plaintiff next claims that the trial court erred in considering defective affidavits and post-resolution financial information. Having analyzed the proofs in light of the specific rulings of the trial court discussed previously in parts I and II of this opinion, we hold that plaintiff has not established any basis for disturbing the trial court's rulings.

Having failed to show that the trial court erred in granting summary disposition in favor of defendant on his various statutory, ordinance, and constitutional claims, we deny plaintiff's alternative request to remand for supplementation of the record. Plaintiff has not shown any basis for deviating from the general rule that enlargement of the record is not permitted. *Admiral Ins Co, supra at* 305; *Amorello, supra* at 330. Indeed, we note that the trial court, at the time of the hearing on the third motion for summary disposition, specified that it asked plaintiff's attorney if the scheduling of the motion for summary disposition needed to be moved because of an outstanding issue concerning defendant's production of documents, but was advised that it was a separate issue and that "they wanted ruling on this motion." In any event, a motion for rehearing or reconsideration under MCR 2.119(F) could have been pursued if plaintiff desired to submit additional proofs or make further argument. The motion would have given the trial court

discretion to give plaintiff a "second chance" with regard to the prior motion for summary disposition. See *Kokx v Bylenga*, 241 Mich App 655, 658-659; 617 NW2d 368 (2000). Thus, we find no justification for granting plaintiff's request for a remand.

Finally, having found no basis for reversal, we find it unnecessary to consider defendant's argument that an alternative basis for affirmance exists based on the doctrines of res judicata or collateral estoppel.

Affirmed.

/s/ Michael J. Talbot
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder