STATE OF MICHIGAN

COURT OF APPEALS

PETOSKEY INVESTMENT GROUP, L.L.C., BEAR CREEK PARTNERS, L.L.C., BEAR CREEK PARTNERS I, L.L.C., BEAR CREEK PARTNERS II, L.L.C., BEAR CREEK PARTNERS HOLDINGS I, L.L.C., and BEAR CREEK PARTNERS HOLDINGS II, L.L.C., Plaintiffs-Appellants,	UNPUBLISHED November 18, 2010
v	Nos. 292811 & 294122 Emmet Circuit Court
BEAR CREEK TOWNSHIP and SPRINGVALE-BEAR CREEK SEWAGE DISPOSAL AUTHORITY, Defendants-Appellees.	LC No. 07-009792-CH

Before: MURPHY, C.J., and BECKERING and M.J. KELLY, JJ.

PER CURIAM.

This case arises out of the development of plaintiffs' property for mixed retail, commercial, and residential purposes. In Docket No. 292811, plaintiffs appeal as of right the trial court's judgment of no cause of action in favor of defendant Bear Creek Township (township) on plaintiffs' claim of a Headlee Amendment violation, Const 1963, art 9, § 31. Plaintiffs further challenge previous orders granting summary disposition in favor of the township and defendant Springvale-Bear Creek Sewage Disposal Authority (sewer authority) on plaintiffs' claims of breach of consent judgment, procedural and substantive due process violations, equal protection violations, and unconstitutional takings. In Docket No. 294122, plaintiffs appeal as of right the trial court's orders awarding case evaluation sanctions in favor of both defendants. We affirm.

Plaintiffs' lawsuit was fueled, for the most part, by defendants' conduct with respect to the referendum and the sanitary sewer connection, which conduct plaintiffs claimed delayed the development of their property and gave rise to civil liability on the part of defendants. Plaintiffs were ultimately able to complete the development project; therefore, their claims were predicated on the underlying theory that they were entitled to *timely* completion of the project and this did not occur because of delays caused by the referendum and by sewer connection problems attributable to defendants.

I. DELAYS IN THE DEVELOPMENT PROJECT – REFERENDUM ISSUES

In regard to the referendum, plaintiffs asserted in their complaint that the township should have acted in support of the state consent judgment and against the referendum, considering that the referendum sought to nullify the zoning change embodied in the consent judgment and that, under the judgment, the township agreed to promptly review and approve final development plans. Plaintiffs maintained that the township should not have published a notice of the consent-judgment rezoning and should not have allowed the referendum process to take its course and go to the township citizenry for a vote. Plaintiffs further alleged that the township should have aligned itself with plaintiff Petoskey Investment Group, L.L.C. (Petoskey Investment), in the circuit court litigation that challenged the referendum and sought enforcement of the consent judgment, instead of taking no position on the matters. Plaintiffs also asserted that the township should not have argued in support of the referendum on appeal.

Whether under a theory or claim of breach of consent judgment, violation of procedural or substantive due process, violation of equal protection, or an unconstitutional taking, we hold that there is no sustainable claim with respect to those causes of action as they relate to and are based upon the referendum. A township resident, an attorney, initially sought publication of the consent-judgment rezoning in order to be able to initiate the referendum process. This resident threatened a mandamus action against the township if publication did not occur. MCL 125.281a[1] mandated the publication of zoning ordinance amendments. MCL 125.284 provided, in part, that "[a]n amendment for the purpose of conforming a provision of the zoning ordinance to the decree of a court of competent jurisdiction as to any specific lands may be adopted by the township board and the notice of the adopted amendment published . . . ." MCL 125.282, which governed the referendum process, gave registered electors, following publication, the right to file with the township clerk a notice of intent to file a petition relative to a referendum. Plaintiffs' counsel vigorously voiced his opposition to any publication and referendum for a litany of reasons. The township informed plaintiffs' counsel that, after review of the law, it thought it appropriate to publish the notice as demanded by the township citizen, just as if the zoning change had been accomplished through the normal zoning process and not via a consent judgment. The township also indicated that it had not taken a position on whether a referendum would be lawful, which was an issue that needed to be addressed by the circuit court if sufficient signatures were obtained. The township published a notice of the consent-judgment rezoning, and the petition and referendum process commenced, ultimately resulting in a township vote that ostensibly nullified the consent judgment and zoning change and precluded plaintiffs' development plans.

During the referendum process, Petoskey Investment went to the circuit court to challenge the referendum and to enforce the consent judgment, claiming the referendum to be unlawful for myriad reasons. The township took no position in the circuit court litigation; it did

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[1] We note that all statutory provisions in the Township Zoning Act, MCL 125.271 *et seq.*, were repealed by 2006 PA 110, but they were in force and governed at the time of the referendum process at issue here.

not present an argument in favor of the consent judgment and against the referendum. The circuit court granted a petition to intervene by a township citizen, noting that absent intervention, the issues presented would have to be decided without the benefit of hearing a counterargument on the issues. See *Petoskey Investment Group, LLC v Bear Creek Twp*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2004 (Docket Nos. 246641, 248203, 248801), slip op at 4 n 4. The circuit court ruled that the consent judgment constituted a rezoning and was subject to a referendum under MCL 125.282. The circuit court's ruling necessarily encompassed a conclusion that publication of the notice of the consent-judgment rezoning was mandatory. On appeal to this Court, the panel, relying on *Green Oak Twp v Munzel*, 255 Mich App 235; 661 NW2d 243 (2003), reversed the circuit court, holding that the consent judgment governed and that the zoning change embodied in the judgment could not be subject to a referendum. *Petoskey Investment Group,* slip op at 5. However, on application to our Supreme Court, the Court found that there was no relief that it could grant to the intervening citizen as the appeal had been rendered moot given a settlement agreement, embodied in a separate federal consent judgment, in *Petoskey Investment Group, LLC v County of Emmet*, United States District Court for the Western District of Michigan, issued September 7, 2004 (Docket No. 5:04-CV-59). 474 Mich 1101 (2006) (indicating also that the development project was underway).[2] The township took a position in favor of the referendum on the appeal to this Court, but the township did not file the application for leave to appeal in the Supreme Court. The application was pursued by the intervening township citizen.

It is abundantly clear and evident that, even had the township refused to publish the notice of the consent-judgment rezoning and argued against the referendum in the circuit court, this Court, and our Supreme Court, the events would still have transpired much like they did and therefore a delay in the development would have occurred regardless of the township's conduct. The township citizen who demanded publication was set to file a mandamus action had the township failed to publish notice of the consent-judgment rezoning, and the circuit court was in agreement that publication was necessary and that the referendum process could go forward. Therefore, even absent the township's voluntary decision to publish, the matter would have come to the attention of the circuit court, a notice would have been published by court order, and the referendum would have occurred. Further, it would be illogical to believe that the circuit court would have ruled differently in the face of challenges to the referendum had the township simply argued against the referendum instead of taking no position, especially considering that the circuit court allowed a township citizen to intervene for the specific purpose of presenting counterarguments in support of the referendum after the township essentially stood mute. Also, under MCL 125.282, once the petition process seeking a referendum was underway, the statute did not provide any mechanism for the township to unilaterally halt the process, although the township clerk did have to make a finding that the petition was sufficient. The issue of petition sufficiency had nothing to do with whether a referendum was lawful under the circumstances, and any attempt to stall or halt the process by the township would have been greeted unfavorably by the circuit court, given the court's position.

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[2] Emmet County became responsible for addressing all zoning matters relative to the property at issue after the township's zoning ordinance expired in January 2003.

Next, any delays in developing the property caused by the appellate process relative to the referendum question were not the fault of the township, where the appeal to this Court was of course brought by Petoskey Investment and it was successful. With respect to the application for leave filed with our Supreme Court, the intervening citizen is listed as the only party appealing this Court's ruling, 474 Mich 1101, and the mootness ruling was not affected by anything argued by the township. Further, as to the period during which the appellate process was taking its course in regard to the referendum, aside from the fact that the township cannot be blamed for causing the delay in commencing construction which resulted from the appeals, there is another reason to disregard the delay occurring during this timeframe relative to the question of liability, that being the transfer of zoning authority to Emmet County and the ensuing federal litigation against the county.

Our review of the April 2004 complaint filed by Petoskey Investment against Emmet County, which was but one of several federal lawsuits initiated by Petoskey Investment relative to development of the property, reveals that Petoskey Investment alleged that Emmet County's Board of Commissioners made decisions on March 13 and August 14, 2003, that denied applications for rezoning and for approval of a preliminary site plan to permit a desired mixed-use project. The federal complaint stated that Petoskey Investment's property was zoned under the county's zoning ordinance. The complaint further alleged:

> Upon information and belief, the County asserts that all property located within Bear Creek Township's municipal boundaries (including the Property) is governed by the provisions in the County Zoning Ordinance because (a) Emmet County possesses a zoning ordinance covering the entire municipal boundaries of Bear Creek Township, (b) Bear Creek Township does not possess such a zoning ordinance itself, and (c) the land in Bear Creek Township's boundaries (including the Property) is not zoned by the Township.

Under the federal consent judgment entered in September 2004, there was county approval of 240 residential units and 300,000 square feet of retail/commercial space. The 2002 state consent judgment provided for the construction of 224 apartments, 36 duplexes, and only 175,000 square feet of retail/commercial space. There are a variety of other differences between the project approved in the state consent judgment and the project approved in the federal consent judgment. Pursuant to the federal consent judgment, Petoskey Investment had the option of obtaining a sanitary sewer connection from either the sewer authority, the city, or another source, or it could construct its own system. The federal consent judgment further provided that it was "the intent of the parties to control the development of the [p]roperty with this [c]onsent [j]udgment, regardless of any other prior legal judgment, including the [state consent judgment]." But Petoskey Investment was not "prohibited from seeking redress in any other proceeding against other parties."

The opinion by this Court on the referendum appeal actually represented the consolidation of three lower court files out of which appeals were pursued by Petoskey Investment in February, April, and June 2003. Zoning matters had already shifted to Emmet County in January 2003, later resulting in the federal consent judgment, which explains the mootness ruling by our Supreme Court. The development project as contemplated by the parties to the state consent judgment did not ultimately govern the actual development of the property, where zoning decisions by Emmet County and entry of the federal consent judgment

subsequently controlled the project. The referendum itself had effectively become irrelevant even before the appellate process commenced, given that Emmet County governed pertinent zoning matters starting in January 2003. Therefore, even assuming one could find fault with defendants' conduct relative to the referendum appellate process, a delay would nonetheless have occurred because Petoskey Investment had to now await approval by Emmet County on applications to start the development, which was not forthcoming, thereby resulting in the federal lawsuit. The irrelevancy of the referendum was recognized by our Supreme Court in its mootness ruling.

In sum, we find no basis in the record or in law to place liability for damages on the township for any delay in the development attributable to the referendum process, *as the necessary element of causation is lacking as a matter of law*, regardless of the cause of action. Defendants' conduct was not the proximate cause of referendum-related, delay damages. Rather, a series of circumstances beyond defendants' control caused the delay. Plaintiffs argue that the township can be held liable for the actions of its citizens in pursuing and approving the unlawful referendum, thereby suggesting that the element of causation was established in connection with referendum-based project delays. We reject this argument. Plaintiffs' complaint was not framed in terms that the township was liable for the acts of its citizens in exercising the referendum process; rather, plaintiffs maintained that township officials acted improperly in confronting the referendum issue when brought to the forefront by township citizens. Moreover, even if we view the referendum vote as an act of the township and assume that this was alleged in the complaint, we are not prepared to hold the township liable for money damages for a referendum-based delay in developing the property where the referendum process was effectively endorsed, sanctioned, and ordered by the circuit court. Such was not the situation in *Poirier v Grand Blanc Twp*, 167 Mich App 770; 423 NW2d 351 (1988), which is the case relied on by plaintiffs, and we thus find *Poirier* distinguishable. Simply put, the township was not free to disregard the circuit court's orders.

Furthermore, on careful review of the state consent judgment, and assuming a cause of action for breach of consent judgment is cognizable,[3] we find no breach of the judgment relative to the township's conduct in connection with the referendum. Moreover, for purposes of substantive due process, the township's conduct in relation to the referendum was not "so arbitrary and capricious as to shock the conscious." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 198; 761 NW2d 293 (2008). We note that, in a federal lawsuit filed by Petoskey Investment against the township, not the one alluded to above, the federal court ruled in July 2005 that Petoskey Investment's claim of a substantive due process violation arising out of the referendum process had to be summarily dismissed. *Petoskey Investment Group, LLC v Bear Creek Twp*, United States District Court for the Western District of Michigan, issued July 27, 2005 (Docket No. 5:03-CV-14), slip op at 7. The federal court stated that there was "no

[3] Although we requested supplemental briefs from the parties with respect to *McGraw v Parsons*, 142 Mich App 22; 369 NW2d 251 (1985), on the issue of whether an independent cause of action for breach of consent judgment is cognizable under Michigan law, our subsequent determination of how to properly analyze this case has now made it unnecessary to resolve that issue.

evidence . . . in this case that could support a finding that [the township's] conduct was arbitrary, capricious or irrational." *Id.* The court further indicated that the township's conduct did not shock the conscience and that, regardless of the decision by the Michigan Court of Appeals in rejecting the referendum, there was no basis to find a substantive due process violation. *Id.*, slip op at 6-7. With respect to substantive due process, "[t]his state's constitutional provision is coextensive with its federal counterpart." *Cummins v Robinson Twp*, 283 Mich App 677, 700-701; 770 NW2d 421 (2009). We agree with the federal court's assessment. Also, given that the same principles apply regardless of whether the claim is brought under the United States or Michigan Constitution, it would appear that the doctrine of res judicata or collateral estoppel would preclude plaintiffs' claim of a substantive due process violation arising out of the referendum delay. See *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 688-689; 762 NW2d 529 (2008) (federal judgment precludes relitigation of same claim in state court based on issues raised in federal action).

Additionally, the township's conduct relative to the referendum did not amount to an unconstitutional taking under the balancing test set forth in *Penn Central Transportation Co v New York City*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978), and cited in *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 577; 575 NW2d 531 (1998). Further, we cannot conceive of any procedural due process violation arising out of the township's conduct in handling the referendum matter. *Mettler Walloon*, 281 Mich App at 213-214. Finally, there is simply no basis for an equal protection claim in connection with the township's conduct relative to the referendum. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010).

II. DELAYS IN THE DEVELOPMENT PROJECT – SEWER CONNECTION ISSUES

In regard to the sanitary sewer connection, plaintiffs asserted that defendants failed to promptly and diligently negotiate a sewer agreement amendment with the city of Petoskey (city) that would have permitted extension of sewer service to the property, that defendants failed to process and delayed or denied applications for a sewer connection despite sufficient sewer capacity to make a connection, that defendants failed to process and delayed or denied plaintiffs' applications for an environmental quality sewer connection permit, and that defendants failed to take any steps under the city sewer agreement to permit a sanitary sewer connection, despite defendants control of the sewer system. Further, plaintiffs alleged that defendants misrepresented that there was insufficient sewer capacity and/or that available capacity had already been allocated to other township users, that defendants improperly allocated sewer capacity to other properties in violation of the township's sewer ordinance, and that, relative to allocating capacity and making a sewer connection, defendants treated plaintiffs differently than other similarly-situated properties and property owners.

We initially hold that defendants cannot be held liable for any sewer connection delays occurring prior to entry of the federal consent judgment. Up until that point in time, whether because of the referendum process and the resulting litigation or because of the transfer of zoning authority to Emmet County and the resulting rezoning denials and federal litigation, matters were effectively at a standstill and there was no clear indication whether plaintiffs would even be able to develop the property as desired. It would have defied commonsense and logic for defendants to press forward with efforts to connect plaintiffs' property to the sewer system when there existed a distinct possibility that no development would come to fruition. Only after

the federal consent judgment was entered could it be definitively concluded that the project would indeed be constructed. Under these circumstances, none of the liability theories proffered by plaintiffs, including breach of consent judgment, would support the imposition of liability.

Furthermore, with focus solely on sewer connection delays and plaintiffs' claim of breach of the state consent judgment, we hold that defendants have no liability even as to events occurring *after* entry of the federal consent judgment. The simple fact is that when the township's zoning authority expired and zoning authority was transferred to the county in January 2003, the state consent judgment was rendered moot and no longer enforceable or relevant, where the township no longer had any say regarding development of the property, and where Emmet County and Petoskey Investment were not bound by the project contemplated and agreed to in the state consent judgment.[4] It cannot rationally be argued that defendants could legally force plaintiffs to construct the project as envisioned in the state consent judgment. And, concomitantly, plaintiffs could not demand that defendants act in accordance with the state consent judgment that was no longer governing the construction project. Any promises made by defendants in the state consent judgment as to a sewer connection no longer had to be honored as defendants' promises related to a now defunct, smaller project. The federal consent judgment also allowed for Petoskey Investment to obtain a sanitary sewer connection *from any source or to construct its own sewage system*, and that judgment also contained an expression of Petoskey Investment's intent that the federal consent judgment alone would control the development of the property, not the state consent judgment. Again, there was a possibility that no development would even occur after Emmet County commenced exercising zoning authority over the property. Petoskey Investment was no longer obligated to conform to the project described in the state consent judgment; thus, defendants could not remain obligated. And entry of the federal consent judgment, while allowing development in accordance with that judgment, could not resurrect promises made by defendants in the state consent judgment.

Liability under a contract may be extinguished where contractual promises become objectively impossible to perform, such as where a supervening event occurs or an unanticipated situation develops that makes performance impossible or makes the performance of promises vitally different than what was contemplated by the parties. *Roberts v Farmers Ins Exch*, 275 Mich App 58, 73-74; 737 NW2d 332 (2007). Here, the transfer of zoning authority over the property to Emmet County rendered the state consent judgment impossible to perform and unenforceable. The supervening event or unanticipated situation was the change in zoning authority. If this were not a case of impossibility, plaintiffs could have simply proceeded with the development envisioned in the state consent judgment without the need to engage in a dispute and court battle with Emmet County. No one, however, has suggested that Emmet County could be so ignored.

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[4] To the extent that this conclusion is at odds with this Court's ruling in the referendum appeal, we note that the law of case doctrine is inapplicable because we are addressing a separate lawsuit. See *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000). Regardless, the Supreme Court's order finding the appeal to be moot reflected a repudiation of this Court's ruling, which had rejected the mootness argument.

Our Supreme Court's holding that the issues regarding the referendum and state consent judgment were moot lends further support for not finding defendants liable for any conduct associated with the sewer connection taken after entry of the federal consent judgment and tied to promises made in the state consent judgment. And the holding equally supports our conclusion that no liability could arise from claims connected to the state consent judgment that related to conduct occurring at and after the time that Emmet County received zoning authority over the property. Although Petoskey Investment indicated in the federal consent judgment that it was not surrendering claims against other parties, this statement assumes the existence of *valid* claims. Further, defendants here were not parties to that federal action, so they did not agree to allow redress by Petoskey Investment against them, nor did they waive any defenses to the claims raised by plaintiffs arising out of the state consent judgment.

This leaves us to contemplate the causes of action predicated on constitutional theories that related to delays in connecting to the sewer system unassociated with the state consent judgment and the referendum, but only those delays occurring after entry of the federal consent judgment. It was only at that point in time that the project was definitively going forward. We hold that these claims also fail. With respect to the substantive due process claims, plaintiffs' arguments on appeal are all structured around and dependent upon the state consent judgment. Having rejected any claim for liability arising out of the state consent judgment for the reasons stated above, the substantive due process claims fail in their entirety.

With respect to plaintiffs' unconstitutional taking claims, one of the claims pertained to and was based on the state consent judgment. Accordingly, this claim fails. In its brief, plaintiffs also argue that the referendum process resulted in a compensable taking; however, this argument fails given our referendum analysis and conclusion above. The second takings claim in the complaint was based on the alleged intentional delay in extending the sanitary sewer to plaintiffs' property, resulting in a temporary taking. It appears that most of plaintiffs' arguments on this matter concern the time period before entry of the federal consent judgment, and those arguments are thus rejected. As to delays after the federal consent judgment was entered, we hold that they do not support a takings claim.

After entry of the federal consent judgment, to accommodate the sewer capacity that plaintiffs requested, the sewer authority had to renegotiate a sewer service agreement with the city. In addition, plaintiffs had to remedy bottlenecks in the system before the Michigan Department of Environmental Quality (MDEQ) would issue a Part 41 permit, which was necessary to begin construction. Until the bottlenecks were remedied, the sewer authority limited the daily average flow to plaintiffs' development to 10,000 gallons per day (gpd), so as not to exceed the system's capacity. The bottlenecks were not remedied until approximately September 2006. Thus, the delay in extending sewer service does not indicate that a compensable temporary taking occurred. See *Penn Central*, 438 US at 124; *K & K Constr*, 456 Mich at 577 (factor one of the *Penn Central* test focuses on the character of the government's actions).

The second *Penn Central* factor requires this Court to consider the economic effect of enforcing the sewer service prerequisites. *Penn Central*, 438 US at 124; *K & K Constr*, 456 Mich at 577. Plaintiffs offer no argument regarding the economic effect of the regulations and instead argue that they were treated differently from other sewer service applicants. This argument is better suited for plaintiffs' equal protection claims, which are addressed below.

Finally, the third *Penn Central* factor requires examination of the extent by which the regulations interfered with plaintiffs' distinct, investment-backed expectations. This factor fails to support plaintiffs' claim of a temporary taking as well. Although plaintiffs would have preferred to develop their property sooner, problems involving sewer capacity in the south leg as well as bottlenecks in the system first had to be remedied to obtain the necessary approvals and permits. In addition, the sewer authority was first required to amend its agreement with the city. Normal delays in obtaining permits and the like do not amount to a compensable regulatory taking. *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302, 335; 122 S Ct 1465; 152 L Ed 2d 517 (2002). The United States Supreme Court stated:

> A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication. [*Id.*]

Accordingly, plaintiffs have failed to create a question of fact regarding their taking claims, and the trial court properly granted summary disposition in favor of defendants under MCR 2.116(C)(10).

Next, with respect to procedural due process, plaintiffs maintain that defendants never adhered to the procedure mandated by the state consent judgment, which required prompt and good-faith conduct, and never provided due process in regard to approved uses in the state consent judgment. Given our analysis and conclusions above concerning the state consent judgment and events that transpired during the referendum process and associated appeals, these procedural due process arguments fail.

Finally, with respect to equal protection, plaintiffs argue that their property is similarly-situated to three other properties in the area and that the owners of those properties received preferential treatment and treatment not in accordance with law in regard to sewer connections. This argument relates in part to events preceding entry of the federal consent judgment; however, we shall review the issue independent of our conclusions above. Const 1963, art 1, § 2, provides that "[n]o person shall be denied the equal protection of the laws[.]" Michigan's equal protection provision is coextensive with the equal protection provision of the United States Constitution. *Shepherd Montessori*, 486 Mich at 318. "The Equal Protection Clause requires that all persons similarly situated be treated alike under the law." *Id.* When reviewing government action "challenged as denying equal protection, the threshold inquiry is whether plaintiff was treated differently from a similarly situated entity." *Id.*

Here, plaintiffs compared their project to three other developments – Meadows Apartments, Independence Village, and RG Properties. Plaintiffs contend that those three developments were approved and allocated sewer capacity despite the fact that the amounts allocated collectively exceeded the 150,000 gpd available capacity by 50,000 gpd. The trial court correctly determined that the three entities are not similarly situated to plaintiffs based on the amounts of capacity requested. Plaintiffs' counsel conceded that Meadows Apartments, the largest of the three projects, requested only approximately 20,000 gpd while plaintiffs sought approximately 85,000 gpd.

Additionally, the record reveals that both zoning approval and site plan approval was necessary before a development was granted sewer connection approval. Joseph O'Neill, plaintiffs' engineer, testified that zoning approval precedes site plan approval. O'Neill further testified that the three other entities had obtained site plan approval and were allocated sewer capacity while Petoskey Investment had not yet obtained site plan approval in 2001. In fact, because of the referendum, plaintiffs did not obtain zoning approval until entry of the 2004 federal consent judgment. O'Neill admitted that he was not aware of any entity that was allocated sewer capacity without having first obtained zoning or site plan approval. Plaintiffs filed their first formal application for sewer service on September 16, 2004. Correspondence in 2004 indicates that the sewer system had very limited capacity left at that time. While the other three entities completed the steps necessary for approval in 2001, plaintiffs did not obtain zoning approval until 2004, three years later, when sewer capacity was limited. Accordingly, plaintiffs were not similarly situated to the other three developments. Because plaintiffs failed to establish a question of fact in this regard, we need not determine whether there existed a rational basis for the alleged disparate treatment. *Shepherd Montessori*, 486 Mich at 323. The trial court properly granted summary disposition for defendants under MCR 2.116(C)(10).

III. HEADLEE AMENDMENT

Plaintiffs next contend that the trial court's determination that sewer connection fees constituted a permissible fee rather than an unlawful tax in violation of the Headlee Amendment was against the great weight of the evidence. In a bench trial setting, we actually review a great-weight framed argument to determine whether the court's underlying factual findings were clearly erroneous. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652 n 14; 662 NW2d 424 (2003). Clear error exists where a reviewing court is left with a definite and firm conviction that a mistake was made. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). Further, whether a charge constitutes a tax or a permissible fee is a question of law that this Court reviews de novo. *Bolt v City of Lansing*, 459 Mich 152, 158; 587 NW2d 264 (1998).

"The levying of a tax or an increase in the tax rate higher than that authorized by law at the time of the Headlee Amendment's adoption triggers application of [Const 1963, art 9, § 31] of the Headlee Amendment." *Wolf v Detroit*, 287 Mich App 184, 198; 786 NW2d 620 (2010), appeal gtd __ Mich __; 788 NW2d 664 (2010). That provision states, in relevant part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

If a charge constitutes a user fee rather than a tax, the Headlee Amendment is not implicated. *Bolt*, 459 Mich at 159. "Rather than being an exercise of the municipality's power to tax, the imposition of a fee constitutes an exercise of the municipality's police power to regulate public health, safety, and welfare." *Wolf*, 287 Mich App at 199. A "fee" is generally exchanged for a service rendered or a benefit conferred and a reasonable relationship exists between the amount of the fee and the value of the service or benefit. *Bolt*, 459 Mich at 161. On the other hand, a tax is designed to raise revenue and is imposed primarily for public rather than

private purposes. *Id.* In *Bolt*, the Michigan Supreme Court articulated three criteria to consider when determining whether a charge is a tax or a fee: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose[;]" (2) "user fees must be proportionate to the necessary costs of the service[;]" and (3) the charge, in order to constitute a fee, must relate to a commodity or service for which a person is free to voluntarily choose, refuse, or limit. *Id.* at 161-162. Other factors to consider include:

> [W]hether the charge constitutes an investment in infrastructure; whether the charge simply defrays the cost of a regulatory activity; whether the charge reflects the actual cost of use, metered with relative precision in accordance with available technology, including some capital investment component; whether the charge corresponds to the benefits conferred; whether the charge applies only to those property owners who will enjoy the full benefits of the new construction or applies to all property owners; whether the ordinance imposing the charge lacks a significant element of regulation; whether the payment of the charge is compulsory only for those who use the service; whether the users of the service have the ability to choose how much of the service to use; whether the users of the service have the ability to decide whether to use the service at all; whether the charge raises revenue to replace a portion of a program that was previously funded by a government's general fund; whether the charge may be secured by the imposition of a lien; and whether the charge is billed through a governmental unit's assessor's office and is mailed with property tax statements. [*Wolf*, 287 Mich App at 199-200 (footnotes omitted).]

The evidence presented at trial showed that in 2005 the township was facing sewer capacity pressure, in part because of plaintiffs' development. As a result of the limited capacity, the township board appointed individuals to form a task force to conduct a year-long study of the township's sewer needs, including identifying the projected amount of growth necessary over the following 20-year period. The task force predicted a total capacity of negative 8,000 gpd and estimated that up to an additional 500,000 gpd was necessary. The task force explored different alternatives for providing the additional capacity and recommended redirecting flow to the Harbor Springs Sewer Authority. The task force, led by Douglas Coates, recommended increasing the sewer connection fee to $3,000 and setting aside those funds for capital improvements, including future growth. In July 2005, the township adopted ordinance 22-05, which increased connection fees from $2,000 to $3,000.

The first *Bolt* factor requires this Court to consider whether the charge served a regulatory purpose or a revenue-raising purpose. The trial court determined that the connection fee was not intended to raise general revenue, but rather was calculated to cover the cost of additional sewer system capacity. The evidence supports the trial court's determination. Dennis Keiser, the township's supervisor, testified that the $3,000 connection charge was imposed to create additional sewer capacity and that the connection fees collected were earmarked for sewer purposes and placed in a capital improvement account. Keiser denied that the funds in the account were commingled with general funds. Additional sewer capacity was necessary to accommodate new users based on the task force's projection of sewer needs in the following 20-year period.

This case is similar to *Graham v Kochville Twp*, 236 Mich App 141, 149-150; 599 NW2d 793 (1999), which involved the question whether a connection fee constituted a tax or a special assessment. Recognizing that the fee-special assessment distinction was similar to the fee-tax distinction presented in *Bolt*, this Court applied the three-prong *Bolt* test. *Id.* at 150-156. Regarding the first factor, this Court opined:

> Although the charge at issue here will also pay for an investment in infrastructure, the extended water line will not benefit the general public. Nor, according to defendant, will it continue to serve the public long after it is paid off by the charge. Instead, the charge will pay for the regulation of a specific part of the community's access to a municipal water supply. Defendant, the township, has extended its water supply to a rural part of the community that formerly was served only by private wells. It seeks to pay, in part, for such extension of its water pipeline by a connection fee that is exacted when residents of this newly served community connect to the municipal water supply. By exacting the fee for connection to the water system, the purpose is clearly to regulate and control the use and distribution of water provided by the municipal system. This ordinance, through its connection charge, will regulate access to a clean, dependable water supply. Although the revenue raised by the charge will pay for the construction of the watermain extension, we find that the purpose of the charge is mainly regulatory-without the extension of the water line and the connection to such line, the citizens of the community served by the new line would have no access to municipal water.
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> Further, the construction at issue here benefits only those citizens in the community newly serviced by the water extension who connect to the water line. There is no evidence in the record indicating that the water extension would benefit anyone who does not pay for the privilege of "hooking up" to the extension, nor that anyone who did not benefit would be forced to pay the charge . . . . [*Id.* at 152-153.]

Similarly, the improvements to the sanitary sewer system at issue here will not benefit the general public, but rather only users connected to the system. Although plaintiffs argue that they will not benefit from a new sewage disposal system because they will remain connected to the city plant, the evidence showed that they will benefit from such an improvement because the flow from the north leg of the system would no longer be directed to the city facility, opening up additional capacity for users in the south leg, such as plaintiffs. Admittedly, the connection fee raises money, but raising money is not considered a tax if the fee serves an underlying regulatory purpose and the money raised supports such a purpose. *Graham*, 236 Mich App at 151. Thus, the evidence showed that the fee served a regulatory purpose rather than a revenue-raising purpose.

The next *Bolt* factor examines whether a fee is proportionate to the necessary cost of the service. *Bolt*, 459 Mich at 161-162. While a tax is designed to raise revenue for general public purposes, a fee must be proportionate to the cost of a regulation and is presumed reasonable absent contrary evidence. *Graham*, 236 Mich App at 151. Here, the $3,000 connection fee is proportionate to the improvements necessary to create additional system capacity. Coates testified that he employed the incremental cost method, which involves anticipating future costs

and proportioning those costs to new users to offset the cost of their impact on system capacity. Based on the task force study, Coates estimated that the township required up to an additional 500,000 gpd in treatment capacity. Coates estimated that achieving additional capacity would cost approximately $8 million and require the creation of 2,607 additional REU's, or residential equivalent units. Coates arrived at the connection fee by dividing $8 million by 2,607, which produced a cost of $3,069 per REU. Thus, Coates recommended increasing the $2,000 connection fee to $3,000 to cover the anticipated cost. Although plaintiffs argue that they have paid a substantial amount for infrastructure improvements necessary to accommodate their development, those sums were unrelated to the connection fees. In addition, the fact that capacity was higher than expected in 2008, three years after the sewer study, did not render the connection fee disproportionate. Accordingly, the evidence shows that the connection fee is proportionate to plaintiffs' impact on the sewer system's capacity.

The third *Bolt* factor requires this Court to consider whether the charge relates to a commodity or service for which a person is free to voluntarily choose, refuse, or limit. *Bolt*, 459 Mich at 162. As stated in *Bolt*, 459 Mich at 167, "[o]ne of the distinguishing factors of a tax is that it is compulsory by law, whereas payments of user fees are only compulsory for those who use the service, have the ability to choose how much of the service to use, and whether to use it at all." (Quotations and citation omitted.)

Scott Chappelle, plaintiffs' managing member, testified that he examined alternatives to connecting to defendants' sewer system but determined that the alternatives were economically and practically impossible. Thus, he concluded that connecting to defendants' system was plaintiffs' only option. On the other hand, Coates testified that plaintiffs could have built a private sewage system on their property, that a nearby Indian tribe had constructed a private system, and that although the MDEQ encourages connection to a public system, it does not require such connection. The trial court found Coates's testimony that a private system was feasible more credible than that of Chappelle. "[T]his Court defers to the trial court on issues of credibility." *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000).

Further, the trial court recognized that plaintiffs were engaged in a commercial enterprise and were able to choose the number of connections it desired. As this Court stated in *Mapleview Estates, Inc v Brown City*, 258 Mich App 412, 417; 671 NW2d 572 (2003):

> Plaintiff is engaged in a commercial enterprise and has the apparent desire to earn a profit. It need not pay the tap-in fee unless it decides to install a home site in a particular location. It has the ability to choose whether to use the service at all, and those who occupy plaintiff's homes have the ability to choose how much water and sewer they wish to use.

Similarly, in this case, plaintiffs were able to make construction determinations, within the outer limits of the federal consent judgment, and to determine the number of sewer connections they desired. Thus, the connection fee was not compulsory for all, but rather only for those who chose to connect to the sewer system. Accordingly, the record shows that the fee is voluntary.

Because an analysis of all three *Bolt* factors supports a conclusion that the connection charge is a permissible fee rather than a tax, the charge did not violate the Headlee Amendment. The trial court's determination as such is not against the great weight of the evidence.

IV. CASE EVALUATION SANCTIONS

In Docket No. 294122, plaintiffs argue that the trial court abused its discretion by granting case evaluation sanctions rather than applying the "interest of justice" exception in MCR 2.403(O)(11). We review de novo a trial court's decision to grant or deny case evaluation sanctions. *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005). Because a trial court's decision whether to apply the "interest of justice" exception is discretionary, however, we review that decision for an abuse of discretion. *Id*. "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Moore v Secura Ins,* 482 Mich 507, 516; 759 NW2d 833 (2008).

MCR 2.403(O) provides, in relevant part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party *must* pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation. [Emphasis added.]
>
> (2) For the purpose of this rule "verdict" includes,
>
> * * *
>
> (b) a judgment by the court after a nonjury trial,
>
> (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.
>
> * * *
>
> (11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.

Because this case involves verdicts stemming from summary disposition motions as well as a bench trial, both subrules (O)(2)(b) and (c) are implicated.

Plaintiffs argue that the trial court erred by refusing to apply the "interest of justice" exception in subrule (O)(11). As stated in the court rule, the "interest of justice" exception applies only to subrule (O)(2)(c), or to judgments resulting from rulings on motions. Subrule (O)(11) does not apply to judgments entered as a result of nonjury trials as stated in subrule (O)(2)(b). Therefore, to the extent that plaintiffs contend that the trial court abused its discretion by refusing to apply the exception with respect to the judgment of no cause of action following the bench trial, their argument lacks merit. As provided in subrules (O)(1) and (O)(2)(b), the trial court was required to award case evaluation sanctions with respect to the verdict following the bench trial.

The trial court dismissed the remainder of plaintiffs' claims pursuant to motions for summary disposition. Plaintiffs argue that the trial court should have applied the "interest of

justice" exception because the court did not rule on defendants' motions until after the deadline for accepting or rejecting the case evaluation had passed. Thus, the motions were still pending at the time the parties received notice of the outcome of the case evaluation. This Court recently addressed this circumstance in *Peterson v Fertel*, 283 Mich App 232, 238-239 n 2; 770 NW2d 47 (2009), and opined that the fact that a dispositive motion is pending at the time a plaintiff must either accept or reject a case evaluation is irrelevant for purposes of applying subrule (O)(2)(c).

"The purpose of this fee-shifting provision [MCR 2.403(O)(1)] is to encourage the parties to seriously consider the evaluation and provide financial penalties to the party that, as it develops, 'should' have accepted the award but did not." *Smith v Khouri*, 481 Mich 519, 527-528; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.). The trial court's award of case evaluation sanctions in this case was not inconsistent with the purpose of case evaluation. In awarding sanctions in favor of the sewer authority, the trial court stated:

> The date for case evaluation was established by this Court by its Scheduling Conference Order dated June 3, 2008. That Scheduling Order also set a deadline for completion of discovery of October 24, 2008, and it required that all motions be heard prior to the Final Pretrial date of December 12, 2008. The Authority's motion was timely under the Scheduling Order. It is typical that dispositive motions under MCR 2.116(C)(10) are filed at or near to the close of discovery. Such motions filed earlier are susceptible to opposition on the grounds of prematurity.
>
> Nothing in the rules requires that dispositive motions be decided prior to case evaluation. Since case evaluation hearings are scheduled promptly after completion of discovery, it is routine for dispositive motions to be pending when cases are submitted to case evaluation. The merits of such dispositive motions are presumably considered by the case evaluators in reaching their decision, and thereafter the parties must likewise evaluate the strength of the dispositive motion arguments in deciding whether to accept or reject the case evaluation award.
>
> There is no indication that the timing of the Authority's summary disposition motion involved any gamesmanship or other misconduct. The timing of the summary disposition motion and the fact that it was pending when case evaluation took place is not an unusual circumstance which warrants application of the interest of justice exception.

Thus, the trial court recognized that the timing of the case evaluation and the summary disposition rulings was not unusual. In deciding whether to accept or reject a case evaluation, a party must necessarily consider the merit of any pending dispositive motions. Here, the case evaluators awarded plaintiffs $100,000 against the township and determined that plaintiffs had no cause of action against the sewer authority. Plaintiffs were able to consider these evaluations in conjunction with defendants' summary disposition motions in determining whether to accept or reject the evaluations. Similar to a plaintiff who rejects a case evaluation award and opts to proceed to trial, plaintiffs in this case chose to "roll the dice" in the hope that their claims would survive summary disposition. In fact, two of plaintiffs' claims, violation of the Headlee Amendment and unlawful exaction, did survive summary disposition. Accordingly, the trial court did not abuse its discretion by refusing to apply the "interest of justice" exception in these

circumstances. The trial court's decision is not outside the range of reasonable and principled outcomes. *Moore*, 482 Mich at 516.

Plaintiffs further argue that the trial court should have applied the "interest of justice" exception because there existed unusual circumstances. In *Haliw v City of Sterling Hts*, 257 Mich App 689, 709; 669 NW2d 563 (2003), rev'd on other grounds 471 Mich 700 (2005), this Court stated that "if the trial court finds on the basis of all the facts and circumstances of a particular case and viewed in light of the purposes of MCR 2.403(O) that unusual circumstances exist, it may invoke the 'interest of justice' exception found in MCR 2.403(O)(11)." This Court noted that such unusual circumstances include, but are not limited to, cases of first impression, cases in which the law is unsettled and substantial damages are at issue, and cases that may have a significant effect on third persons. *Id*. at 707.

Plaintiffs contend that they had no reason to accept the case evaluation of no cause of action because the trial court previously denied substantially similar motions and determined that there existed genuine issues of material fact. We note that the no cause of action evaluation pertained only to the sewer authority and that plaintiffs received an award of $100,000 against the township. The trial court "strongly disagree[d]" with plaintiffs' argument that they had a right to rely on the denial of the first round of summary disposition motions. We conclude that while the previous denials may have been a factor to consider, plaintiffs were nevertheless required to evaluate the second round of motions anew in conjunction with the case evaluations.

Plaintiffs also argue that the trial court relied on a new unpublished opinion that was not yet decided at the time of the first round of motions. As the trial court recognized, however, the law applicable to plaintiffs' claims was well settled and plaintiffs had the benefit of the unpublished decision when determining whether to accept or reject the case evaluations.

Finally, plaintiffs argue that there is a public interest in having issues judicially determined and that the issues in this case involved public issues not applicable solely to plaintiffs. In making this argument, plaintiffs disregard the notion that an underlying purpose of case evaluation is "to encourage settlement and deter protracted litigation[.]" *Haliw*, 257 Mich App at 700 (quotations and citation omitted). Moreover, this case does not present a situation in which there is a public interest in having an issue judicially decided rather than merely settled. *Id*. at 707. Accordingly, the trial court did not abuse its discretion by awarding case evaluation sanctions and declining to apply the "interest of justice" exception.

Affirmed. Defendants, having prevailed in full, are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly