STATE OF MICHIGAN

COURT OF APPEALS

CITY OF RIVERVIEW and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

V

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant-Appellant,

and

CITY OF RIVER ROUGE,

Defendant.

UNPUBLISHED
September 19, 2013

No. 301549; 302903
Ingham Circuit Court
LC No. 09-000712-CZ

CITY OF NOVI, VILLAGE OF BEVERLY HILLS, CITY OF FARMINGTON HILLS, CITY OF AUBURN HILLS, VILLAGE OF BINGHAM FARMS, and CITY OF WALLED LAKE,

Plaintiffs-Appellees,

and

CITY OF ORCHARD LAKE VILLAGE,

Plaintiff,

V

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant-Appellant.

No. 301551; 302904
Ingham Circuit Court
LC No. 09-001569-CZ

DAVID ANGILERI, BUTLER BENTON, KENNETH BUTLER II, TOWNSHIP OF BROWNSTOWN, CITY OF DEARBORN, CITY OF DEARBORN HEIGHTS, CITY OF GIBRALTAR, TOWNSHIP OF HURON, TOWNSHIP OF SUMPTER, CITY OF TAYLOR, CITY OF TRENTON, TOWNSHIP OF VAN BUREN, ROBERT CANNON, ROBERT CHIRKUN, CHARTER TOWNSHIP OF CLINTON, LOUIS KISIC, ALAN LAMBERT, CITY OF LINCOLN PARK, CITY OF MADISON HEIGHTS, CITY OF NEW BALTIMORE, CITY OF NORTHVILLE, OAKLAND COUNTY, CITY OF PLYMOUTH, CHARTER TOWNSHIP OF REDFORD, CITY OF ROCHESTER, CITY OF ROMULUS, CITY OF ROSEVILLE, LISA SANTO, PHILIP SANZICA, PAUL SINCOCK, CITY OF SOUTHGATE, PATRICK SULLIVAN, and WAYNE COUNTY,

Plaintiffs-Appellees,

V

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant-Appellant.

No. 301552; 302905
Ingham Circuit Court
LC No. 10-000039-CZ

Before: CAVANAGH, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Defendant, Department of Environmental Quality, appeals by leave granted[1] the circuit court order denying, in part, its motion for summary disposition, of the claimed violation of Article 9, § 29 of the Michigan Constitution, known as the Headlee Amendment. We reverse and remand for entry of an order granting summary disposition in favor defendant and vacate the order awarding sanctions.

[1] *City of Riverview v Dep't of Environmental Quality*, unpublished order of the Court of Appeals, issued March 22, 2011 (Docket Nos. 301549, 301551, 301552, 302903, 302904, and 302905).

Pursuant to the federal Clean Water Act, 33 USC 1251 *et seq*., defendant implemented a storm water program. This case arises from defendant's issuance of National Pollution Discharge Elimination Permits (NPDES) for storm water discharges from municipal separate storm sewer systems. Plaintiffs filed administrative challenges to those permits, and this litigation alleging arbitrary and capricious conduct, statutory and administrative rule violations, and violation of the Headlee Amendment.[2] Defendant filed a motion for summary disposition, and the trial court granted the motion except with regard to the Headlee Amendment claim and for declaratory relief. We granted defendant's application for leave to appeal.

Defendant contends that the circuit court erred by denying summary disposition of the Headlee Amendment claim because the state did not mandate that plaintiffs own and operate municipal separate storm sewer systems. We agree. A trial court's ruling on a motion for summary disposition presents a question of law subject to review de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). Initially, the moving party must support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Once satisfied, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id*. "The nonmoving party may not rely on mere allegations or denials in the pleadings." *Id*. The documentation offered in support of and in opposition to the dispositive motion must be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). "The affidavits must be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the motion." *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Mere conclusory allegations that are devoid of detail are insufficient to create a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996).

In *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 8-9; 818 NW2d 337 (2011), this Court set forth the rules governing interpretation of a constitutional provision:

> Cases involving questions of constitutional interpretation are reviewed de novo. *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011). When interpreting a constitutional provision, the primary goal is to determine the initial meaning of the provision to the ratifiers, the people, at the time of ratification. *Nat'l Pride At Work, Inc v Governor*, 481 Mich 56, 67; 748 NW2d 524 (2008). "[T]he primary objective of constitutional interpretation, not dissimilar to any other exercise in judicial interpretation, is to faithfully give meaning to the intent of those who enacted the law." *Id*. To effectuate this intent, the appellate courts apply the plain meaning of the terms used in the constitution. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 11;

[2] A more detailed statement of facts can be found in *City of Riverview v State of Michigan*, 292 Mich App 516, 518-519; 808 NW2d 532 (2011).

> 743 NW2d 902 (2008). When technical terms are employed, the meaning understood by those sophisticated in the law at the time of enactment will be given unless it is clear that some other meaning was intended. *Id*. To clarify the meaning of the constitutional provision, the court may examine the circumstances surrounding the adoption of the provision and the purpose sought to be achieved. *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971). An interpretation resulting in a holding that the provision is constitutionally valid is preferred to one that finds the provision constitutionally invalid, and a construction that renders a clause inoperative should be rejected. *Id*. at 406. Constitutional convention debates are relevant, albeit not controlling. *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). Every provision in our constitution must be interpreted in light of the document as a whole, and "no provision should be construed to nullify or impair another." *Id*. "Statutes are presumed constitutional unless the unconstitutionality is clearly apparent." *Toll Northville Ltd*, 480 Mich at 11. The court's power to declare a law unconstitutional is exercised with extreme caution and is not exercised where serious doubt exists regarding the conflict. *Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008).

The interpretation and application of a statute presents a question of law that the appellate court reviews de novo. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. *Id*. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself. *Id*. "When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *In re Receivership of 11910 South Francis Road*, 492 Mich 208, 222; 821 NW2d 503 (2012). Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman*, 493 Mich at 311.

Const 1963, art 9, § 29 commonly known as the Headlee Amendment provides:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. 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. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18.

The underlying purpose of the Headlee Amendment was set forth as follows:

> The Headlee Amendment was part of a nationwide taxpayers revolt to limit legislative expansion of requirements placed on local government, to put a

> freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level. [*Airlines Parking, Inc v Wayne Co*, 452 Mich 527, 532; 550 NW2d 490 (1996) (quotation marks, punctuation, and citation omitted).]

In *Judicial Attys Ass'n v State of Michigan*, 460 Mich 590, 595; 597 NW2d 113 (1999), the Court described the two different sentences of the Headlee Amendment:

> The first sentence of this provision prohibits reduction of the state proportion of necessary costs with respect to the continuation of state-mandated activities or services. The second sentence requires the state to fund any additional necessary costs of newly mandated activities or services and increases in the level of such activities or services from the 1978 base year. [Further citation omitted.]

As explained in *Adair v State of Michigan*, 470 Mich 105, 111; 680 NW2d 386 (2004), the two sentences represent maintaining funds or prohibiting unfunded mandates:

> To assist the public in understanding the different thrusts of these two sentences, this Court has described the first sentence as a "maintenance of support" (MOS) provision and the second sentence as a "prohibition on unfunded mandates" (POUM) provision. See *id*. Accordingly, to establish a Headlee violation under the MOS clause, the plaintiffs must show "(1) that there is a continuing state mandate, (2) that the state actually funded the mandated activity at a certain proportion of necessary costs in the base year of 1978-1979, and (3) that the state funding of necessary costs has dipped below that proportion in a succeeding year." *Oakland Co v Michigan*, 456 Mich 144, 151; 566 NW2d 616 (1997) (opinion by KELLY, J.). Under the POUM clause, they must show that the state-mandated local activity was originated without sufficient state funding after the Headlee Amendment was adopted or, if properly funded initially, that the mandated local role was increased by the state without state funding for the necessary increased costs.
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> However, not all activity changes established pursuant to statute or rule constitute "new or increased" activity requiring state funding. MCL 21.234(5) explains what the POUM provision excludes:
>
> > (a) A requirement imposed on a local unit of government by a state statute or an amendment to the state constitution of 1963 adopted pursuant to an initiative petition, or by a state law or rule enacted or promulgated to implement such a statute or constitutional amendment.
> >
> > (b) A requirement imposed on a local unit of government by a state statute or an amendment to the state constitution of 1963, enacted or adopted pursuant to a proposal placed on the ballot by the legislature, and approved by the voters, or by a state law or rule enacted or promulgated to implement such a statute or constitutional amendment.

(c) A court requirement.

(d) A due process requirement.

(e) A federal requirement.

(f) An implied federal requirement.

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

(h) A requirement of a state law which does not require a local unit of government to perform an activity or service but allows a local unit of government to do so as an option, and by opting to perform such an activity or service, the local unit of government shall comply with certain minimum standards, requirements, or guidelines.

(i) A requirement of a state law which changes the level of requirements, standards, or guidelines of an activity or service that is not required of a local unit of government by existing law or state law, but that is provided at the option of the local unit of government.

(j) A requirement of state law enacted pursuant to section 18 of article 6 of the state constitution of 1963.

Thus, under a POUM analysis, not every required change in school activities requires state funding under the Headlee Amendment. *Judicial Attorneys Ass'n, supra* at 603. Headlee, at its core, is intended to prevent attempts by the Legislature "to shift responsibility for services to the local government . . . in order to save the money it would have had to use to provide the services itself." *Id*. at 602-603.

Case law has addressed whether a licensing requirement that follows a county's voluntary undertaking is an unfunded mandate of the Headlee Amendment and rejected the assertion. In *Livingston Co v Dep't of Mgt & Budget*, 430 Mich 635; 425 NW2d 65 (1988), the plaintiff county began operating a sanitary landfill in 1972, in accordance with the licensing requirements of the garbage and refuse disposal act (GRDA), 1965 PA 87. In 1979, the act was repealed and replaced with the comprehensive Solid Waste Management Act (SWMA), 1978 PA 641, MCL 299.401 *et seq*. In November 1978, shortly before the adoption of the SWMA, the voters amended the Michigan Constitution by adopting the Headlee Amendment, which provided that the state had to appropriate funds of any necessary costs associated with "an increase in the level of any activity or service beyond that required by existing law." *Id*. at 637-638. To comply with the SWDA, the plaintiff signed a schedule of compliance with the then Department of Natural Resources, and upgraded its landfill by undertaking hydrogeological studies and installing a leachate collection system and PVC liner. The county plaintiff sought to recover the cost of these improvements from the state, but the state asserted that it was not liable. *Id*. at 638. The

county obtained a judgment in the Court of Claims, and the Court of Appeals majority affirmed, but our Supreme Court reversed. *Id*. at 638-639.

Our Supreme Court held that the state was not responsible for costs of services and activities unless mandated by state law:

> We are persuaded by our understanding of the purpose of the Headlee Amendment, as expressed in its totality, that it was intended to apply only to increases in the level of those services and activities that state law mandates in the first instance. As we said in *Durant* [*v State Bd of Ed*, 424 Mich 364; 381 NW2d 662 (1985)], the Headlee Amendment was intended to "limit legislative *expansion of requirements* placed on local government . . . . "
>
> If we examine the language of art 9, § 29 as a whole, we are left with the firm conviction that this provision of the Headlee Amendment applies only to services and activities required of units of local government. The first sentence of art 9, § 29 clearly limits the reduction of the state-financed portion of the necessary costs of any existing activity or service "required" by state law. There is no ambiguity here about whether or not the activity or service is required. Disregarding the troubling clause of the second sentence of art 9, § 29, there is also no doubt that a new activity or service cannot be required without state financial support for any necessary increased costs.
>
> Section 29 then at least makes clear its intent to prohibit either the withdrawal of support where already given or the introduction of new obligations without accompanying appropriations, and, in both instances, art 9, § 29 applies only to services or activities required by state law. The question then is why would the drafters or the voters limit the prohibition against the withdrawal of support to "required" activities or services in sentence one, and at the same time, in sentence two, prohibit the unfinanced expansion of an optional activity? Such an interpretation creates a flaw in the logic of the Headlee Amendment's overall plan.
>
> That plan is quite obvious. Having placed a limit on state spending, it was necessary to keep the state from creating loopholes either by shifting more programs to units of local government without the funds to carry them out, or by reducing the state's proportion of spending for "required" programs in effect at the time the Headlee Amendment was ratified. The plan clearly does not prohibit the reduction of the "state financed proportion . . . of any existing activity or service [*not*] required . . . by state law."
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> Yet under amicus curiae's interpretation plaintiff would be reimbursed for the increased costs allegedly mandated by the SWMA, but due to the unambiguous language in the first sentence of art 9, § 29, a unit of local government that hypothetically was receiving state aid for a landfill at the time of the adoption of the Headlee Amendment could have that support withdrawn. More specifically, to accept amicus curiae's interpretation of the second clause of

the second sentence of art 9, § 29 would place that provision in conflict with sentence one. What sentence two would give, sentence one would take away.

Amicus curiae further argues that many essential services of cities and townships, such as fire protection services, are not mandated by state law and that our interpretation of art 9, § 29 would, in effect, defeat the Headlee Amendment by making these units of local government vulnerable to expensive state regulations. We cannot of course anticipate all of the advantages and disadvantages of what we consider to be the plain and most obvious reading of the Headlee Amendment. It does seem, however, that the most fundamental services, such as fire protection, are already being performed in large measure by units of local government. While the state can, and sometimes does, mandate higher standards, benefits, and so forth, it does not necessarily profit from increasing these standards, and, therefore, the kind of escape hatch for the state that the Headlee Amendment was intended to head off is not created. Unlike the shifting of traditional state functions to units of local government, increasing the costs of services that are currently performed predominantly by units of local government does not lessen the state's financial burden.

Moreover, if we were to accept amicus curiae's argument that the Headlee Amendment applied to increases in the level of even optional activities or services, any unit of local government that had undertaken an optional activity in the past could pass along to taxpayers statewide the costs of improvements. Units of local government, such as plaintiff county, could look to all state taxpayers for the cost of upgrading a voluntarily assumed, quasi-governmental function, such as a sanitary landfill, whereas taxpayers in an adjoining county that used a private landfill would presumably find charges for using their landfill increased because the private landfill owner could not be reimbursed for upgrading his landfill. That unit of government would in turn have to pass off that increased cost to its own tax base, rather than to that of the entire state. Rather than containing the cost and scope of state and local government as indicated by the Headlee Amendment, this result would encourage local units of government to undertake those services and activities previously provided by private enterprise since state taxpayers as a whole, as opposed to local consumers of the service, would pay for any necessary increased costs associated with the increase in the level of that service or activity. [*Livingston Co*, 430 Mich at 643-646 (Emphasis in original).]

The Supreme Court then went on to address whether the SWMA, in effect, required the county to continue to operate the landfill and therefore upgrade its facility. The Court acknowledged that there are statutes that require the county to be responsible for ensuring that all solid waste was removed from its site of generation. However, the Court rejected the assertion that this obligation translated into a viable Headlee Amendment claim, holding:

While the record does not indicate the degree of difficulty plaintiff would encounter in disposing of solid waste if it did not continue the operation of its landfill, we have no reason to gainsay the fact that its continued operation would be beneficial. We also do not doubt that the alleged newly mandated

> requirements for the operation of the landfill would add to the cost of disposing of waste. However, the $260,000 cost of the landfill improvements arrived at by the trial court is part of the cost of the ownership of the landfill, not the cost of its use. It is the latter that, arguendo, is mandated, not the former.
>
> The heightened requirements for the licensure of a disposal area were not directed solely to public owners. To the contrary, the statute encourages, as a matter of policy, the continued operation of privately owned landfills. It is a regulatory measure, like many others passed by the Legislature, that applies new technology to everyday activities in the private and public sector.
>
> Under the holding of the court below, the added costs of regulating the many optional services of government would have to be accompanied by an appropriation, if it could be shown to be related to the carrying out of a required service or activity, before that increased regulatory costs is translated into the recoverable cost of that required service or activity. We do not think this complies with either the express language of art 9, § 29, or its overall intended purpose. [*Livingston Co*, 430 Mich at 652-653 (footnotes omitted).]

Additionally, in *Kramer v City of Dearborn Hts*, 197 Mich App 723, 725; 496 NW2d 301 (1992), the plaintiffs, property owners in the city, alleged that the state was responsible for the requirements imposed on the city to upgrade sanitary and storm sewers to be in compliance with the Clean Water Act. This Court rejected the Headlee Amendment challenge:

> There is no merit to plaintiffs' claims that the action in this case is violative of the Headlee Amendment because it was taken pursuant to a 1988 amendment of the Federal Clean Water Act, 33 USC 1251 *et seq*., rather than pursuant to the language of the pre-1978 act. The Headlee Amendment requires the state to pay for the increase in costs incurred by units of local government because of any new activity or service required by the Legislature or another state agency. *Ann Arbor v Michigan*, 132 Mich App 132, 136; 347 NW2d 10 (1984). By statute, a law that allows a local unit of government to perform an activity or service, but does not require it, is not a "requirement of state law." MCL 21.234(5)(h) . . . . 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. [*Id*.]

In light of the above cited authority, the trial court erred by denying defendants' motion for summary disposition of the Headlee Amendment claim. Irrespective of whether the permitting requirement for operation of municipal separate storm sewer systems requires increased costs on cities, villages, townships, and counties, as stated in *Kramer*, the operation of the disposal systems was optional, not a mandatory action. Therefore, the increased costs of permits that follow from the voluntary assumption of an activity do not constitute a violation of the POUM provision of Headlee. Plaintiffs' attempt to distinguish these cases is unpersuasive. In *Livingston Co*, our Supreme Court noted the abuse that would occur as a result of a Headlee

claim wherein private landfill owners would be required to pass along additional permit requirements to its users whereas county owners could spread the increase costs of regulation to state taxpayers as a whole, and that was not intended by Headlee. Similarly, the cost of complying with changes to the sewer permit system will be passed along to all statewide residents if plaintiffs prevail.

MCL 117.4b(2) provides that each city "may" provide in its charter for the "installation and connection of sewers and waterworks . . ."; MCL 101.1 governs fourth class cities and provides that the "council of any city may establish, construct and maintain sewers and drains whenever and wherever necessary . . . "; and MCL 67.24 governs drains in a village and provides that the "council of any village may establish, construct, and maintain sewers, drains, and watercourses whenever and wherever necessary." The Legislature's use of the term "shall" denotes mandatory action or direction, *Mich Educ Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011), and the term "may" denotes permissive action, *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008). Pursuant to the authority of *Livingston Co* and *Kramer*, the trial court erred by denying summary disposition of the Headlee Amendment claim. The operation of a drainage and sewer system is permissive and not mandated by state law. The fact that the state regulated the optional activity does not require the state to pay for the costs of compliance with the regulations.

In light of holding, we need not address defendant's remaining issues challenging the administrative process. If the trial court had appropriately granted defendant's motion for summary disposition in its entirety, the propriety of the allegations contained in the third amended complaint and the issue of sanctions would never have been addressed. Therefore, we vacate the order addressing the third amended complaint and sanctions.

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood