

STATE OF MICHIGAN
COURT OF APPEALS

ARLINGTON ESTATES, L.L.C.,
Plaintiff-Appellant,

UNPUBLISHED
May 5, 2011

v

TOWNSHIP OF MUSKEGON,
Defendant-Appellee.

No. 294197
Muskegon Circuit Court
LC No. 08-046088-CZ

Before: OWENS, P.J., and MARKEY and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s order that found no cause of action as to its claims challenging the changes to defendant’s sewer system user charges. We affirm.

Plaintiff first argues that the trial court abused its discretion in finding that its pleadings failed to give notice of a claim for reimbursement of overpayments. “Decisions involving the meaning and scope of pleadings are reviewed for an abuse of discretion.” *Taxpayers of Mich Against Casinos v Mich*, 478 Mich 99, 105; 732 NW2d 487 (2007). An abuse of discretion occurs when a trial court selects a decision that is outside of a range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

“Each allegation of a pleading must be clear, concise, and direct.” MCR 2.111(A)(1). A pleading includes “(1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer.” MCR 2.110(A). A complaint must contain, in part, “[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.” MCR 2.111(B)(1). Generally, a plaintiff may not litigate an issue or claim that was not raised in the pleadings. *Belobradich v Sarnsethsiri*, 131 Mich App 241, 246; 346 NW2d 83 (1983). An exception exists if the parties expressly or impliedly agree to litigate an unpled claim. *Zdrojewski v Murphy*, 254 Mich App 50, 61; 657 NW2d 721 (2002).

In this case, plaintiff filed a three-count complaint, alleging equal protection violations, a violation of the Headlee Amendment, and a claim for “accounting and damages.” On appeal, plaintiff complains that it paid defendant \$18,810 per quarter for sewer service from 1994 to 2007, when it should have been charged \$16,310.25 per quarter for such service. As such,

plaintiff seeks a reimbursement for any overpayment. Plaintiff's complaint sets forth no allegations related to this purported overpayment.¹ Plaintiff's complaint does not reference the purported overpayment from 1994 to 2007 in its general allegations section. Further, the purported overpayment is not referenced in the sections alleging equal protection violations, the Headlee Amendment violation, or the claim for "accounting and damages." On appeal, plaintiff asserts that its claim for "accounting and damages" encompasses the purported overpayment.² Even with a liberal reading of that section, we disagree. Further, plaintiff filed no other pleadings below. See MCR 2.110; See MCR 2.118. Plaintiff cannot litigate its overpayment claim, because it was not raised in the pleadings and the parties did not expressly or impliedly agree to litigate that issue. While plaintiff raised this claim in its trial brief, defendant contended that such claim was not properly pleaded. Our court rules provide that amendment of pleadings offered during trial should be rejected unless the plaintiff affirmatively establishes that the defendant would not be prejudiced. MCR 2.118(C)(2); *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992). Plaintiff has not made or requested to make this showing. *Id.* As defendant succinctly states on appeal, plaintiff's complaint failed to put defendant on notice that plaintiff sought a 13-year retroactive reimbursement for purported overcharges. On this record, the trial court's denial of plaintiff's overpayment claim was within a range of reasonable and principled outcomes, and, therefore, did not constitute an abuse of discretion. *Taxpayers of Mich Against Casinos*, 478 Mich at 105; *Maldonado*, 476 Mich at 388.

Next, we turn to plaintiff's constitutional challenges, which are subject to de novo review. *In re Estate of Eggleston*, 266 Mich App 105, 115; 698 NW2d 892 (2005).

Plaintiff first asserts that defendant's sewer service ordinance offends equal protection principles. The federal and Michigan constitutions guarantee equal protection of the law. US Const, Am XIV; Const 1963, art 1, § 2; *Shepherd Montessori Ctr Milan v Ann Arbor Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). Both guarantees provide similar protection. *Id.* "The Equal Protection Clause requires that all persons similarly situated be treated alike under the law." *Id.* The ordinance at issue is unquestionably subject to the rational basis standard. *Id.* at 318-319. Under this deferential standard, the party challenging the state action has the burden of showing its unconstitutionality. *Id.* at 319.

¹ In its trial brief and on appeal, plaintiff stated that it should have been charged \$16,310.25 per quarter, rather than \$18,810. Plaintiff claims that it should have been charged for 659 pads at a rate of three-quarters of the \$33 per residence sewer usage fee, which amounts to \$16,310.25. Clearly, if plaintiff included this allegation in its complaint or in an amended complaint, defendant would have been on notice regarding this reimbursement claim. However, plaintiff made no attempt to amend its pleadings, and there was no showing that defendant would not be prejudiced by such amendment. *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992).

² We find the validity of plaintiff's claim for an "accounting and damages" to be questionable, where such an action normally applies only in a commercial setting. See generally *Laubengayer v Rohde*, 167 Mich 605, 611; 133 NW 535 (1911).

Plaintiff's complaint appears to be based not on the fact that it is being treated differently than other mobile home parks, but that it is now being treated like a traditional single-family residence under defendant's present sewer charge unit. Under defendant's user charge unit scheme for sewer services, mobile home parks are treated like single family residences, condominiums, duplexes or row houses and apartments, as well as a number of commercial entities, all of which have user charge units of 1.0. A municipality has the right to charge for the services it provides to the community, and "it has the right to rationally impose classifications upon its users so long as all persons within the class are treated alike." *Brittany Park Apartments v Harrison Charter Twp*, 432 Mich 798, 805; 443 NW2d 161 (1989).

We conclude that plaintiff has failed to establish its burden of overcoming the presumption that defendant's action in modifying the sewer charge unit is constitutional. On the record, we agree with defendant's assertions below:

The sewer ordinance is rationally related to the governmental purpose of defraying the cost of providing sewer service to township residents. It is rationally related to the government purpose of establishing a roughly approximate estimate of usage that is deemed by the Township Board to be reasonably fair, for various categories of township residents and businesses that elect not to have their usage metered. The ordinance does not treat Arlington differently from any other mobile home park, and in its current form does not treat mobile homes any differently from single family residences.

Based on the purposes stated above, defendant's action is constitutional, where "the legislative judgment is supported by any set of facts, known or reasonably assumed, even if the facts are subject to debate." *Crego v Coleman*, 463 Mich 248, 260; 615 NW2d 218 (2000). We dismiss plaintiff's self-serving characterization that defendant's REU-change regarding mobile home parks and defendant's charge for sewer services on occupied and unoccupied pads is arbitrary and unreasonable. The occupied pads receive the same services as those received by other township housing, and the unoccupied pads can become occupied at any time and certainly benefit from capital improvements, replacements, and expansion. Plaintiff has not "negate[d] every conceivable basis that would support the legislation." *In re Estate of Eggleston*, 266 Mich App at 115-116.

Finally, plaintiff claims that defendant's sewer charge violates the Headlee Amendment. The Headlee Amendment, Const 1963, art 9, § 31, was designed to place specific limitations on state and local revenues, and its ultimate purpose was to place public spending under direct control. *Bolt v City of Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). On the one hand, a tax imposed without voter approval "unquestionably violates the Headlee Amendment." *Id.* at 158. On the other hand, a charge that is a user fee, "is not affected by the Headlee Amendment." *Id.* at 159. The Headlee Amendment does not define either "tax" or "fee," so "[t]here is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Id.* at 160. A fee is generally "exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit." *Id.* at 161 (internal quotation omitted). Taxes are for the purpose of raising revenue. *Id.* In distinguishing a user fee from a tax, our Supreme Court indicated that a user fee has three criteria: (1) "a user fee must serve a regulatory purpose rather than a revenue-

raising purpose”; (2) a user fee “must be proportionate to the necessary costs of the service”; and (3) a user fee is voluntary. *Id.* at 161-162.

First, the stipulated statement of facts provides little information regarding the purpose of defendant’s sewer system and related charges; however, we discern that it ultimately serves a regulatory purpose. Plaintiff’s sewage is directed to a central main located outside of the mobile home park, and such central main is owned and operated by defendant, which then disposes of plaintiff’s sewage. Defendant “maintains and repairs the sewage collection system that transports the park’s septage.” Only sewer system users are charged for the use thereof, and there is no free sewer service, Muskegon Charter Township Code, Article III, §§ 54-79 and 54-80; thus, the sewer system does not benefit the general public, but only those connected to the sewer system. Plaintiff is clearly benefitted by the sewer system as a means to dispose of its sewage. Even though the sewer charge raises funds, the ordinance contemplates that any revenue will be used for the current and future maintenance and improvement of the sewer system. Muskegon Charter Township Code, Article III, §§ 54-79 and 54-82. Based on the foregoing, we conclude that the sewer charge serves an underlying regulatory purpose. See *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

Second, the agreed statement of facts provides little information regarding the proportionality of defendant’s sewer charges. A fee must be proportionate to the cost of the service, and we presume that the amount of the fee is reasonable unless the contrary is established. *Id.* Plaintiff’s mobile home park is treated just as unmetered single-family residences are treated. Moreover, the ordinance specifically provides that the user’s rates and charges shall be proportionate to meet the various expenses of the sewer system. See Muskegon Charter Township Code, Article III, § 54-79. Other than plaintiff’s self-serving assertions on appeal, there is no indication that the sewer charges are disproportionate or that defendant has not undertaken annual reviews to ensure that the sewer charges remain proportionate. Plaintiff, therefore, failed to establish that the sewer charge is not proportionate. *Id.*

Third, we conclude that the sewer charge is voluntary. “One 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 chose how much of the service to use, and whether to use it at all.” *Bolt*, 459 Mich at 167. Here, only the users of the sewer system are charged. Muskegon Charter Township Code, Article III, § 54-79. While there is little evidence regarding whether plaintiff has a choice of how much of the service to use or whether to use it at all, this Court should ultimately conclude that plaintiff does have other options. Namely, plaintiff can install meters for each pad, and directly control how much service is used. Further, there is no evidence to suggest that plaintiff can or cannot establish a private sewage system. The sewer charge was not compulsory for all, but only for those who chose to connect to defendant’s sewer system; thus, the sewer charge is voluntary. *Graham*, 236 Mich App at 155-156.

In sum, the trial court correctly determined that the sewer charge is a permissible fee rather than a tax, and, therefore, the sewer charge does not violate the Headlee Amendment.

Affirmed.

/s/ Donald S. Owens

/s/ Jane E. Markey

/s/ Patrick M. Meter