

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re PETITION FOR FORECLOSURE OF  
CERTAIN PARCELS OF PROPERTY.

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MACOMB COUNTY,

Plaintiff,

and

TOWNSHIP OF CHESTERFIELD,

Intervening Party-Appellant/Cross-  
Appellee,

v

PARCELS OF PROPERTY and HALL  
MEADOWS CONDOMINIUM ASSOCIATION,

Defendants,

and

TED WAHBY,

Counter-Defendant,

and

JEFFREY DEAN SAXON,

Counter-Plaintiff/Interested Party,

and

FOX, L.L.C., d/b/a ROSIE O'GRADY'S,

Interested Party-Appellee/Cross-  
Appellant,

UNPUBLISHED

May 27, 2014

No. 309229

Macomb Circuit Court

LC No. 2011-002208-CH

and

FRANCINE MANOR APARTMENTS, L.L.C.,  
UTICA FRASER INVESTMENTS, L.L.C.,  
PATRICIA CORIC LIVING TRUST, dated  
August 1, 1998, and DENISE A. HUDSON,

Interested Parties.

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Before: CAVANAGH, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

The Macomb County Treasurer sued to foreclose several parcels of real property under the General Property Tax Act, MCL 211.1 *et seq.* After the trial court allowed Chesterfield Township to intervene, interested party Fox, L.L.C. (Fox), which owns one of the parcels and does business as Rosie O’Grady’s restaurant, moved for summary disposition to challenge its liability for fees allegedly owed to the Township. The trial court granted Fox’s motion and required the Township to remove its lien from the parcel primarily on the ground that the fees constituted an unlawful tax under the Headlee Amendment of the Michigan Constitution, but the court also ruled that the doctrine of laches barred enforcement of the lien. The Township now appeals by right and Fox cross-appeals the trial court’s decision to deny its request for attorney fees and costs. For the reasons more fully explained below, we affirm in part, reverse in part, and remand for further proceedings.

## I. CHESTERFIELD TOWNSHIP’S APPEAL

### A. STANDARD OF REVIEW

On appeal, the Township argues that the trial court erred when it determined that its water and sewer tap fees were actually an improperly levied tax. “This Court reviews *de novo* rulings on motions for summary disposition, issues of statutory construction, matters concerning the interpretation and application of municipal ordinances, and questions of constitutional law.” *Wayne Co Employees Retirement Sys v Wayne Co*, 301 Mich App 1, 24, 836 NW2d 279 (2013). We also review *de novo* whether a municipality’s charge to its property owners is a tax or user fee. *USA Cash #1, Inc v City of Saginaw*, 285 Mich App 262, 279; 776 NW2d 346 (2009). Finally, this Court reviews *de novo* a trial court’s dispositional ruling on an equitable matter. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

The foreclosure against Fox's property arose from Fox's failure to pay "water/sewer tap" fees totaling \$41,250, as set forth in a 2009 winter tax bill from the Township.<sup>1</sup> Fox moved to dismiss the foreclosure under MCR 2.116(C)(8) and (10). Fox, however, did not challenge the sufficiency of the foreclosure petition—it contested its liability for the fees and submitted documentary evidence in support of its motion. Therefore, we shall treat this as a motion under MCR 2.116(C)(10) alone. See *Krass v Tri-County Security, Inc*, 233 Mich App 661, 665, 593 NW2d 578 (1999). In order to determine whether the Township's fees were in actuality a tax, this Court must examine the evidence submitted by the parties and determine whether there is a question of fact as to whether the charges are legitimate fees for services or an improperly levied tax.<sup>2</sup> See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 370-375; 775 NW2d 618 (2009).

## B. WATER AND SEWER TAP FEES

The Township's Code of Ordinances, Chapter 64, Article III, governs its sewer and water rates. Article III is divided into four divisions, two of which are relevant here: Division 3 addresses water supply and Division 4 addresses wastewater. Both divisions contain usage rates, connection fees, privilege fees, and debt service charges. It is apparent from the "water department receipt" dated March 2008 that the department calculated Fox's \$41,250 charge using the ordinance provisions for privilege fees.

Division 3, § 64-183(a), provides for the payment of the water privilege fee "at the time an application for a permit to connect to the water supply system is made." Section 64-183(b) establishes that the "water privilege fee shall be \$750.00 per dwelling unit or tap unit." Division 4, § 64-214(a), provides for payment of the sewer privilege fee "at the time an application for a permit to connect to the wastewater system and/or an application for a building permit is made." Section 64-214(b) provides that the "sewer privilege fee shall be \$2,000.00 per dwelling unit<sup>3</sup> or tap unit." For occupational uses other than residential uses, both privilege fees are based on the expected use of metered water, with a single unit consisting of the annual use of 50,000 gallons of metered water. Section 64-219(a) contains a table of capacity unit factors for both the "water system benefit fee" and the "sewer system benefit fee." For instance, for a conventional restaurant such as the building on Fox's property, § 64-219 provides for three tap units per 1,000 square feet. Under § 64-219(d), the expected use is further estimated by requiring that fractional portions of units be rounded to whole numbers.

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<sup>1</sup> Chesterfield Township enforced its lien under the municipal water liens act, MCL 123.161 *et seq.* See MCL 123.163.

<sup>2</sup> Fox places considerable emphasis on the labels "water tap" and "sewer tap", but this court is concerned with evidence, not labels. See *Rothenberg v Follman*, 19 Mich App 383, 391; 172 NW2d 845 (1969).

<sup>3</sup> Division 1, § 64-123, defines a "dwelling unit" as "a building, or a unit of a building, including an apartment, housing trailer, or mobile home, occupied by one or more persons as a residence, with a single set of culinary facilities intended for a single family."

The evidence showed that a restaurant was initially constructed on Fox's property under an application for a building permit submitted by a former property owner. According to the "Application for Plan Examination and Building Permit" submitted by Fox, dated February 2008, Fox planned to construct a 5,700-square-foot addition to the existing building. There was no evidence that the addition involved another connection to the water supply or wastewater systems. However, it is clear from the "water department receipt" that the privilege fees were computed and charged to Fox for the tap units associated with the addition. The township determined that there were 15 "tap factors" for the 5,700 square foot addition and that Fox should pay a "sewer tap" fee of \$30,000 (\$2,000 times 15 tap factors) and a "water tap" fee of \$11,250 (\$750 times 15 tap factors). Although these computations and other documents containing the fees do not use the precise terms used in the ordinance, reasonable minds could not differ in concluding that these fees, in substance, constituted water and sewer privilege fees.

We note that the trial court erred in treating the entire \$41,250 as a sewer privilege fee. Even considering the undifferentiated label "water/sewer tap" used in the 2009 winter tax statement, it is clear from the evidence that only \$30,000 of this amount represents the sewer privilege fee. This distinction is significant because, unlike the sewer privilege fee provided in § 64-214, the provision establishing the water privilege fee in § 64-183 does not require payment of the fee in connection with an application for a building permit. In addition, while the trial court referred to the water privilege fee as a "water tap" fee of \$11,250, it also determined that it should be disallowed because the Township did not establish its authority to impose the charge. The Township does not address this portion of the trial court's decision, but rather incorrectly treats the total fees of \$41,250 as a sewer privilege fee falling within § 64-214. Because the Township has not addressed its authority to charge Fox \$11,250 for a water privilege fee, we decline to disturb the trial court's decision concerning the \$11,250 fee. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987). Therefore, we limit our review to whether the Township established any basis for disturbing the trial court's ruling with respect to the \$30,000 sewer privilege fee.

### C. DOCTRINE OF LACHES

Although the trial court primarily relied on Fox's constitutional challenge to the validity of the \$30,000 charge, it also determined that laches barred the Township from enforcing its lien. Courts will generally not reach constitutional issues that are unnecessary to resolve. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Therefore, we shall first consider the Township's argument that the trial court erred in applying the doctrine of laches to bar its foreclosure action.

"The doctrine of laches will not ordinarily apply if a statute of limitations will bar a claim because laches is viewed as the equitable counterpart to the statute of limitations." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 456; 761 NW2d 846 (2008). Both laches and the statute of limitations constitute affirmative defenses to a claim. *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982). But unlike the statute of limitations, which is concerned with the delay alone, laches concerns the effect or prejudice caused by the delay. *Id.* "The doctrine of laches is a tool of equity that remedies the inconvenience resulting from a parties' failure to assert a right that was practicable to assert." *Johnson Family Ltd Partnership v White Pine*

*Wireless, LLC*, 281 Mich App 364, 394; 761 NW2d 353 (2008). The delay resulting in prejudice must be of such character as to render it inequitable to enforce the right. *Knight v Northpointe Bank*, 300 Mich App 109, 115; 832 NW2d 439 (2013).

The doctrine of laches is distinguished from equitable estoppel, which applies in exceptional circumstances to preclude a municipality from enforcing an ordinance where a party changes its position in reliance on a mistake committed by the municipality. See *Pittsfield Twp v Malcolm*, 375 Mich 135, 147-148; 134 NW2d 166 (1965). “An equitable estoppel arises where (1) a party by representation, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on this belief, and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts.” *Hughes v Almena Twp*, 284 Mich App 50, 78; 771 NW2d 453 (2009).

In this case, Fox did not specifically rely on the doctrine of laches when moving for summary disposition. Rather, the thrust of Fox’s argument was that it should not be held liable for the fees because two township supervisors decided not to collect the fees for a period of time. We conclude that the submitted evidence failed to establish that equity provided a basis for summary disposition. We shall assume for purposes of this issue that a \$30,000 sewer privilege fee was lawfully charged to Fox because an affirmative defense does not controvert the opposing party’s prima facie case, but rather denies relief for reasons not disclosed in the pleadings. *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312, 503 NW2d 758 (1993). In addition “everyone dealing with a municipality and its agents is charged with knowledge of the restrictive provisions of lawfully adopted ordinances.” *Hughes*, 284 Mich App at 78. Therefore, Fox must be charged with knowledge of the Township’s ordinances, notwithstanding its nonpayment of the sewer privilege fee.

The trial court found two bases of prejudice to justify application of the doctrine of laches, both of which were based on conduct of a township supervisor. First, the trial court determined that a former township supervisor, Jim Ellis, decided to allow Fox to proceed with the addition to the restaurant without payment of the sewer privilege fee, that the Township nevertheless later decided to impose the fee, and that Fox took action in the interim that directly exposed it to liability. However, the evidence does not establish that Ellis was involved in issuing the building permit or decided to allow construction without payment of the fee. We agree that the evidence discloses that Fox was able to obtain a building permit in April 2008, without paying the sewer privilege fee. But according to a letter written by Fox’s president, Brian Kramer, to a successor supervisor, Michael Lovelock, dated February 2009, Kramer had received the bill for the fees from the water department by April 2008, and thereafter contacted Ellis regarding the bill. Ellis’s subsequent letter to Fox’s lawyer, dated July 2008, shows that he found the water department’s calculation to be accurate.

Other documentary evidence establishes that the “water tap” and “sewer tap” fees were thereafter included in Fox’s bill for the 2008 winter property taxes as part of the township’s efforts to collect the fees. Even if we were to conclude from this evidence that the Township should have acted sooner to collect the fees, considering the evidence that Fox had knowledge of the water department’s position before it expanded, we are unable to conclude that Fox established a prejudicial delay that warranted the application of equity to bar the fee.

We also conclude that the trial court erred in determining that the involvement of the successor township supervisor, Lovelock, supported summary disposition in favor of Fox on the basis of laches. Neither the February 2009, “to whom it may concern” letter written by Lovelock regarding the removal of the fees from the 2008 tax roll nor his April 2009, letter requesting that a deputy treasurer put the fees on the 2009 tax roll indicate that Lovelock waived the fees. Even if Lovelock did attempt to do so, Fox offered no substantively admissible evidence demonstrating that it was prejudiced by any delay associated with Lovelock’s conduct that would require equity to intervene. Therefore, the trial court erred in granting summary disposition in favor of Fox on the basis of laches. *Barnard Mfg*, 285 Mich App at 369-370.

As indicated previously, Fox’s argument was actually that the Township was estopped from enforcing the lien because Ellis and Lovelock made administrative decisions not to collect the fees. We reject this estoppel theory because it lacks record support. Fox’s reliance on *People v Detroit, Grand Haven & Milwaukee R Co*, 228 Mich 596; 200 NW 536 (1924), is misplaced because the question decided in that case involved how to construe a phrase in a tax statute. The rules governing the interpretation of a statute also apply to municipal ordinances. *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). But the conclusive deference given to past administrative constructions of a statute in *Detroit, Grand Haven & Milwaukee R Co*, 228 Mich at 611, is no longer good law. See *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008).

Fox also generally asserts a due process right to relief, but does not further expand on this argument. A party may not merely announce its position and leave it to this Court to discover and rationalize the basis of the claim, nor give an issue cursory treatment with little citation to supporting authority. *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009). In addition, Fox’s reliance on *Spoon-Shacket Co, Inc v Oakland Co*, 356 Mich 151; 97 NW2d 25 (1959), is also inapposite. In that case, the majority concluded that a taxpayer could invoke equity to challenge a property tax that it paid, without knowledge that a mistake was made in the assessment and without indicating that the payment was made under protest, even though such relief was not available to the taxpayer under the then-existing tax law. As indicated in *Thkachik v Mandeville*, 487 Mich 38, 45-46; 790 NW2d 260 (2010), the underlying equitable principle provides a court with discretion to grant relief where a legal remedy is unavailable. In this case, Fox had the right to challenge the legality of the fees without the aid of equity. Therefore, Fox’s legal remedy is adequate. Having considered Fox’s various arguments, we find no alternative reasoning upon which to affirm the trial court’s summary disposition decision on equitable grounds. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 86; 592 NW2d 112 (1999).

#### D. HEADLEE AMENDMENT

We now turn to the Township’s challenge to the trial court’s determination that the sewer privilege fee violates the Headlee Amendment. “This Court presumes that ordinances are constitutional, and the party challenging the validity of the ordinance has the burden of proving a constitutional violation.” *People v Rapp*, 492 Mich 67, 72; 821 NW2d 452 (2012). The Headlee Amendment became effective December 1978. *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 355; 604 NW2d 330 (2000). It added Const 1963, art 9, § 31, which prohibits units of local government 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 . . . .”

Here, the dispute is over whether the sewer privilege fee constitutes a user fee or a tax passed in violation of Const 1963, art 9, § 31. There is no bright-light rule to be applied in making this determination. *Bolt v City of Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). In general, a “tax” is designed to raise revenue and a “fee” is exchanged for a service rendered or benefit conferred. *Id.* at 161. As this Court explained in *USA Cash #1, Inc*, 285 Mich App at 280:

There are “three primary criteria to be considered when distinguishing between a fee and a tax.” [*Bolt*, 459 Mich at 161.] First, “a user fee must serve a regulatory purpose rather than a revenue-raising purpose,” although a fee may also be used to raise money as long as it is in support of the underlying regulatory purpose. *Id.*; *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999). Second, a user fee must be proportionate to the necessary costs of the service rendered or the benefit conferred. *Bolt, supra* at 161-162. Third, a fee must be voluntary in nature, meaning that the payer of the fee must be able to refuse or limit its use of the service or benefit. *Id.* at 162. These criteria must be considered in their totality rather than in isolation. *Id.* at 167 n 16. Accordingly, “a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee.” *Graham, supra* at 151.

With respect to the first criterion, we disagree with the trial court’s determination that the purpose of the sewer privilege fee is unclear. Article III, Division 1, § 64-122(6), sets forth the Township’s purpose of establishing various sewer and water rates:

Act No. 94 of the Public Acts of Michigan of 1933 (MCL 141.101 et seq.), as amended, authorizes public corporations to purchase, acquire, contract, improve, extend, repair and maintain sewage disposal systems and water supply systems, and to provide for the imposition and collection of charges, fees, rentals, or rates for services, facilities and commodities furnished for such improvements, and to issue bonds in anticipation of such revenues.

On its face, Article III, Division 4, § 64-214(a), clearly falls within the purpose set forth in § 64-122(6) because it is expressly intended to be considered “payment of the applicant’s fair share of major capital improvements of the wastewater system such as trunk sewers and master sewage meters.” As a whole, it reflects a primary purpose to raise revenue for capital improvements to the wastewater system. Cf. *Bolt*, 459 Mich at 163 (stating that a storm water service charge established to fund a combined sewer control program, with a major component of capital expenditures, over the next 30 years “constitutes an investment in infrastructure as opposed to a fee designed simply to defray the costs of regulatory activity”).

With respect to the proportionality of the fee, the trial court relied on evidence that the former owner of Fox's property paid a sewer privilege fee when it tapped into the sewer system and reasoned that the fee required for Fox's addition to the building was disproportionate because it conferred no benefit on Fox. We find merit to the Township's argument that the trial court's reasoning was deficient because it failed to consider how the sewer privilege fee is computed. As already indicated, § 64-214 provides that the sewer privilege fee for a "dwelling unit" is \$2,000. For occupational uses other than residential uses, the sewer privilege fee is \$2,000 per "tap unit" with a single unit considered to be "the annual use of 50,000 gallons of metered water." Section 64-219(a) lists several factors to consider in determining how many "tap units" may exist for other occupational uses. The number of tap units for a conventional restaurant is three per 1,000 square feet. For an outdoor theater, the "tap units" are based on a factor of .012 per car space. *Id.* For a rooming house without meals, the "tap units" are based on a factor of .25 per bed. In addition, § 64-219(d) provides that "[i]n any event, a minimum of 1.00 unit factor shall be charged for usage."

All of these "tap units" are clearly based on expected future uses and estimates. As with "dwelling units," payment of the fee is only triggered by an application for a permit to connect to the wastewater system or an application for a building permit. As applied to Fox, the "tap units" used to compute the sewer privilege fee accounts for the prior "tap units" paid by the prior owner at \$1,500 per "tap factor," but applies the current fee of \$2,000 to the "tap units" attributable to the 5,700-square-foot addition. While there is merit to the Township's argument that the fee accounts for the increased discharge to the system, the fee for the building as a whole nonetheless remains an attempt to raise capital for improvements based on assumptions regarding the future use of the wastewater system, and without any indication that the fees will ever be used in a manner that will provide a benefit to a fee payer.

The fees charged by a municipality must be reasonably proportionate to the direct and indirect charges of providing the underlying service. *Jackson Co v City of Jackson*, 302 Mich App 90, 109; 836 NW2d 903 (2013). This Court will presume that a fee is reasonable unless the contrary appears from the face of the ordinance or is established by proper evidence. *Id.* A permissible utility charge may include some capital investment component. *Id.* at 110. But as explained in *Jackson Co*, 302 Mich at 110-111, the actual use is the most relevant consideration:

A permissible utility service charge is one that "reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component . . . ." *Bolt*, 459 Mich 164-165, quoting *Bolt*, 221 Mich App at 92 (MARKMAN, J., dissenting). In the present cases, the management charge is predicated on the assumption that properties contribute to runoff, and, hence, storm sewer use, as a direct function of the size of a parcel's [impervious] and pervious areas. Despite this assumption, residential parcels measuring two acres or less are charged a flat rate based on the average EHA [equivalent hydraulic area] of all single family parcels, and not on the individual measurements of each parcel's impervious and pervious areas. Single family residential parcels account for 12,209 or 83 percent of the 14,743 parcels within the city. According to the city, it is cost-prohibitive to calculate the EHA units for each single family residential parcel on the basis of actual measurements of impervious and pervious areas of each parcel. In contrast,

residential parcels measuring over two acres and commercial, industrial, and institutional parcels of all sizes are assessed a management charge based on the individual measurements of each parcel's impervious and pervious areas. This method of apportioning the management charges among all urban properties emphasizes administrative convenience and ease of measurement and, thereby, suggests an absence of a close proportional relationship between the amount of runoff attributable to a particular parcel and the management charge, as does the fact that the method of calculating the charge fails to consider property characteristics relevant to runoff generation, such as a parcel's location in reference to storm gutters and drains and soil grade. This lack of proportionality is further demonstrated by the fact that the charge generates sufficient revenue to allow the city to maintain a working capital reserve of 25 to 30 percent of the storm water utility's total expenses. Although maintaining a capital reserve is a common practice amongst rate-based public utilities that provides a degree of fiscal stability to utilities, see 73B CJS, Public Utilities, § 64, 64 Am Jur 2d, Public Utilities, § 107, those reserves are funded by true user fees closely calibrated to the actual use of the service or a price paid for a commodity. The management charge at issue in these cases is not such a fee. For these reasons, the actual use of the storm water sewer system by each parcel is not accounted for with the requisite level of precision necessary to support a conclusion that the charge is proportionate to the costs of the services provided.

This case is distinguishable from *Jackson Co* because the sewer privilege fee at issue here is only intended to fund capital improvements. But considering the lack of correspondence between the fee and any particularized benefits conferred on the person paying the fee, it fails to satisfy the proportionality criterion. "A true 'fee' . . . is not designed to confer benefits on the general public, but rather to benefit the particular person on whom it is imposed." *Bolt*, 459 Mich at 165.

Lastly, the trial court determined that the fee was not realistically voluntary because there may be many circumstances, such as a leaky roof, that would force a landowner to make improvements and presumably seek a building permit. On appeal, the Township argues that the fee is not required simply because a person obtains a building permit, but rather considers the stress that the construction of the building places on the sewer system and its purpose to insure payment of the user's fair share of the sewer system's operation and maintenance costs.

The Township characterizes the purpose of the sewer privilege fee too broadly because the stated reason for payment of the fee in § 64-214(a) is "major capital improvements." When the language used in an ordinance is clear and unambiguous, this Court must apply it as written. *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995). In addition, the focus of the voluntariness criterion is on whether the payer of the fee could refuse or limit its use of the service or benefit. *USA Cash #1, Inc*, 285 Mich App at 282-283. In this case, Fox had control over the sewer privilege fee in the sense that it could refuse to make an addition or limit the size of the addition. But such control is not a legitimate method for controlling a fee "because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property." *Bolt*, 459 Mich at 168. Therefore, the third criterion also supports a determination that the sewer privilege fee is a tax.

Considering all the criteria, the trial court did not err when it determined that the sewer privilege fee constitutes a tax. The undisputed evidence established that the sewer privilege fee is in reality a tax imposed to collect revenue to cover future capital investments and that it was passed in violation of the Headlee Amendment. While we do not fully agree with the trial court's evaluation of the criteria, "this Court may affirm a trial court's grant of summary disposition for reasons different than relied on by the trial court." *Jackson Co Hog Producers*, 234 Mich App at 86. Thus, we affirm the trial court's decision requiring the Township to remove its lien from Fox's property and prohibiting the Township from taking further action to collect the sewer privilege fee.

In light of our resolution of Chesterfield Township's appeal, it is unnecessary to address Fox's argument that the trial court's decision may be affirmed on the alternative ground that the lien is not enforceable under the three-year period of limitations applicable to enforcing liens in the municipal liens water act. See MCL 123.162.

## II. FOX'S CROSS-APPEAL

Fox argues that the trial court erred in denying its request for attorney fees and costs. Fox argues that the trial court incorrectly analyzed its request under MCL 600.2591, which allows a court to award attorney fees and costs where a claim or a defense is frivolous. Fox argues that it is entitled to attorney fees and costs under Const 1963, art 9, § 32, as the prevailing party in an action predicated on the Headlee Amendment. The Township concedes on appeal that Fox is entitled to such relief if we affirm the trial court's decision on the basis of the Headlee Amendment. Having upheld that decision, we therefore remand this case to the trial court to afford Fox an opportunity to tax costs under Const 1963, art 9, § 32. On remand, Fox may tax costs only with respect to the Township and only with respect to Fox's objections to the foreclosure action based on the Headlee Amendment. *Adair v State of Michigan*, 486 Mich 468, 492-494; 785 NW2d 119 (2010).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh  
/s/ Donald S. Owens  
/s/ Michael J. Kelly