MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

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GARY McDANIEL, SUSAN McDANIEL, on behalf of themselves and all others similarly situated. Plaintiffs, vs. CITY OF BILLINGS, Defendant.	Cause No. DV 19-1444 **DECISION AND ORDER RE: PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING THE LEGALITY OF CITY ORDINANCES AND SIA PROVISIONS IMPOSING "FRANCHISE-FEES" (COUNT I)**

On March 11, 2021, Plaintiffs filed Plaintiffs' Motion for Partial Summary Judgment Regarding the Legality of City Ordinances and SIA Provisions Imposing "Franchise-Fees" (Count I) ("Motion") and Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Regarding the Legality of City Ordinances and SIA Provisions Imposing "Franchise-Fees" (Count I) ("Brief"). Ct. Docs. 60, 61. On April 29, 2021, Defendant City of Billings ("City") filed Brief of the City of Billings in Opposition to Plaintiffs' Motion for Summary Judgment. ("Opposition"). Ct. Doc. 82. On May 17, 2021, Plaintiffs filed Reply in Support of Plaintiffs' Motion for Partial Summary Judgment Regarding the Legality of City Ordinances and SIA Provisions Imposing "Franchise-Fees" (Count I) ("Reply"). Ct. Doc. 84. On May 19, 2021, the City filed Request for Oral Argument. Ct. Doc. 85.

The Court notes that in City of Billings' Response in Opposition to Plaintiffs' Motion for Class Certification the City suggested to the Court that for the "sake of judicial economy, the Court should decide several important threshold and potentially dispositive or limiting motions before the Court addresses class certification." Ct. Doc. 47, p. 1. This approach has been approved by

other courts. *See, Sheehan v. Transit Auth.*, 155 Wn. 2d 790, 807, 123 P.3d 88 (2005) ("...a trial court retains discretion, for purposes of judicial economy, to delay ruling on a motion for class certification until after hearing dispositive motions."). In this case, the Court has not yet addressed Plaintiffs' Motion for Class Certification. The Court points this out because in the related case of *Houser, et al. v. City of Billings,* Montana 13th Judicial Dist. Ct., Cause No. DV 19-0778, the parties agreed that notice should be given to the certified class before the Court decides motions for summary judgment. *Houser* is procedurally distinct from this case because in *Houser* the class was certified. *Houser,* Ct. Doc. 74.

On October 19, 2021, the Court held a hearing on Plaintiffs' Motion. Matthew G. Monforton represented Plaintiffs. Doug James and Bryce Burke represented the City. From the parties' Briefs and counsel's oral arguments, the Court is fully advised.

BACKGROUND FACTS

The City provides water, wastewater services, and solid waste disposal services directly to its customers through the Public Works Department. Ct. Doc. 7 (City Answer) ¶ 54-56. The City has not provided these services through a franchise. Ct. Doc. 7, ¶ 4-5. The City requires its residents to obtain water service and wastewater service, with some exception, and solid waste disposal service from the City. Brief, Ex. B, Rls. 4-7 and 4-8; Billings Mun. Code § 21-214, Ct. Doc. 22, Ex. E ("It is unlawful for any person other than the city to engage in the business of collecting, removing and disposing of refuse within the jurisdiction of the city.").

On February 27, 1992, Gerald D. Underwood, PE, Utilities Director ("Underwood") wrote a Memorandum to the City Council, which was approved by Alan Tandy, City Administrator ("Tandy"). Opposition, Ex. 20, Ex. O. In the Memorandum, Underwood recommended that the City Council adopt 4% "franchise fees" on water and wastewater utility customers. In the

Background section of the Memorandum, Underwood wrote "At your meeting on February 24, 1992, you adopted a Three-year Budget Plan for the General Fund. In this plan, you included a provision for levying a four (4) percent franchise fee against the municipal water/wastewater utilities beginning July 1 1992. If you adopt these special fees, it will allow the department to recover from its customers the cost of paying the City's new franchise fee." *Id.* The action recommended in the Memorandum was approved by the City Council. *Id.*

On April 13, 1992, then Assistant City Administrator Bruce McCandless ("McCandless") testified before the City Council about a proposed 4% water rate increase and a proposed 4% wastewater rate increase. Brief, Ex. C (Denise Bohlman Aff., Ex. A, § 6). McCandless explained that the "reason for the rate increase is that the city has proposed charging a franchise fee to be assessed against the water and wastewater facilities. If the rate increases are approved, Public Utilities will collect the fees from the customer and pay the fees to the City's General Fund. Monies will be used to pay for core city services, such as police, fire, street and park maintenance." *Id.* McCandless further explained that "a franchise is basically a grant to use the public right-of way. Franchise agreements are traditionally negotiated with investor-owned utilities such as water, gas, electric, telephone and cable t.v. Fees are customarily assessed as a rental or lease payment for use of the right-of-way." *Id.* McCandless explained that "the need for revenues in the general fund is immediate" and that the "franchise fees were identified as one of the prime alternatives to increasing property taxes." *Id.*

The City's Council responded by approving Resolution 92-16531, which imposed a 4% "franchise fee" across-the-board to all water/wastewater rates, fees and charges to be "shown separately on the utility bills effective July 1, 1992." Ct. Doc., ¶ 3, Brief Ex. C (Denise Bohlman Aff., Ex. P). On July 1, 1992, the City also began applying a 4% "franchise fee" to solid waste

disposal ratepayers. Brief, Ex. D (Aff. of Bruce McCandless) ¶ 3. As discussed below, the solid waste disposal "franchise fee" was subsequently increased to 5%. The City Council subsequently enacted rate resolutions (usually on an annual basis) and included "franchise fee" provisions in those resolutions. Ct. Doc. 13, Aff. of Denise Bohlman, Exs. B, D, F, G, H, I, J, K; Ct. Doc 69, ¶ 12 ("The cost of utility service for water and wastewater services, as provided yearly or every other year after by the City Council after public hearings, noticed as required under Mont. Code Ann. § 69-7-111, included the franchise fees...")

On February 23, 2004, the City Council considered Resolution 04-18092 to adopt a 5% "franchise fee" for water, wastewater services and solid waste disposal services. Opposition, Ex. 20 (Denise Bohlman Aff., Ex. H, § 2). McCandless told the City Council that "raising the franchise fees to 5% would have the effect of producing about $1.6 Million that would go into the General Fund."

During his deposition on April 23, 2019, McCandless was asked about the minutes of the City Council meeting on February 23, 2004. The minutes show that during that meeting McCandless said:

> ...if the Council does not approve the 1% increase and eliminates the current 4% franchise fee it would create a 10% reduction in the General Fund and 5% reduction in the Public Safety Fund, which could result in the following: eliminating 40 FTE General Fund employees, five police officers, two 911 center operators and reducing firefighter overtime, reduction Fire Department/911 Center building and equipment maintenance, changing City-wide training, reducing Code enforcement by 25%, eliminating support for Task Force meetings, reducing funding for City newsletter, reducing City Hall maintenance, reducing travel for Mayor, Council, Administration and Parks, withdrawing from MLCT and NLC, closing Athletic Pool, reducing park maintenance and repair by 20%, closing wading pools, reducing operational support for the Municipal Court and reducing financial services support."

Reply, pgs. 14-15, Ex. 5 (McCandless Depo.), pgs. 84-88; Notice of Errata to Reply, Depo. Ex P-

38, pgs. 39-40. According to McCandless, the "franchise fees" also included rental for the Public Work's Department's use of the public right-of-way. The proposed increase was not adopted. *Id.*

However, on June 14, 2004, the City Council formally approved the solid waste "franchise fee" when it increased that fee from 4% to 5%. Brief, Ex. D (Aff. of Bruce McCandless), ¶ 3. In his report to the Council on the issue of the solid waste 5% "franchise fee" on the City Council Agenda Item, McCandless wrote:

> The City Council will consider adopting a 5% franchise fee applied to the City's solid waste collection and disposal service. A 4% fee has been in effect since 1992. The entire fee is paid to the City's General Fund to compensate for city-at-large impacts of using city rights of way and other services that support the solid waste operation. The additional 1% fee may lessen the proposed service reductions in the General and Public Safety Funds or reduce the amount of reserves that are necessary to balance the Funds. City Council action is required at this time because the Council is scheduled to adopt the FY 2005 budget on June 14, 2004.

Opposition, Ex. 20 (Denise Bohlman Aff.) Ex T. The City Council approved the 1% increase to the 4% "franchise fee" for solid waste disposal services. *Id.*

The "franchise fees" were not a component of the rates charged to utility customers but were instead imposed on top of, and in addition to, rates paid by the City's water, wastewater, and solid waste disposal customers. Brief, Ex. A, Depo. of Public Works Director David Mumford ("Mumford"), pp. 9:4-11 (describing the "franchise fee" as "a fee that's a percentage that is placed on the actual rates that our customers pay. So it's a percentage of that. And that fee is collected at the same time that we collect our rates – or our monthly charges. And then that money is taken to the general fund outside of Public Works. We're just a pass-through"). See also, Brief, Ex. C, Aff. of Denise Bohlman, Ex. P, with Exs. "B" and "C" attached to Resolution 92-16531. Exhibits "B" and "C" show the 4% "franchise fee" wastewater and water services imposed by the City.

The "franchise fees" are not considered in setting rates for water, wastewater services and solid waste disposal services. *Id,* p. 67:18-21. The "franchise fees" did not have any relationship to the cost of providing water, wastewater, or solid waste disposal to City customers. Brief, Ex. A pp. 64:9-12; Ex. E, pp. 62:25-63:3. Further, there was no franchise agreement between the City and the Public Works Department. *Id.,* p. 67:3-6. In his Deposition, Mumford testified that the City sells water, wastewater services and solid waste disposal services directly to its customers. *Id.* p. 67:9-11.

The primary purpose of the "franchise fee" was to raise revenue. Brief, Ex. A, pp. 63:23-64:3; Ex. E, p. 39:20-24 (describing the "franchise fee" as a source of general revenue for the City). The "franchise fees were not allocated to costs related to the provision of water, wastewater, and solid waste disposal." *Id.,* p. 64: 9-11. The "franchise fee" has always been transferred to the City's General Fund. Ct. Doc. 7 ¶ 66; Brief, Ex. D. ¶ 9. After the "franchise fees" were transferred to the general fund, Public Works did not have any right to the "franchise fees." Reply. Ex. 6, p. 60:2-15. The "franchise fees" were included with each of the City Council resolutions that followed public rate hearings. Opposition, p. 7.

Public Works Finance Manger Jennifer Duray ("Duray") expressed concerns about the "franchise fees." Brief, Ex. E, pp. 62:7-64:21. Duray testified that the "franchise fees [did not] have any relationship to the cost of providing water, wastewater, or sewer services to [the City's] customers." *Id.,* pp. 62:25- 63:3. In May 2017, Duray told then City Administrator Christina Volek ("Volek") of a customer insisting the "franchise fees" were illegal and threatening to seek an attorney, to which Volek replied, "This is just what we feared." *Id.,* at 66:2-67:5.

All "franchise fees" were deposited into a single checking account. Brief, Ex. E. p. 21:12-16. In her Deposition, Duray testified that all of the City's revenues for water, wastewater services

and solid waste disposal services come from user fees or assessments, and not from property taxes or general fund taxes. Brief, Ex. E, p. 23:11-13. However, the "franchise fees" are pass-through fees that are collected for the general fund. *Id.*, at p. 23:14-22. The "franchise fees" are collected directly from the customers. There is no third party involved. *Id.*, p. 72:19-25. Duray was concerned that the City was collecting the "franchise fees" but not using them for the department from which they were collected, in that they were being transferred to the general fund and not being retained and applied to the Public Works fund. Brief, Ex. E., p. 62:11-20.

Mumford had no idea why this particular fee was called a "franchise fee." Ex. A., p. 67:14. He assumed that "somebody knew what they were doing." *Id.*, p. 67:16-17.

Several City Council members objected to the City's "franchise fees." Council member Dan Farmer ("Farmer") denounced the "fees" as a "very regressive sales tax" because "it hurt the little guy on a fixed income and the elderly." Brief, Ex. C (City Minutes attached to Ex. A to Bohlman Aff.). Farmer also noted that it was "fundamentally dishonest to go around the Charter." *Id.*

Several City officials voiced their disagreements with the "franchise fees." Mumford expressed his concerns about the legality of the "fees" as far back as 2004 and as recently as January 2016, when he informed the City Administrator of the following:

> I have discussed with legal staff in the past my concern that the State Supreme Court ruling that the Franchise Fee is a tax as currently implemented. The Court ruling clearly states that there must be a nexus between how the fee is used to what you are being assessed for. By assessing the fee on customers for the use of [rights-of-way] and using the revenues for General Fund obligations would not appear consistent with the Court ruling.

Brief, Ex. A, p. 62:3-6; Brief, Ex. A, pp. 60:25-61:15. However, Mumford also testified that the franchise fees were not "rates" but were "charges" pursuant to Mont. Code Ann. § 69-7-101." Opposition, Ex. 8, Depo. of Mumford, pp. 95:17-96:3.

Other City officials and persons made statements about the "franchise fees" being a component of the cost of services:

Volek: "franchisee fees were included as a component part of the cost of service from the City of Billings." Opposition, Ex. 14, Aff. of Volek, ¶ 5.

McCandless: "When the Billings City Council considered rate adjustments for water, wastewater, and solid waste disposal services, franchise fees were included as a component part of the cost of service from the City...I consider the franchise fees to be part of the contract price for the City's water, wastewater, and solid waste disposal services." Opposition, Ex. 16, Second McCandless Aff.

Tom Hanel ("Hanel"), former Mayor: "The franchise fees were simply a part of the total cost of services that the City of Billings charged to its customers." Opposition, Ex. 13, Aff. of Hanel, ¶ 5.

Rod Wilson ("Wilson"), Public Works Board Member and Real Estate Developer: "The franchise fees were simply a part of the contract rate that was charged by the City of Billings." Opposition, Ex. 6, Aff. of Wilson, ¶ 13.

Carl Peters ("Peters"), the Board President for the Lockwood Area/Yellowstone County Water and Sewer District testified "The City had no obligation to provide wastewater services to the District because the District is outside of the Billings City limits...[T]he District agreed to pay franchise fees and other rates, fees, and charges to the City of Billings." Opposition, Ex. 17, Aff. of Peters, ¶ 6-8.

The City admitted in discovery that between 2010 and 2018, "the funds collected through the franchise fees were not spent solely on the operation, maintenance, construction, or improvement of the City's water supply and wastewater systems." Reply, Ex. 2 (City Suppl. Resp. to RFA No. 14), p. 8; *id.*, (City Suppl. Resp. to RFA No. 22) (between 2010 and 2018, "the franchise fees during that time period were not used solely to pay for the operation, maintenance, construction of improvement of the solid waste disposal system." The City also admitted that "the funds collected through the franchise fees were used to pay unallocated costs such as public safety (fire, police)." *Id.*

When setting utility rates, the City commissioned outside consultants to conduct rate studies that are "complicated and usually take probably four months to complete." Reply, Ex. 4, p. 81:18-20. The rate studies were designed to capture or anticipate as many costs as possible. Reply, Ex. 5, p. 19:23-25. The City considered the studies to be accurate. *Id.*, p. 22:6-24. The "franchise fees" were not considered by the consultants in determining these rates. Reply, Ex. 4. P. 83:2-15. The City also used outside consultants to calculate the value of City resources such as legal services, human resources, and administration used by the Public Works Department. *Id.*, p. 51:21-24. The City used this data to "charge back" funds from Public Works to the City's general fund to account for costs of City services incurred by the Public Works. *Id.* p. 51: 21-24

In 2002, Woodridge, LLC entered into a Subdivision Improvement Agreement ("SIA") with the City. The SIA provided for the first phase of the Ironwood Subdivision. The SIA was recorded in the records of Yellowstone County on October 17, 2002. Opposition, Ex. 1. Through this SIA, the City agreed to subdivide the Ironwood Subdivision and agreed to provide City services to the lots within the new subdivision, including water, wastewater, solid waste disposal and public service. In exchange, the developer agreed to fund the construction of roads, utilities,

traffic control devices, and parks, including the payment of certain System Development Fees. The SIA also states that "All fees paid to the Public Utilities Department [for Lateral and Trunk Sewer Fees and Water Main Fees] are subject to "the 4% Franchise Fee." Opposition, Ex. 1 (SIA, Ex. 1, pp. 5-6). The developer agreed to pay the "franchise fees." Plaintiffs admitted that they have no evidence that the City had any duty to annex the real property where Plaintiffs' home is located prior to the execution of the SIA. Opposition, Ex. 5, Request for Admission No. 7. The Public Works Department of the City also had a subdivision improvements agreement template. Opposition, Ex. 6, Aff. of Rod Wilson, Ex 1. The template provided that "...appropriate water and wastewater construction fees and franchise fee in effect shall be submitted with the applications...It is acknowledged that all fees stated above are subject to the Franchise Fee in effect at the time of payment." *Id.*

The "franchise fees" remained fixed at the same percentages (4% for water and wastewater service and 5% for solid waste disposal) until July 2018. Brief, Ex. D, ¶ 3, 6-7. After a class action lawsuit was filed in *Houser* challenging the legality of the "franchise fees," the City ceased collecting the "franchise fees." The City Council made the decision not to include "franchise fees "in the cost of water, wastewater, and solid waste disposal services in 2018. On November 12, 2019, the City Council formally adopted Resolution 19-10386 repealing Resolution 92-16531 to be consistent with its decision to no longer charge the "franchise fees." Ct. Doc. 13, Ex. Q.

In November 2004, Plaintiffs purchased a home in the Ironwood Estates Subdivision. Ct. Doc. 1, ¶ 12. Plaintiff Susan McDaniel ("Susan") had an account with the City for water, wastewater, and solid waste disposal and paid "franchise fees" for these services. Ct. Doc. 1, ¶ 13; Ct. Doc. 7, p 13. Plaintiffs' home is subject to an SIA containing the following provision: "All fees paid to the Public Utilities Department are subject to a 4 percent franchise fee." Ct. Doc. 47,

p. 6. Susan paid the "franchise fees" until they were eliminated in 2018. From 2004 through 2018, the account at the City for water, wastewater, and solid waste disposal services was solely in Susan's name. Opposition, Ex. 19, ¶ 3-7. Susan called the Public Works Department to initiate service and admits that the monthly bills were sent exclusively to her. Opposition, Ex. 4, pp. 120:14-124:25. Plaintiffs admit that they do not have any City bills that were sent to Plaintiff Gary McDaniel. Opposition, Ex. 5, Request for Admission, Nos. 53, 64, & 65.

Other undisputed facts are discussed in the Court's Discussion when they relate to a particular issue.

SUMMARY JUDGMENT

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Feller v. First Interstate Bancsystem, Inc.*, 2013 MT 90, ¶ 16, 369 Mont. 444, 299 P.3d 338 (citing Mont. R. Civ. P 56(c)(3)). Summary judgment may be entered for either all or part of the claim. Mont. R. Civ. P. 56(a). Once the moving party demonstrates the absence of any genuine issue of material fact, the burden of proof shifts and the non-movant "must establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that the moving party is not entitled to prevail under the applicable law." *Semenza v. Kniss,* 2008 MT 238, ¶ 18, 344 Mont. 427, 189 P.3d 1188 (citation omitted); *In re Thornton*, 2009 MT 367, ¶ 28, 353 Mont. 252, 220 P.3d 395. In addition, "all reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party who opposed summary judgment." *Heiat v. Eastern Montana College*, 275 Mont. 322, 327, 912 P.2d 787, 791 (1996). However, a "party cannot create a disputed issue of material fact by putting his own interpretations and conclusions

on an otherwise clear set of facts." *Knucklehead Land Co. v. Accutitle, Inc.*, 2007 MT 301, ¶ 24, 340 Mont. 62, 172 P.3d 116 (citing *Koepplin v. Zortman Mining*, 267 Mont. 53, 61, 881 P.2d 1306, 1311 (1994).

DISCUSSION

1. The "Franchise Fees"

Plaintiffs argue that the "franchise fees" are a sales tax under § 7-1-112(1), MCA, which prohibited the City from charging the "franchise fees" on the water, wastewater and solid waste disposal services to its residents. Section 7-1-112(1), MCA, provides:

> A local government with self-government powers is prohibited the exercise of the following powers unless the power is specifically delegated by law:
>
> (1) the power to authorize a tax on income or the sale of goods or services, except that, subject to 15-10-420, this section may not be construed to limit the authority of a local government to levy any other tax or establish the rate of any other tax;

The City is a local government with self-government powers and operates under a self-government charter. Thus, the City may exercise any power or provide any service except those that are specifically prohibited by the Montana Constitution, state law, or the charter itself. Section 7-1-102, MCA; *D & F Sanitation v. City of Billings*, 219 Mont. 437, 445, 713 P.2d 977 (1986).

Plaintiffs contend that although the statute does not define "tax," there are several Montana Supreme Court cases that do. See, *e.g., Montana-Dakota Utilities Co. v. City of Billings,* 2003 MT 332, ¶ 25, 318 Mont. 407, 80 P.3d 1247 ("[if] charges are primarily to raise money, they are taxes. If the charges are primarily tools of regulation, they are not taxes."), quoting 16 McQuillin, Municipal Corporations, § 44.02 at 2 (3rd ed., supp. 2003); *Lechner v. City of Billings,* 244 Mont. 195, 199, 797 P.2d 191 (1990) ("A tax is levied for the general public good, and without special regard to the benefit conferred upon the individual or property subject thereto"), quoting *State ex*

rel. Malott v. Board of County Commissioners, 89 Mont. 37, 296 P. 1, 14 (1931); *State ex rel. State Aeronautics Comm. v. Board of Examiners,* 121 Mont. 402, 407, 194 P.2d 633 (1948) ("Taxes are imposed for the purpose of general revenue.").

The City argues that this case is about the cost of City services and is a rate case under the purview of § 69-7-101, MCA, which provides:

> A municipality has the power and authority to regulate, establish, and change, as it considers proper, rates, charges, and classifications imposed for utility services to its inhabitants and other persons served by municipal utility systems. Rates, charges, and classifications must be reasonable and just.

The City maintains that under this statute, the "franchise fees" were "charges" that were part of the rate system. The City argues that the only standard for the "charges" is that they be "reasonable and just." The City contends that because Plaintiffs have not alleged that the cost of City services was unreasonable or unjust that Plaintiffs have not overcome a presumption that the law has been obeyed and the rates, including the "franchise fees," were presumptively reasonable. Of course, the City's proposition is based upon the City's assertion that that the "franchise fees" are "charges" under the statute. The City cites several cases to support its premise that the cost of municipal services is presumptively reasonable. See, *Trahey v. City of Inkster*, 311 Mich. App. 582, 876 N.W.2d 582 (2015); *City of Novi v. City of Detroit,* 433 Mich. 414, 446 N.W.2d 118 (Mich. 1989); *Detroit v. Highland Park,* 326 Mich. 78, 100-101, 39 N.W.2d 325 (1949); *City of Tipton v. Tipton Light & Heating Co.,* 176 Iowa 224, 157 N.W. 844 (1916); Opposition, pp.7-8.

In making its argument, the City concludes, without any authority, that the "franchise fees" are "charges." "Charges" is not defined in the statute. At the hearing on October 19, 2021, counsel for the City asserted that the "franchise fees" were imposed to use the right-of-way, which is a fact that was advanced by McCandless at the hearing before the City Council on April 13, 1992.

Counsel claimed that the use and occupancy of the right-of-way is a disputed issue of a material fact, which would preclude partial summary judgment. The Court does not agree this fact is a disputed issue of material fact. McCandless made the statement at the hearing. Whether the "franchise fees" can be justified as a "charge" for the use and occupancy of the right-of-way is a question of law. Moreover, the City official's disagreement with the characterization of the "franchise fees" and the use of the "franchise fees" do not create a disputed issue of a material fact. These disagreements, and even contrary interpretations by the same City official, i.e., Mumford, do not create a disputed issue of a material fact. *See, Knucklehead Land Co.*

In Montana, a franchise includes "every special privilege in the streets, highways, and public places of the city, whether granted by the state or the city, that does not belong to citizens generally by common right." Section 7-3-4201(3), MCA. The City contends that as part of the creation and imposition of the "franchise fees" on the Public Works Department, the City included a "grant to use the public right-of-way." Opposition, Ex. 21, Aff. of Denise Bohlman, ¶ 3(A). The City argues that the "franchise fees" were an internal City charge upon the Public Works Department and is an "indirect" cost. The City contends that Plaintiffs present no evidence to the contrary. Opposition, p. 13. The Court notes that Resolution 92-16531 which established the water and wastewater "franchise fees" does not contain any language about the public right-of-way.

When interpreting § 7-1-112(1), MCA, the Montana Supreme Court has also had the opportunity to consider fees imposed by the City in other cases. The Montana Supreme Court has held that a $1.00 per night "fee" on hotel rooms imposed by the City constituted a "tax" under the statute. *Montanan Innkeepers Assoc. v. City of Billings*, 206 Mont. 425, 430, 671 P.2d 21, 23 (1983). The Supreme Court relied on § 7-1-112(1), MCA, to invalidate a City ordinance imposing

an annual licensing fee based on gross revenues generated by attorneys. *Brueggemann v. City of Billings*, 221 Mont. 375, 378, 719 P.2d 768, 769-70 (1986).

In their argument, Plaintiffs rely heavily on *Montana-Dakota Utilities* to support their position. In *Montana-Dakota Utilities,* the issue was whether "a franchise fee based on a 4 percent of gross annual revenue generated by [a] utility that occupies the public rights-of-way within the city constituted a tax on the sale of utility services." *Montana-Dakota Utilities,* ¶ 2. The City's Ordinance creating the franchise fee had stated purposes for the Ordinance to protect the public rights-of-way utilized by the Utilities to install and maintain facilities and to establish a regulatory scheme. *Id.*, ¶ 3. The Ordinance also provided for options for the payment of fees, one of which was "a franchise fee based on a 4 percent of gross annual revenues received from the provision of telecommunications or utility services within the city." *Id.* The Utilities challenged the "franchise fee" provisions of the Ordinance as an illegal sales tax of their services within the City. The Ordinance also provided for a lease or a license and the imposition of fees generated by a lease of city property based on fair market rent or a pass-through license based on a per-foot annual assessment. *Id.*

In *Montana-Dakota Utilities,* the District Court applied the test established in *City of Lakewood v. Pierce County,* 106 Wn. App. 63, 23 P.3d 1 (Wash. Ct. App. 2001) to determine whether the City's option for payment of a franchise fee constituted a tax. The *Lakewood* test is:

> (1) whether the primary purpose is to raise revenue or to regulate; (2) whether the money collected must be allocated only to the authorized regulatory purpose; and (3) whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer.

Montana-Dakota Utilities, ¶ 23.

In *Montana-Dakota Utilities*, the District Court concluded that the primary purpose of the Ordinance was to raise revenue; the money collected would be placed in the general fund and was not allocated to any specific regulatory activity such as managing and maintaining the public rights-of-way; and the relationship between the fee charged and the services rendered or burden imposed upon the public rights-of-way was uncertain. *Montana-Dakota Utilities,* ¶ 24. The District Court also noted that the franchise fee was not subject to negotiation, but imposed on the Utilities unilaterally by ordinance. *Id.* The District Court concluded that because the City planned to collect the franchise fee as a revenue-generator and would not deposit the fees in a special account for right-of-way maintenance or regulation, the Court concluded that the fee was a tax. *Id.* The Montana Supreme Court affirmed the District Court and held "that a unilaterally imposed, revenue-generating gross-revenue fee, unrelated to use or occupancy of the right-of-way, is a tax on goods or services in violation of § 7-1-112(1), MCA." *Id.,* ¶ 35.

Plaintiffs contend the "franchise fees" imposed in this case are like those imposed in *Montana-Dakota Utilities* because in this case the "franchise fees" are gross revenue fees "based exclusively on the sale of a product or service within the city." *Montana-Dakota Utilities, ¶ 26.* Plaintiffs point to the deposition testimony of the City's own witnesses that the City added "franchise fees" on top of its rates for water, wastewater service and solid waste disposal service. In his Deposition, Mumford testified:

> It is a fee that's a percentage that is placed on the actual rates that our customers pay. So it's a percentage of that. And that fee is collected at the same time that we collect our rates – our monthly charges. And then that money is taken to the general fund outside of Public Works. We're just a pass-through.

Brief, Ex. A. pp. 9:4-11; *id.,* 57:13-15 (the franchise fee is an "assessment that the council places on – for a fee outside of our rate structure that is attached to the fees, but not part of the fees");

Brief, Ex. F., Depo. of Bruce McCandless, p. 86:1-4 (the Public Works Department does not include "franchise fees" when it establishes rates).

In this case, the "franchise fees" have always been transferred to the City's general fund. Ct. Doc. 7, ¶ 66; Brief, Ex. D. ¶ 9. The private utility "franchise fees" at issue in *Montana-Dakota Utility* had been imposed as a result of an Ordinance enacted by the City in October 2000. *Montana-Dakota Utilities*, ¶ 3. The Montana Supreme Court characterized those "fees" as being "unilaterally imposed" because they were "not subject to negotiation but imposed on the utilities unilaterally by ordinance." *Id.*, ¶ 24.

Here, the City originally and unilaterally imposed the "franchise fees" beginning in 1992, in a similar way it did in *Montana-Dakota Utilities,* i.e., by a resolution enacted by the City Council. Brief, Ex. C (Bohlman Aff., Ex. P). Neither the 4% "franchise fees" on water and wastewater services, nor the 5% "franchise fees" on solid waste disposal, were negotiated between the City and the ratepayers. Rather, the City's Council unilaterally imposed the "fees" on every ratepayer simultaneously.

Plaintiffs argue that the "franchise fees" in this case are even more one-sided than those in *Montana-Dakota Utilities*, which involved dealings between the City and private utilities. In this case, the City forced ratepayers to transact with it by using its sovereign authority to monopolize water, wastewater service, and solid waste disposal services by the City. Brief, Ex. B Rule 4-7; Billings Mun. Code § 21-214 ("It is unlawful for any person other than the city to engage in the business of collecting, removing and imposing of refuse within the jurisdiction of the city."). As Plaintiffs point out, the large private utilities in *Montana-Dakota Utilities* had at least some ability to walk away from the City's actions in a way that the residential customers of the City in this case

could not. In addition, the ordinance in *Montana-Dakota Utilities* provided other options by which the City could collect fees from the utilities.

The City claims that this case is different from *Montana-Dakota Utilities* because *Montana-Dakota Utilities* was based upon § 69-4-101, MCA, which relates to telegraph, telephone, electric light, or electric power line corporations. Opposition, p. 5. The City's attempt to distinguish *Montana-Dakota Utilities* from this case by focusing on the authority to the use of public rights-of-way for water and wastewater services is not definitively persuasive to this Court to determine whether a "franchise fee" may be imposed as a charge by the City on its ratepayers for water, wastewater service and solid waste disposal service.

The City also argues that this case is factually different from *Montana-Dakota Utilities* because the City water and wastewater services had no statutory right to use the public rights-of-way and there was no franchise agreement involved in this case. The City argues that that "[t]here is nothing in Montana law that precludes the City from charging the Public Works Department a fee for use of the right-of-way which is then passed on to ratepayers as a "franchise fee." Opposition, p. 5.

As characterized by Plaintiffs, the "franchise fees" cannot be justified as payments extracted by the City's right hand from its left hand, with the left hand subsequently extracting "franchise fees" from ratepayers to recover the payments. Rather, the "franchise fees" were gross-revenue fees that the City, as an entity, collected from its ratepayers and placed in its general fund. See, Reply, Ex. 2 (City Suppl. Resp. to Request for Admission No. 3), p. 4 (admission by the City that "the Department of Public Works of the City of Billings is not a separate legal entity, distinct from the City of Billings.").

The City argues that the "franchise fees" were not unilaterally imposed, because they were adopted in accordance with statutory proceedings for rate setting. As discussed above, the City asserts that the Legislature has given municipalities broad authority to establish the cost of municipal services as long as the cost is "reasonable and just." Section 69-7-101, MCA. The City urges the Court to deny Plaintiffs' Motion because Plaintiffs have neither alleged nor proven that the cost of City services was unreasonable and unjust. Opposition, p. 6. A determination of whether the cost of City services was reasonable and just would only be applicable if the "franchise fees" are charges imposed under § 69-7-101, MCA, and not sales taxes imposed under § 7-1-112, MCA. Plaintiffs do not concede that the "franchise fees" were either charges or rates under § 69-7-101, MCA. To the contrary, the thrust of Plaintiffs' argument is that the "franchise fees" are illegal sales taxes under § 7-1-112, MCA and that § 69-7-101, MCA cannot be referenced as a source of authority for their adoption or implementation.

The City argues that the "franchise fees" were included in the cost of service by the City after utilizing the procedure set out in state statutes. According to the City, ratepayers had opportunities for comment and redress for any decision that strayed from the statutory ratemaking framework. The City argues that the "franchise fees" were enacted under the City's express statutory authority to establish the cost of the City's own utility services. The City maintains that because the facts are undisputed, that the City complied with the statutory requirements to change or impose utility costs upon ratepayers, that the test in *Montana-Dakota Utilities* does not apply. Opposition, p. 6. The City concludes that the "franchise fees" in this case were a valid exercise of the City's ratemaking authority.

The City argues that when the City adopted Resolution 92-16531 in 1992 establishing the "franchise fees," it did so under the authority of Title 69, Chapter 7 of the Montana Code

Annotated. Opposition, p. 6. Section 69-7-101, MCA provides in part that a "municipality has the power and authority to regulate, establish, and change, as it considers proper, rates, charges, and classifications imposed for utility services to its inhabitants..." The City further attempts to distinguish *Montana-Dakota Utilities* from this case because of its assertion that this case involved the City's ratemaking authority, which was not an issue in *Montana-Dakota Utilities.* What factual differences may exist between *Montana-Dakota Utilities* and this case are inconsequential in the application of the legal conclusion announced by the Montana Supreme Court in *Montana-Dakota Utilities* to the facts of this case.

Relying on *Lechner* and a Montana Attorney General Opinion, the City contends that pursuant to § 69-7-101, MCA, it has the authority to "design its own rate system" under its self-governing authority without having to comply with the provisions of § 7-13-4304, MCA. Opposition, p. 7; Mr. Paul J. Luwe, 50 Mont. Op. Att'y Gen. No 10 (Oct. 12, 2004). Section 7-13-4304(1), MCA, provides that "the governing body of a municipality operating a municipal water or sewer system shall fix and establish, by ordinance or resolution, and collect rates, rentals, and charges for the services, facilities, and benefits directly or indirectly afforded by the system, taking into account services provided and benefits received." According to the Attorney General, "a self-governing municipality...would be free to design its own rate system without having to comply with the provisions of Mont. Code Ann. § 7-13-4304 under the broad authority of Mont. Code Ann. § 7-1-103." *Id.* Section 7-1-103, MCA, provides:

> A local government unit with self-government powers which elects to provide a service or perform a function that may also be provided or performed by a general power government unit is not subject to any limitation in the provision of that service or performance of that function except such limitations as are contained in its charter or in state law specifically applicable to self-government units.

The City reasons that this case is about the cost of City services and that the City may design its own rate system pursuant to § 69-7-101, MCA. Again, the City argues that this is not a tax case. Opposition, p. 7. Although the Attorney General noted the broad authority given to the City under § 7-1-103, MCA, the Court notes that such authority is limited by § 7-1-112(1), MCA. The City claims that the "franchise fees" were "charges" that were part of the rate system. *Id.* The City argues that the only criteria to consider for the "franchise fees" in this case is whether they are "reasonable and just" under the provisions of § 69-7-101, MCA.

The City claims that the authority of the City under § 69-7-101, MCA, to impose "charges" and the use of that terminology raises genuine issues of material fact that preclude partial summary judgment. The City bases this argument in response to Plaintiffs' focus on the City's authority to impose "rates" under the statute. The City claims that "charges" as used in the statute supports the City's authority to include "franchise fees" when establishing the cost of City services. Opposition, p. 11.

Plaintiffs claim that the "franchise fees" were an illegal sales tax because the fees "have no relationship to the cost of providing water, wastewater, and solid waste disposal to City customers." Ct. Doc. 61, Statement of Undisputed Facts, p. 4. The City claims that the Plaintiffs' claim is contradicted by sworn testimony which demonstrates the existence of a genuine issue of material fact. According to the City, the testimony also demonstrates that the "franchise fees" were "indirect costs" properly included in the cost of City services. Whether the "franchise fees" are charges is a question of law. The sworn testimony which could possibly demonstrate the existence of a genuine issue of material fact is the testimony of the City officials. As noted, that testimony is not sufficient to preclude summary judgment.

Again, the City further relies on *Lechner* to advance its arguments. In *Lechner,* the City of Billings established system development fees upon customers who requested new water or wastewater services or an upgrade in existing water or wastewater services. *Lechner,* 244 Mont. at 198, 797 P.2d 193. "The fees are "revenue-raising measures adopted to fund construction of new water and wastewater facilities needed to meet the demands placed on the existing facilities by new growth in the City." *Id.* "They are placed in a special fund, which is used solely for the construction of expansion-oriented, general-benefit water and wastewater facilities or for the retirement bonds sold for such purposes." *Id.* The plaintiffs in *Lechner* brought a declaratory judgment action to strike down the City's funding system.

In *Lechner*, the Montana Supreme Court held:

> System development fees are no different in this respect than monthly user charges. In both cases, properties not directly benefited by certain improvements are paying for those improvements. The need for expansion facilities is directly related to the new users coming onto the systems. If there were no new applicants for service, there would be no need for additional facilities. System development fees are thus designed to place a greater share of the cost of meeting that need on those persons creating the need.
>
> Furthermore, Montana law does not prohibit a municipality from establishing rates and charges for water and sewer systems simply because the benefit from the system does not directly benefit the customer charged. Section 7-13-4304, MCA, allows a municipality to establish and "collect rates, rentals, and charges for the services, facilities, and benefits directly or indirectly afforded by the system, taking into account services provided and benefits received." As pointed out by the discussion above, new users of the City's water and sewer systems are *indirectly* if not directly benefited by the construction of new facilities when the reserve capacity of existing facilities is exhausted. The system development fee is a reasonable response to the demand placed on the City's water and sewer systems by the growth of the area.
>
> Several other jurisdictions have upheld similar methods of funding the expansion of water and sewer systems to meet the additional

> demands on those systems created by new users. *Meglino v. Township Comm. of Eagleswood,* 103 N.J. 144, 510 A.2d 1134 (1986); *Loup-Miller Constr. Co. v. City and County of Denver*, 676 P.2d 1170 (Colo. 1984); *Coulter v. City of Rawlins*, 662 P.2d 888 (Wyo. 1983); *Home Builders Ass'n of Greater Salt Lake v. Provo City,* 28 Utah 2d 402, 503 P.2d 451 (Utah 1972); *Hayes v. City of Albany,* 7 Or. App. 277, 490 P.2d 1018 (Or. Ct. App. 1971). (emphasis added).

Lechner, 244 Mont. at 205-06, 797 P.2d at 198.

The City argues that the "franchise fees" are indirect costs in the same way that the system development fees were in *Lechner.* Opposition, p. 12. According to the City, McCandless testified that the "franchise fees were an allocation method for including a portion of unallocated costs in the cost of water, wastewater, and solid waste services." *Id.* McCandless explained that police and fire provide services to the Public Works Department and that the costs for these services need to be recovered in some way. *Id.* McCandless explained that the City Council chose to recover those costs through the payment of the "franchise fees." According to the City, the "franchise fees" were also included as rental for the Public Works Department's use of the public right-of-way. The City claimed that this was an indirect cost and that Plaintiffs have no evidence to the contrary. Opposition, p. 13. Reply, p. 12, *Montana-Dakota Utilities,* ¶ 28, quoting *State v. City of Helena,* 193 Mont. 441, 444, 632 P.2d 332, 334 (1981).

The City also relies on *Atlas Valley Gold and Country Club, Inc. v. Village of Goodrich,* 227 Mich. App. 14, 575 N.W.2d 56 (1997). The circumstances in *Atlas* are distinguishable from the circumstances in this case. In *Atlas,* the issue was not whether a city could impose a "franchise fee" for indirect costs on all of its residents; the issue was whether a city could impose higher rates for sewer services on county nonresidents using those services. The *Atlas* court held:

> ...that the rate difference was justified because city residents pay indirect costs to support the system, whereas nonresidents are free from those costs. This Court identified several of these costs: fire and police protection for the system, higher taxes to compensate for

> the tax exemption granted to the utility, and costs associated with the risk of tort liability arising out of the operation of the system. *This Court further noted that the city is able to tax the enhanced value of city areas connected to the sewage system, whereas nonresidents are not similarly burdened.* (emphasis supplied).

Atlas, 227 Mich. App. At 22, 575 N.W.2d at 60 (1997). Notably, in *Atlas*, the city had the authority to tax the city residents. At the hearing, the City's counsel argued that *Atlas* was merely cited to illustrate what may be an indirect cost. Nevertheless, in *Atlas* the indirect costs were not distinguished from the city's authority to impose a tax.

Plaintiffs argue that the City does not present any evidence quantifying "indirect" costs. Reply, p. 13. The City admitted that it never prepared any report that identifies unallocated costs that were attributable to the Public Works Department for the years 2010-2018. Reply, Ex. 3 (Interrogatory No. 34), pp. 6-7.

Plaintiffs urge the Court to view the City's claims of "unidentified, phantom costs" with suspicion in light of the fact that the City meticulously calculated costs attributable to its utilities. Reply, p. 13. When setting utility rates, the City commissioned outside consultants to conduct rate studies that are "complicated and usually take probably four months to complete." Reply Ex. 4, p. 81:18-20. The rate studies were designed to capture or anticipate as many costs as possible. Reply, Ex. 5, p. 19:23-25. The City considered the studies to be accurate. *Id.*, p. 22:6-24. Notably, the "franchise fees" were not considered by the consultants in determining these rates. Reply, Ex. 4, p. 83:2-15. The City also used outside consultants to calculate the value of City resources such as "general fund services for legal, City administration, City council, finance, HR purchasing." *Id.*, p. 51:21-24. These facts are not disputed by the City.

Plaintiffs point out that the City also had a history of meticulously calculating costs attributable to its utilities and the City failed to explain why these costs were not captured in the

detailed studies prepared by its outside consultants. Reply, p. 14. Plaintiffs further illustrate that the City offers no evidence as to what the amounts of these costs were or the very existence of the costs. *Id.* Notably, Plaintiffs contend that if the City actually did have verifiable unallocated costs the City gave no reason why it suddenly ceased collecting "franchise fees" after Plaintiffs filed suit in *Houser* in May 2018. *Id.* Plaintiffs reason that if "the operation of the City's utilities had actually created substantial indirect costs, those costs surely would not have disappeared in response to Plaintiffs' filing their complaint." *Id.* Plaintiffs conclude that the "City's arguments regarding 'indirect costs' amount to 'conclusory statements rather than the kind of substantial evidence' needed to defeat Plaintiffs' summary judgment motion." *Id.* (citing *In re Thornton,* ¶ 28).

The City's claims of "unallocated" or "indirect costs" are contradicted by its admissions during discovery. As discussed in the Background Facts of this Decision and Order, the City admitted that, between 2010 and 2018, the funds collected through the franchise fees were not spent solely on the operation, maintenance, construction, or improvement of the City's water supply and wastewater systems or costs related to the public right-of-way. The City also admitted that the funds collected through the franchise fees were used to pay unallocated costs, such as public safety (fire, police).

City officials have even gone further by testifying that all of the "franchise fees" were used for purposes unrelated to the City's utilities. Reply, Ex. 6 (Deposition of Mumford), p. 59:22-60:19 (testifying that no portion of the general fund is allocated to the costs of providing water, sewer, or garbage disposal services during the time the City collected "franchise fees"); Ex. 7 (Deposition of Weber), p. 33:17-34:2 (testifying that the general fund was not used to pay for the operating or other costs of providing water, wastewater, or solid waste disposal).

The City's contention that it used "franchise fees" to cover "unallocated" or "indirect" costs is not supported by any evidence in the record. Moreover, the City's contention is flatly contradicted by its own admissions and the testimony of its own City officials. The City's attempts to justify the "franchise fees" as a charge for the use of the right-of-way fails. The City had no agreement with itself to the use of the right-of-way. Even if the City had the authority to impose a "franchise fee" on its own right-of-way for its Public Works Department, such a "franchise fee" defies logic. The City assessed the "franchise fees" on its own Public Works Department. In other words, taking the City's argument to its logical conclusion the City would be charging itself "franchise fees." The City admitted that the Public Works Department was not a separate legal entity from the City. However, in order for the Public Works Department to pay the "franchise fees," the City had to impose the "franchise fees" on the customers of the Public Works Department, who are customers of the City.

It is clear from the statements made by the City's officials that the City was in need of revenue and property tax was not an alternative available to it. Thus, the City resorted to imposing the "franchise fees" which, after being deposited into the City's general fund, were used for purposes other than the right-of-way or water, wastewater services or solid waste disposal services.

The City argues that the Court should deny Plaintiffs' Motion because the Legislature has given municipalities broad authority to establish the cost of municipal services, so long as the cost is "reasonable and just" under § 69-7-101, MCA. The City also argues that the "franchise fees" are "charges" under § 69-7-101, MCA, which may be imposed by the City. As discussed earlier herein, § 69-7-101, MCA, provides that a "municipality has the power and authority to regulate, establish, and change, as it considers proper, rates, charges, and classifications imposed for utility services to its inhabitants..." The City argues that Plaintiffs conflate the terminology associated

with municipal services and that a review of the facts and the use of the correct terminology demonstrates that there are genuine issues of material fact that preclude summary judgment. Opposition, p. 10. The City concludes it has the authority to establish the cost of city services by imposing "charges." More specifically, the City argues that Plaintiffs' contention that the "franchise fees" were imposed on top of, and in addition to, rates paid the City's water, wastewater, and solid waste disposal services conflates the term "rates" with the word "charges." *Id.* The City contends that "rates are only a part of the cost of City services under the statute." *Id.* The City argues that the "franchise fees" were "charges" that were part of the rate system and that the City may "design its own rate system" pursuant to § 69-7-101, MCA. Opposition, p. 7. However, if the City could assess "franchise fees," which are a percentage of the rates or cost of services, and place those fees in the general fund to contribute to the costs of the City administration, the City would eradicate the limitations imposed upon it by § 7-1-112(1), MCA.

Citing *Page v. City of Wyandotte,* 2018 WL 6331339 (Mich. 2018), the City suggests that if the cost of services is reasonable and just, then the cost of services is a user fee or a "charge" and not a tax. *Page* is an unpublished opinion issued by the Michigan Court of Appeals. Nevertheless, *Page* is not helpful to the City under the undisputed facts of this case. In *Page*, the Wyandotte Municipal Services, a department of the City of Wyandotte, began transferring a $200,000 flat-rate payment to the City of Wyandotte based on a calculation of the reasonable costs the City of Wyandotte incurred that are attributable to the water utility. This transfer was known as the water franchise fee. The water franchise fee was not a separate charge to customers, and was not itemized on the customers' water bills. The Court in *Page* noted that following the transfer of the water franchise fees consumers payments did not change. The plaintiffs challenged the

water franchise fee on several grounds, including that the water franchise fee was an illegal tax under Michigan's Constitution.

The Court in *Page* said that a user fee is not a tax. The Court distinguished the two by noting "generally, a 'fee' is 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. A 'tax', on the other hand, is designed to raise revenue." *Bolt v. Lansing*, 459 Mich. 152, 161; 587 NW2d 264 (1998). In *Page,* the Court held that plaintiffs failed to address whether the amount they paid for water services—as a commodity provided by the City—is reasonably proportionate to the services they receive. The Court held that plaintiffs did not provide any analysis of the overall charge customers pay for water, and they offered no assertion that the overall charge for water services is disproportionate in relation to the commodity customers receive. Thus, plaintiffs did not prevail with their challenge. In *Page,* the Court held that whether a charge is a tax or a user fee presents a question of law.

In this case, the City suggests that the water charge includes the rate that the customers pay for the services plus the "franchise fee," and those amounts taken together are reasonable and just. In *Page,* there was not a separate percentage amount charged to the customers. A lump sum was paid by Municipal Services to the City of Wyandotte based on the calculation of the reasonable costs the City of Wyandotte incurred that are attributable to the water utility. Those facts do not exist in this case. In this case, the costs incurred by the City to justify the "franchise fees" were not calculated. In this case, the costs for which the "franchise fees" were imposed are not specifically quantified but are generally categorized.

In addition, the City's reliance on *Lechner* is fascinating because in *Lechner* the Montana Supreme Court considered whether the system development fee was a sales tax prohibited by § 7-

1-112, MCA. In *Lechner,* the Supreme Court's focus was on the distinction between a tax and special assessment. Although a special assessment is not involved in this case, the Supreme Court's discussion about what constitutes a tax is enlightening for purposes of the issue in this case. The Supreme Court said, "A tax is levied for the general public good, and without special regard to the benefit conferred upon the individual or property subject thereto...Nor is the fee a tax levied for the general public good. Rather, the fee is imposed for the benefit of new users of the water and sewer facilities whose use of these systems gives rise to the need for the additional water and sewer capacity." *Lechner,* 244 Mont. at 207-208, 797 P.2d at 199. The Supreme Court noted that other jurisdictions with similar system development fees have concluded that they "are not taxes or assessments but more in the nature of service fees or user charges. These jurisdictions have held that the fees are not taxes as long as 1) they are not placed in a general revenue fund; and 2) there is a reasonable relationship between the fees and the uses to which they are put." *Lechner,* 244 Mont. at 208, 797 P.2d at 199 (citing *Hayes,* 490 P.2d 1020; *Home Builders Ass'n,* 503 P.2d at 452).

In *Lechner,* the system development fees were not held in a general revenue fund to be used on projects totally unrelated to the City's water and water system. *Id.* The system development fees were placed in a special fund earmarked for expanding the City's water and sewer facilities for retiring bonds issued for that purpose. *Id.* Unlike the fees in *Lechner,* in the present case, the "franchise fees" are placed in the general revenue fund. The "franchise fees" are not placed in a special fund earmarked for a specific purpose relating to water, wastewater services or solid waste disposal services. Applying the *Lechner* rationale and assuming *arguendo* that the statements of the City's officials are not conclusory statements but are undisputed issues of fact, the "franchise fees" in this case might not be prohibited by § 7-1-112(1), MCA. However, as

discussed herein, that is not the proper characterization of those statements which would result in a favorable outcome for the City on the issue of the illegality of the "franchise fees."

The City also argues that the Court should deny the Plaintiffs' Motion because the prohibition on municipalities establishing a tax under § 7-1-112(1), MCA does not preclude a city from establishing the cost of city services under § 69-7-101, MCA. The City argues that under the General/Specific Canon for statutory interpretation, the City's authority to establish utility rates governs. "In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it." Section 1-2-102, MCA.

The City contends that § 7-1-112(1), MCA is a general statute prohibiting municipalities from imposing sales taxes and that § 69-7-101, MCA is a more specific statute that specifically relates to a municipality's authority to set the rates for municipal services. The City maintains that under the Canons of statutory construction, the more specific statute relating to rate-setting governs. Plaintiffs argue that there is no conflict between § 7-1-112(1), MCA and § 69-7-101, MCA. Plaintiffs point out that the Canon cited by the City only applies when "a general and particular provision are inconsistent..." Section 1-2-102, MCA. Thus, a "specific statute will only govern over a more general statute if the two statutes are in conflict and cannot be resolved." *Gibson v. State Compensation Fund,* 255 Mont. 393, 842 P.2d 338, 340 (1992). If "called upon to interpret several different provisions this Court will, if possible, construe the statutes so as to give effect to all of them." *Id.* The burden is on the City to show that the statutes conflict with one another. *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018). ("A party seeking to

suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow.")

"When interpreting a statute, [this Court's] objective is to implement the objectives the legislature sought to achieve." *Mont. Vending, Inc. v. Coca-Cola Bottling Co.*, 2003 MT 282, ¶ 21, 318 Mont. 1, 78 P.3d 499. "[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 109, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). "If the intent of the legislature can be determined from the plain meaning of the words used in the statute, the plain meaning controls, and this Court need go no further nor apply any other means of interpretation." *Mont. Vending, Inc.*, ¶ 21. It is a settled rule of statutory construction that this Court interprets "related statutes to harmonize and give effect to each. Different language is to be given different construction." *Bullock v. Fox*, 2019 MT 50, ¶ 59, 395 Mont. 35, 435 P.3d 1187 (citing *Gregg v. Whitefish City Council*, 2004 MT 262, ¶ 38, 323 Mont. 109, 99 P.3d 151 (internal citations omitted).

"This Court will 'avoid a statutory construction that renders any section of a statute superfluous or fails to give effect to all of the words used.'" *Rosendale v. Victory Insurance Company*, 2018 MT 299, ¶ 10, 393 Mont. 428, 432 P.3d 114 (quoting *Mont. Trout Unltd. v. Mont. Dep't of Nat'l Res. And Conserv.*, 2006 MT 72, ¶ 23, 331 Mont. 483, 133 P.3d 224). "This Court operates 'under the presumption that the legislature does not pass meaningless legislation, and we will harmonize statutes relating to the same subject in order to give effect to each statute. *Id.* (quoting *Farmers Union Ass'n v. Paquin*, 2009 MT 305, ¶ 5, 352 Mont. 390, 217 P. 3d 74).

A cursory view of the plain language of theses statutes shows that they are not inconsistent. Section 7-1-112(1), MCA requires a "specific[] delegate[ion]" of authority in order for municipalities with self-government powers to impose a tax on the sale of goods or services. By

contrast, the Legislature did not include any language delegating taxing authority to municipalities when it enacted § 69-7-101, MCA. Under § 69-7-101, MCA, a municipality has the "power and authority to regulate, establish, and change, as it considers proper, rates, charges and classifications imposed for utility services to its inhabitants and other persons served by municipal utility systems." The statute makes no reference to taxes. Indeed, Section 7-1-112(1), MCA applies to "taxes." Section 69-7-101, MCA applies to "rates, charges and classifications." Montana law differentiates these terms.

As discussed earlier in this Decision and Order, a "tax" is "a governmental demand for money made for the purpose of raising revenue." *Montana-Dakota Utilities,* ¶ 25, citing *State ex rel. State Aeronautics Comm. v. Board of Examiners*, 121 Mont. 402, 407-408, 194 P. 2d 633, 636-637 (1948); *Lechner.* Indicators that government-collected monies are "taxes" include (1) an intent to use such monies as an alternative to property taxes, as well as, (2) the deposit of such monies in a municipalities general fund from which expenditures benefitting the general public are derived. *Montana-Dakota Utilities*, ¶ 22.

By contrast, funds derived from "charges" are placed in a segregated account rather than a municipality's general fund; they are then spent in a manner that is reasonably related to those charges. *Lechner*, 244 Mont. at 208, 797 P. 2d at 199-200, citing *Hays v. City of Albany,* 490 P.2d 1018, 1020 (Or. App. 1971) and *Home Builders Assn. of Great Salt Lake v. Provo City*, 503 P.2d 451, 452 (Utah 1972). For example, special one-time connection fees imposed upon new water and sewer customers that were placed in a segregated account and spent solely on construction of new water and sewer facilities were "not taxes but [ ] service charges...." *Id.*

The plain language of § 7-1-112(1) and § 69-7-101 are consistent. The City's reliance upon the general-versus-specific Canon of statutory interpretation is misplaced. A municipality,

like the City in this case, acts unlawfully when it uses the regulatory authority granted by § 69-7-101, MCA as a pretext to circumvent the sales tax prohibition in § 7-1-112(1), MCA.

The City argues that the statements made by the City officials set forth in the Background Facts (p. 5-6) create genuine issues of material facts precluding summary judgment. Plaintiffs argue that the statements are merely conclusory and do not satisfy the requirement for the City to present substantial evidence to defeat summary judgment.

The Court agrees with Plaintiffs. Mumford's testimony that he considered "franchise fees" to be "charges" under § 69-7-101, MCA is conclusory. Further, Mumford's legal conclusion is also irrelevant. *Rundgren v. Hood River County*, 474 P.3d 449, 456 (Or. App. 2020). ("Legal conclusions...cannot defeat a motion for summary judgment.")

The Court considers Volek's testimony that she did not consider the franchise fees were sales taxes but were part of the contract price for the City's water, wastewater, and solid waste disposal services as conclusory. Her conclusory opinion that "franchise fees" should be characterized as a "cost of service" is simply a form-over-substance remark that carries no weight in a tax case. *State ex rel. State Aeronautics Comm'n v. Board of Examiners*, 121 Mont. 402, 407-408, 194 P.2d 633, 636-637 ("[t]he distinction between a demand of money under the police power and one made under power to tax is not so much one of form as of substance.").

McCandless' subject labelling of the "franchise fees" as a "cost of service" and part of the contract price" do not create a dispute regarding the material facts of this case: the "franchise fees" were gross-revenue fees that, for 26 years, the City unilaterally imposed upon its ratepayers, deposited into its general fund, and used for purposes entirely unrelated to its utilities.

Hanel's testimony that the "franchise fees were simply a part of the total cost of services that the City of Billings charged to its customers" is conclusory.

Wilson's testimony that "The franchise fees were simply part of the contract rate that was charged by the City of Billings" is conclusory.

The statement of Peters is not helpful. He correctly stated that the City has no obligation to provide wastewater service to a county water district located outside the City. Whether the City can charge "franchise fees" to non-resident ratepayers over who the City has no jurisdiction and who have the freedom to contract with other providers presents a legal issue falling outside the scope of this case. *Montana-Dakota Utilities*, ¶ 26 ("the gross revenue fee...is based exclusively on the sale of a product or service within the City").

Plaintiffs contend the "franchise fees" imposed in this case are like those imposed in *Montana-Dakota Utilities* because in this case the "franchise fees" are gross revenue fees "based exclusively on the sale of a product or service within the city." *Montana-Dakota Utilities,* ¶ 26. Plaintiffs point to the deposition testimony of the City's own witnesses that the City added "franchise fees" on top of its rates for water, wastewater service and solid waste disposal service. In his Deposition, Mumford testified:

> It is a fee that's a percentage that is placed on the actual rates that our customers pay. So it's a percentage of that. And that fee is collected at the same time that we collect our rates – our monthly charges. And then that money is taken to the general fund outside of Public Works. We're just a pass-through.

Brief, Ex. A. pp. 9:4-11; *id.,* 57: 13-15 (the franchise fee is an "assessment that the council places on – for a fee outside of our rate structure that is attached to the fees, but not part of the fees"); Brief, Ex. F., Depo. of Bruce McCandless, p. 86:1-4 (the Public Works Department does not include "franchise fees" when it establishes rates).

In this case, the "franchise fees" have always been transferred to the City's general fund. Ct. Doc. 7, ¶ 66; Brief, Ex. D., ¶ 9. The private utility "franchise fees" at issue in *Montana-Dakota Utility* had been imposed as a result of an Ordinance enacted by the City in October 2000.

Montana-Dakota Utilities, ¶ 3. The Montana Supreme Court characterized those "fees" as being "unilaterally imposed" because they were "not subject to negotiation but imposed on the utilities unilaterally by ordinance." *Id.*, ¶ 24.

Here, the City originally and unilaterally imposed the "franchise fees" beginning in 1992, in a similar way that it did in *Montana-Dakota Utilities,* i.e., by a resolution enacted by the City Council. Brief, Ex. C (Bohman Aff., Ex. P). Neither the 4% "franchise fees" on water and wastewater services, nor the 5% "franchise fees" on solid waste disposal, were negotiated between the City and the ratepayers. Rather, the City Council unilaterally imposed the "fees" on every ratepayer simultaneously.

The Montana Supreme Court has "repeatedly held that the party opposing summary judgment must present substantial evidence, as opposed to mere denial, speculation, or conclusory statements, raising a genuine issue of material fact." *In re Thornton,* ¶ 28. The City attempts to justify its "franchise fees" as an offset for "indirect costs arising from its utilities." Opposition, p. 14-15. However, the City did not even attempt to identify the sources of these costs.

The City claims that it had indirect costs for which the "franchise fees" could be imposed. The City has not offered any evidence to support the amount (or even the existence) of indirect or the claimed indirect costs. The City has not even attempted to identify the sources of these costs. During discovery, the City was asked to state the amount of unallocated costs attributable to the Public Works Department between 2010 and 2018. Reply, Ex. 3 (Interrogatory No. 34, p. 6-7. The City admitted that it "has not prepared any report that identified unallocated costs that were attributable to the Public Works Department." *Id.*, p. 7

Plaintiffs have demonstrated the absence of any issue of material fact and the City has failed to demonstrate otherwise. The parties have presented many different arguments to support

their positions and to oppose the arguments of the other party. After the Court's exhaustive review and analysis of those arguments, the voluminous amount of exhibits attached to the briefs and the numerous court cases cited by the parties, the Court concludes that the test applied by the Montana Supreme Court in *Montana-Dakota Utilities* controls the Court's decision.

The primary purpose of the Ordinance was to raise revenue; the money collected was placed in the general fund and was not allocated to any specific regulatory activity such as managing and maintaining the public rights-of-way; and the relationship between the fee charges and the services rendered or burden imposed upon the public rights-of-way was uncertain. *Montana-Dakota Utilities,* ¶ 24. In fact, the money placed in the general fund was not limited to purposes for the rights-of-way, but was used for other City services, such as police, fire, street and park maintenance. The franchise fees were not subject to negotiation, but imposed unilaterally by the initial adoption of Resolution 92-16531 and subsequent resolutions. The City, through its Public Works Department, collected the "franchise fees" as a revenue-generator in its general fund and did not deposit the fees in a special account for right-of-way maintenance or regulation. The "franchise fees" were not a charge under § 69-7-101, MCA. Like the fee in *Montana-Dakota Utilities* the "franchise fees" in this case were unilaterally imposed, revenue-generating gross-revenue fees, unrelated to use or occupancy of the right-of-way, and thus as a matter of law are taxes on goods or services as prohibited under § 7-1-112(1), MCA.

2. The SIA

Throughout this litigation, the City has insisted that the SIA created a contractual obligation for the Plaintiffs to pay the "franchise fees" and, therefore, the "franchise fees" are not taxes. It is undisputed that the SIA and its terms were negotiated between a real estate developer and the City. The City emphasizes Plaintiffs paid the fees and admit that they have no evidence that the City

breached the SIA or any of the 277 SIAs that are involved in this litigation. Opposition, Ex. 5, Request for Admissions, No. 56 & 57.

Because the Court has concluded that the "franchise fees" were taxes on the sale of goods and services prohibited by § 7-1-112(1), MCA, the Court, nevertheless, needs to address the City's argument that the SIA was a contractual obligation of the parties and the "franchise fees" could be imposed by the City through the SIA. The SIA states, "All fees paid to the Public Utilities Department are subject to a 4 percent Franchise Fee." Opposition, Ex. 20, Ex. 1 (SIA, p. 6). These fees applied to the water and wastewater services.

The City relies on *Baker v. Montana Petroleum Co.*, 99 Mont. 465, 44 P.2d 735 (1935) for the proposition that the "franchise fees" were contractual obligations of the parties. In 1916, the City of Baker:

> ...enacted a gas franchise ordinance granting to Montana Petroleum Company, a corporation, a franchise to install and operate within or adjacent to the city a gas plant and to lay and maintain conduits, mains, fixtures and other apparatus for supplying and transmitting natural or artificial gas into the city, and in and through the streets, avenues, alleys or public grounds thereof. The franchise included the ordinary provisions common to such grants and ordinances. It imposed upon the parties usual conditions.

Baker, 99 Mont. at 473, 44 P.2d at 735. Section 6 of the ordinance provided for the payment by the corporation to the city of a percentage of the gross income received from sales of gas. *Id.* Montana Petroleum accepted the terms of the ordinance, installed a gas distribution system, and operated the same as a public utility ever since it accepted the terms of the ordinance. *Id.* Montana Petroleum paid the payments each year through 1929. Montana Petroleum did not make the payment for 1930 and 1931. Montana Petroleum sued the City of Baker claiming, among other issues, that section 6 of the ordinance was invalid and did not constitute a valid enforceable contract. *Baker,* 99 Mont. at 475, 44 P.2d at 735.

In *Baker,* the Montana Supreme Court concluded:

> The relation created between the city and the company was contractual in character, and the ordinance granting the franchise and providing for the percentage payments should be construed as a contract between the parties.

Baker, 99 Mont. at 476, 44 P.2d at 736-737.

However, the facts in this case are distinguishable from the facts in *Baker.* In this case, the "franchise fees" were unilaterally adopted by Resolution 92-16531 and subsequent resolutions. Clearly, Resolution 92-16531 was the controlling resolution because it was the resolution that the City Council repealed in 2019, abolishing the "franchise fees." The franchise fees were not created pursuant to any franchise agreement between the City and a third party and were not defined in Resolution 92-16531 creating them. In this case, there was no franchisee which was limited to a grant to use the public right-of way of the streets and alleys in the City. As discussed herein, the funds collected from the "franchise fees" were used for other City services through the general fund.

In *Baker,* the franchise fees were adopted as part of a franchise ordinance setting forth the specifics of the franchise to which Montana Petroleum agreed. The Montana Supreme Court said "It is generally held that conditions such as that imposed in this franchise [*Baker*] are not a tax or license, but rather in the nature of rental or compensation for the use of streets." *Baker,* 99 Mont. at 476, 44 P.2d at 736. As this Court has discussed in its consideration of the legality of the "franchise fees" as originally enacted, the "franchise fees" in this case are not limited in the nature of rental or compensation for the use of streets. The "franchise fees" collected from the City's ratepayers were deposited into the City's general fund and were used for City services. The Court recognizes that Plaintiffs admitted that they received benefits from the SIAs, specifically City services. However, in this case there was no franchise agreement or ordinance defining the

franchise as there was in *Baker*. In this case, "franchise fees" were unilaterally established by resolution for the general fund. The Court notes that the SIA between the developer of the subdivision in which Plaintiffs reside and the City does not define any terms or conditions of a franchise agreement. It merely requires the developer to pay the "franchise fees." The only source of "franchise fees" was Resolution 92-16531 and subsequent resolutions enacted by the City.

When *Baker* was decided, Montana's statutory scheme for a municipality to set rates in a franchise ordinance involved the oversight by the state. "The rates fixed in the franchise ordinance could not have been effective or controlling without the acquiescence of the state through the Public Service Commission." *Baker*, 99 Mont. at 479, 44 P.2d at 738. When the rates "were approved by and filed with the commission, they became the legal rates and were such until changed in the manner provided by the Public Service Act." *Baker*, 99 Mont. at 479-80, 44 P.2d at 738. Although the Supreme Court concluded that a municipality could establish a rate in an agreement through a franchise ordinance, the Supreme Court said, "The rate was legal, not because it was agreed upon between the city and the company, but essentially because it was approved by the commission..." *Id.* That legality existed even if there was something erroneous about the rate in the ordinance. *Id.* That situation does not exist in this case.

Although *Baker* recognizes a municipality's authority to enter into a contract through a franchise ordinance containing terms and conditions defining the relationship between the municipality and the franchisee, *Baker* does not address the issue of whether an agreement incorporating an illegal "franchise fee" that was earlier adopted by resolution of the City makes the "franchise fee" legal merely by virtue of the agreement.

As Plaintiffs point out, the City appears to argue that the SIAs imposed obligations to pay "franchise fees" above and beyond those imposed by the City's "franchise fee" resolutions.

Plaintiffs argue that under the state statutes and municipal ordinances, all payment obligations imposed by a municipal utility upon a ratepayer must be established by municipal resolutions and not contracts imposed by the municipality upon developers. Reply, p. 2.

Section 7-6-4013(1), MCA requires a municipality to hold a notice, public rate hearing to establish or change any "fees, rates, charges, and classifications" that it intends to impose on its customers. Following the hearing, "the fees, rates, charges, or classifications must be established *by resolution* of the *governing body*." Section 7-6-4013(5), MCA (emphasis added). The City recognizes that it is subject to § 7-6-4013, MCA. Opposition, p. 14. As Plaintiffs point out and as discussed in the Background Facts, the City enacts on a nearly annual basis rate resolutions following noticed rate hearings. Plaintiffs argue that because § 7-6-4013, MCA requires the establishment of "fees, rates, charges, or classifications" by a City resolution, the City cannot use SIAs to create an alternative basis to obligate subdivision ratepayers to pay "franchise fees."

Section 7-13-4304, MCA operates in a similar manner. It requires municipalities providing water and wastewater services to "fix and establish, by ordinance or resolution, and collect rates, rentals, and charges for the services, facilities, and benefits directly or indirectly afforded by the system..." Section 7-13-4304 (1), MCA. Further, "[t]he rates for charges may be fixed in advance or otherwise and shall be uniform for like services in all parts of the municipality." Section 7-13-4304(2), MCA. The Court agrees with Plaintiffs that § 7-13-4304, MCA requires that all demands for payments from the ratepayers of a municipal-owned utility (1) be established by resolution and (2) be uniform throughout the municipality.

The City's Municipal Code requires the enactment of City resolutions in order to impose payment obligations upon ratepayers. Section 26-107 of the Billings Municipal Code requires the City to follow Title 69, Montana Code Annotated whenever it establishes or changes rates, charges,

and classifications for water and sewer customers. Reply, Ex. 1. Decisions made during water and wastewater rate hearings 'shall be in writing and in the form of a city resolution...All other fees and charges imposed by the City within the utility service area shall be set by the City Council by resolution. *Id.* The City's solid waste disposal service is subject to the same requirement. Section 21-229, Billings, Muni. Code; Reply, Ex. 1 ("Not later than the first regular council meeting in August of each year, the council shall hold a public hearing and pass and adopt a resolution setting the commercial and residential collection and disposal rates, landfill fees and any other miscellaneous fees or charges deemed appropriate and necessary.")

Clearly, both state and municipal laws require that any payment obligation imposed upon municipal ratepayers for water, wastewater and solid waste disposal services be established or changed by resolution. The Court agrees with Plaintiffs' argument that these laws preclude the City from using SIA provisions as a separate basis to impose payment obligations upon ratepayers. As Plaintiffs suggest if it were any other way, a municipality could circumvent its statutory obligations to hold noticed, public rate hearings by inserting into SIAs whatever demands for utility payments the municipality desires.

The City's argument that the SIA created a contractual obligation to pay "franchise fees" is contradicted by the manner in which the City billed its ratepayers in accordance with City's resolutions and not SIA contractual provisions. When the City first imposed "franchise fees" in 1992, it did so by enacting Resolution 92-16531, which "applied across-the-board to all water/wastewater rates, fees, and charges." Brief, Ex. C (Bohlman Aff., Ex. P). None of the resolutions adopted by the City distinguished between subdivision and non-subdivision ratepayers. The City has never attempted to identify which of its ratepayers reside in properties subject to SIAs and which ones do not. Br., Ex. G, p. 9.

"A law established for a public reason cannot be contravened by a private agreement." Section 1-3-204, MCA. Section 7-5-4301(1), MCA provides "[A] city or town is authorized to make any contracts necessary to carry into effect the applicable powers granted by this chapter and to provide for the manner of executing the contracts." In this case, the Court has concluded that the "franchise fees" were illegal sales taxes under § 7-1-112(1), MCA. As this Court has reasoned, according to that statute, the City did not have the authority to impose the "franchise fees." Section 7-1-112(1), MCA was adopted for a public reason, i.e., to prevent a local government with self-government powers to impose a tax on the sale of goods or services. In the SIA, the City required the payment of 4% "franchise fees," which were established by Resolution 92-16531 and subsequent resolutions. Consequently, § 7-1-112(1), MCA could not be contravened by the SIA, which was a private agreement between the City and developer. In other words, the "franchise fees" could not become legal merely because they were included in the SIA.

Compelling undisputed evidence of this conclusion is that the City ignored the "franchise fee" provisions in the SIA when it was inconvenient. For example, the SIA applicable to Plaintiffs' residence contains a provision stating that "All fees paid to the Public Utilities Department are subject to a 4 percent franchise fee." Ct. Doc. 47 at 6. Yet since 2004, the City has relied on its resolutions to charge Plaintiffs and all other SIA ratepayers (and all non-SIA ratepayers) a five percent franchise fee for solid waste disposal. Brief, Ex. D, ¶ 7.

Further evidence of the SIA "franchise fee" provisions contravening the law prohibiting taxes on sales of goods and services is that the City has never delegated water, wastewater and solid waste disposal services to a franchise. Ct. Doc. 7, ¶ 4-5; Ct. Doc. 47 at 2, Br., Ex. A, 67:7-14. There was never a "franchise" serving these ratepayers and thus no transaction from which a "franchise fee" could be applied.

The City also argues that "franchise fees" were not taxes because they were contractually obligated gross revenue fees for the sale of goods under Montana's Uniform Commercial Code ("UCC"), Title 30, MCA. The City contends that because water is a "good" under the UCC the sale of water is governed by the UCC. Without dispensing with all of the ramifications of that contention in the disposition of the legal issues involved in this Motion, the Court finds that the UCC does not displace the issue of whether the "franchise fees" are an illegal sales tax. The UCC does not create a genuine issue of a material fact to preclude partial summary judgment.

The City contends that because ratemaking is a legislative function the Court should not intrude in that function except in limited circumstances. Opposition, p. 8-9. The City also maintains that the cost of water, wastewater and solid waste disposal services and the "franchise fees" were established within the City's legislative function. Because the City is a self-governing power, its legislative powers "are to be liberally construed and all reasonable doubts" regarding the existence of its power are to be resolved in favor of finding that the power exists." Section 7-1-106, MCA; *Lechner,* 244 Mont. at 200, 797 P.2d 197. Where a local government adopts a self-government charter, "the assumption is that local government possesses [any] power" not "specifically denied" by Montana law. *American Cancer Society v. State,* 2004 MT 376 ¶ 9, 325 Mont. 70, 103 P.3d 1085. "To maintain the presumption that the locality retains all powers the Legislature does not prohibit, the Legislature must expressly – and not impliedly – delineate those prohibitions." *Id.,* "The only way the doctrine of pre-emption by the state can co-exist with self-government powers of a municipality is if there is an express prohibition by statute which forbids local governments with self-government powers from acting in a certain area." *D & F Sanitiation Serv. v. City of Billings*, 219 Mont. 437, 445, 713 P.2d 977, 982 (1986).

The City phrased the core issue before the Court to be whether the City acted within its Constitutional and statutory authority when it included the "franchise fees" as part of the cost of municipal services. The City urges the Court to refrain from substituting its judgment for that of the City when it comes to setting the propriate rates and charges for utility service. Opposition, p. 10. The City also asserts that the Court's review is limited to whether the "franchise fees" were just and reasonable under § 69-7-101, MCA. The Court disagrees with the City. The core issues before the Court are whether the "franchise fees" were illegal sales taxes, whether § 7-1-112(1), MCA, preempted the City from imposing the "franchise fees" and whether the City could impose the illegal "franchise fees" in an SIA. By its decision the Court is not substituting its judgment for that of the City in its ratemaking activity but is enforcing the prohibition enunciated in § 7-1-112(1), MCA, to preclude the City from imposing illegal sales taxes on goods and services provided to its customer.

The "franchise fee" provisions in the Plaintiffs' SIA are unlawful.

For all of the foregoing reasons, the Court renders the following Decision.

DECISION

Plaintiffs have demonstrated that there is no genuine issue as to any material fact and that Plaintiffs are entitled to judgment as a matter of law. The City has failed to establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that Plaintiffs are not entitled to prevail under the applicable law. Therefore, Plaintiffs are entitled to partial summary judgment on the issue of the illegality of the "franchise fees" as included in the SIA.

The "franchise fees" created by Resolution 92-16531 were illegal sales taxes under the provisions of § 7-1-112(1), MCA. Inclusion of the illegal "franchise fees" in the SIA did not

transform their illegality to legal fees. This conclusion is not moot merely because the City repealed the "franchise fees" and ceased collecting the "franchise fees." The copies of the SIA presented to this Court in consideration of the issues in this Motion show that provisions for payment of "franchise fees" in the SIA continue to exist.

Plaintiffs are entitled to partial summary judgment under Count I of its Complaint on the illegality of the "franchise fees" in the SIA. As requested in their Complaint, Plaintiffs are entitled to a partial summary judgment providing for (1) a declaration that the "franchise fees" are unlawful; (2) a declaration that any provisions in the SIA relating to Plaintiff's property and purporting to obligate Plaintiffs to the SIA is an illegal sales tax and unenforceable; and (3) an injunction prohibiting the City from imposing these taxes in the future on Plaintiffs.

ORDER

IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Partial Summary Judgment Regarding the Legality of City Ordinances and SIA Provisions Imposing "Franchise-Fees" is **GRANTED.**

2. On or before January 18, 2022, Plaintiffs' counsel shall prepare a Proposed Partial Summary Judgment on Count I of their Complaint consistent with this Decision and Order and the relief requested by Plaintiffs and submit it to the Court in Word format directly to the Court at its personal email for the Court's consideration for issuance by the Court. Counsel shall file the original Proposed Partial Summary Judgment with the Clerk of the District Court and provide a copy to the City's counsel.

Dated January 5, 2022.

Mike Salvagni

Hon. Mike Salvagni
Presiding Judge

cc: Matthew G Monforton
Doug James
Bryce Burke

MONTANA, THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

Gary McDaniel, et al.	)	Case No. DV 19-1444
Plaintiffs,	)	
	)	Judge Michael Salvagni
Vs.	)	
City of Billings,	)	CERTIFICATE OF SERVICE
Defendant.	)	

On this 5th day of January 2022, the Clerk of District Court certifies that a true and correct copy of the Decision and Order Re: Plaintiff's Motion for Partial Summary Judgment Regarding the Legality of City Ordinances and SIA Provisions Imposing "Franchise-Fees" (Count 1) under seal was mailed, first class, postage paid, to the following parties:

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THIRTEENTH JUDICIAL DISTRICT COURT · YELLOWSTONE COUNTY · SEAL · MONTANA

TERRY HALPIN

By