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IN THE COMMON PLEAS COURT OF LUCAS COUNTY, OHIO

CITY OF TOLEDO,	*	Case No. G-4801-CI-0202102276-000
	*	
Plaintiff,	*	Judge MICHAEL R GOULDING
	*	
-vs-	*	**MEMORANDUM IN SUPPORT OF**
	*	**MOTION TO DISMISS**
BLOCK COMMUNICATIONS, INC.,	*	
	*	Peter R. Silverman (0001579)
Defendant.	*	Matthew T. Kemp (0093136)
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Block Communications, Inc. ("Buckeye")[1] respectfully submits this Memorandum in support of its Motion to Dismiss.

I. INTRODUCTION

A year ago, the City of Toledo and Buckeye were on the same page: the City was responsible for the costs of moving Buckeye's fiber-optic cable lines along Summit Street, as part of the City's project to revitalize and beautify Summit Street for the Solheim Cup. The City proceeded with the project and paid its contractor to do the relocation. Now, the City has reversed course and seeks to hold Buckeye liable for the relocation costs.

It is too late. The City cannot turn back the clock. Because the project is already complete and the funds spent, this controversy is moot. And even if it were not moot, the law does not authorize the City to seek reimbursement for a relocation project already completed. In addition, the City's unjust enrichment claim fails as a matter of law, because the City did not confer any benefit on Buckeye, and Buckeye explicitly rejected the "implied contract" the City seeks to enforce through its unjust enrichment claim.

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[1] The City named as the sole defendant "Block Communications, Inc. d/b/a Buckeye Broadband and Buckeye Cablesystem." Block Communications, Inc., however, is not a proper defendant, because the fiber-optic lines at issue are owned by Buckeye Cablevision, Inc., a separate subsidiary of Block Communications. By filing this Motion to Dismiss, Block Communications Inc. does not waive any arguments with respect to the proper parties in this litigation. This issue, however, need not detain the Court at this juncture, because the case should be dismissed on the substantive grounds discussed in this Memorandum, regardless of which corporate entity is the named defendant.

Finally, even setting aside the fatal flaws in the City's causes of action, the City's claim that Buckeye is responsible for the relocation costs is wrong on the merits. The Complaint's allegations make clear that the Summit Street project was grounded in the City's desire to spur economic development and tourism, not in any urgent public necessity. Accordingly, Ohio law classifies the Summit Street project as proprietary in nature, not governmental. Under Ohio law, the City must bear the relocation costs for such proprietary projects.

In sum, the City's claims fail as a matter of law, and this case must be dismissed.

II. BACKGROUND[2]

The City was selected as the site of the Solheim Cup, a major LPGA event scheduled for September 2021. (Compl. ¶ 3.) According to the City's Complaint, the tournament "is expected to generate many events and related public visitation in and around the downtown area of the City." (*Id.*) In preparation, the City "embarked on a wide variety of public improvement projects under the authority of City Ordinance 180-20 and referred to as the Summit Street Roadway Improvements Project[.]" (*Id.* at ¶ 4.) "These improvements included but were not limited to streetscape, public art, infrastructure, waterline elements, and substructure of the street." (*Id.*)

[2] For purposes of this Motion to Dismiss only, Buckeye accepts as true the facts in the Complaint. This statement of facts is taken from the City's Complaint.

In connection with this project, "the City asked Buckeye [which owned fiber-optic lines along Summit Street], along with the other utilities, to relocate and change the position of certain of their facilities located within the City's right of way." (*Id.* at ¶ 5.) Buckeye declined to do so, citing to Toledo Municipal Code §945.10(b)(4). (*Id.* at ¶ 6-7.) Section 945.10(b)(4) (as characterized by the City) "states that the owner of facilities such as Buckeye need not bear the cost of relocation or change of its facilities within the City right of way if such action is being undertaken for '…a non-transportation related aesthetic improvement.'" (*Id.* at ¶ 7.)

The City accepted Buckeye's legal position, "elect[ing] in good faith based upon the language of Toledo Municipal Code 945.10(b)(4), Ohio Law, and City Ordinance 180-20, to bear the Buckeye relocation costs at that time." (*Id.* at ¶ 9.)[3] The City proceeded to pay its general contractor to relocate Buckeye's lines. (*Id.*)

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[3] Though the City's Complaint fails to mention it, City Law Director Dale Emch issued a legal decision that Buckeye was not required to pay for the relocation, because the project was for aesthetic purposes. Mr. Emch was quoted in the Toledo Blade: "I made the legal decision pursuant to Toledo Municipal Code 945.10(b)(4) that the city should bear the utility relocation cost for this aesthetic improvement to Summit Street[.]" (See https://www.toledoblade.com/local/city/2021/05/06/toledo-summit-street-improvement-project-under-fbi-scrutiny/stories/20210501051.)

Mr. Emch's conclusion was obviously correct in light of the many statements from public officials regarding the aesthetic nature of the project. For example, Mayor Kapszukiewicz stated:

> "There are probably half a dozen major public projects with public dollars and public investment that are all planned with the specific deadline of summer 2021. We are putting our best foot forward. Downtown is in a lot better place than it was 10 years ago, that's for sure. It's in a lot better place than it was five years ago. But

A year later, the City reversed course and filed this suit, apparently prompted by "certain City officials subsequently question[ing] the City having incurred" the relocation costs. (*Id.* at ¶ 10.)

III. ARGUMENT

A. Legal Standard

1. Lack of subject matter jurisdiction under Rule 12(B)(1) due to mootness.

Civil Rule 12(B)(1) provides for dismissal of actions for "lack of jurisdiction over the subject matter." Courts of common pleas' jurisdiction is limited to "justiciable matters." *Morrison v. Steiner*, 32 Ohio St.2d 86, 290 N.E.2d 841 (1972). "'If what were once justiciable matters have been resolved to the point where they become moot, the courts of common pleas no longer have subject matter jurisdiction to hear the case.'" *Graham v. City of Lakewood*, 2018-Ohio-1850, ¶ 23, 113 N.E.3d 44, 52 (quoting *Hirsch v. TRW, Inc.*, 8th Dist. Cuyahoga No. 83204, 2004-Ohio-1125, 2004 WL 444552, ¶ 11).

> we are going to make sure that two years from now when the Solheim Cup is taking place, we take it up another notch.
>
> * * * *
>
> We believe it will make that part of Summit Street more welcoming. It will have a European feel. It's going to aid retail."

(See https://www.toledoblade.com/local/2019/09/13/solheim-cup-will-boost-local-economy/stories/20190910006.) The City's Complaint also fails to mention that the genesis of the Summit Street project was a development agreement between ProMedica Health System and the City. A primary driver of the project has been ProMedica's desire to improve the aesthetics of its downtown headquarters. In deciding this Motion to dismiss, the Court need not consider these statements from City officials or ProMedica's role. But it is notable that the City's Complaint is entirely at odds with its publicly stated legal position from last year.

2. Failure to state a claim under Rule 12(B)(6).

A motion under Rule 12(B)(6) to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the Complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. Of Commrs*., 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). It is well settled that when a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the non-moving party. *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991). However, while the factual allegations of the complaint are taken as true, the same cannot be said about unsupported conclusions; "[u]nsupported conclusions of a complaint are not considered admitted…and are not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 324, 544 N.E.2d 639 (1989).

B. Count I (Declaratory Judgment) must be dismissed (i) for mootness and (ii) because the statutes the City relies on do not authorize the relief it seeks.

The City's declaratory judgment claim must be dismissed for two separate and independent reasons. First, the claim is moot, as the cable relocation project at issue has already occurred, and the City has already expended the funds. Under the local and state code provisions that underlie the declaratory judgment claim, the City was required to pursue its remedies against Buckeye prior to completing and paying for the work. With this action, the City seeks to turn back the clock and reverse its prior deliberate decision,

but the mootness doctrine prevents the City from resurrecting a controversy that has already been resolved.

Second, even if the claim is not moot, the local and state code provisions at issue do not authorize the relief that the City seeks. The code provisions are *prospective only*; they do not allow the City to look back and seek reimbursement for projects already completed and paid for. Thus, the City has no legal authority to seek reimbursement for the costs of relocating Buckeye's lines.

1. The City's request for a declaration of rights under Toledo Municipal Code § 945.10(a) and Ohio Rev. Code § 4939.08 is moot.

Issues are moot:

> when they are or have become fictitious, colorable, hypothetical, academic or dead. The distinguishing characteristic of such issues is that they involve no actual genuine, live controversy, the decision of which can definitely affect existing legal relations. * * * A moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then-existing controversy.

State ex rel. Cincinnati Enquirer v. Hunter, 2014-Ohio-5457, ¶¶ 3-4, 141 Ohio St. 3d 419, 420, 24 N.E.3d 1170, 1171 (internal quotations omitted).

The Tenth District's decision in *Swan Super Cleaners, Inc. v. Franklin Cty Bd of Comm'rs*, 10th Dist. Franklin, 2017-Ohio-8978, 101 N.E.3d 591, illustrates these mootness principles. *Swan* involved an unsuccessful bidder's challenge to a county's award of a cleaning contract. The court dismissed the case as moot, because the contract had already been awarded and the winning bidder was starting to perform. *Id.*, ¶ 18. The court noted that the plaintiff had failed to obtain any injunction that might have preserved available remedies. *Id.*; *see also Garverick v. Hoffman*, 23 Ohio St.2d 74, 81, 262 N.E.2d 695 (1970) (holding that the adoption of a city ordinance accepting annexation rendered moot a case seeking to enjoin the annexation); *State ex rel. Bd of Trustees v. Davis*, 2 Ohio St. 3d 108, 111, 443 N.E.2d 166 (1982) (absent an injunction or order staying further action, the adoption by city council of an ordinance accepting annexation renders moot a case seeking to enjoin annexation). In all of these decisions, a key factor in the mootness analysis was whether the challenging party "failed to take advantage of available remedies[.]" *Swan*, ¶ 19.

Here, the City postures its declaratory judgment claim as a current dispute regarding whether Buckeye should reimburse the City. But "[t]o determine the nature" of a declaratory judgment action, the Court "must examine the substance of [the] arguments and the type of relief requested." *Mobley v. O'Donnell*, 10th Dist. Franklin No. 19AP-440, 2020-Ohio-469, ¶ 16, 2020 WL 703690. And in substance, it is clear that the Complaint asks the Court to travel back in time to reverse a decision that the City made

a year ago. The Complaint acknowledges that it has already "paid its general contractor to accomplish the movement of Buckeye's facilities[.]" (Compl. ¶ 9.) Thus, the action that is the subject of the supposed controversy has already occurred. And the code provisions on which the City's declaratory judgment claim is based do not allow this Court to revisit that controversy, as they are all prospective in nature, i.e., they allow the City only to compel owners of right-of-way facilities to undertake certain projects. They do not allow the City to revisit financial responsibility for those projects after the fact.

Specifically, Toledo Municipal Code §945.10(a) provides: "Every owner or operator of facilities located in the right of way or on public property shall, at its own expense, temporarily or permanently remove, relocate, change, support, hold or alter the position of any facility when the City shall have determined that such removal, relocation, change, support, holding or alteration is reasonably necessary [under certain specified conditions]." (Subsection 945.10(b) – addressed in more detail below – describes certain circumstances in which the City must bear the cost of relocation).

Under the plain language of 945.10(a), the City *could* have attempted to enforce what it believed were its rights under 945.10(a) by seeking a court order compelling Buckeye to perform the work. Or it could have sought an agreement with Buckeye whereby one of the parties would have held the disputed funds in escrow pending a court resolution under Section 945.10(a). *See, e.g.*, *Duke Energy Ohio, Inc. v. City of Cincinnati*, 1st Dist. Hamilton, 2015-Ohio-4844, ¶ 10, 50 N.E.3d 1018 (utility company and city agreed

that funds would be held in escrow pending a judicial resolution of responsibility for relocation costs). The City did neither. It deliberately chose to proceed under 945.10(b)(4), expended the funds, and proceeded with its project. Section 945.10(a) does not allow the City to come back after the fact and claim that Buckeye should have been financially responsible for relocation costs all along.

In sum, this dispute is moot because the City failed to enforce its remedies under Section 945.10(a) at the only time that enforcement could possibly occur – prior to the project. Instead, the City deliberately decided to proceed with and pay for the project itself under 945.10(b). This is a fake controversy, contrived after-the-fact in response to political pressure, as the City's Complaint all but admits: "After the movement of the Buckeye facilities, certain City officials subsequently questioned the City having incurred the related costs." (Compl. ¶ 10.) The City cannot create a case or controversy by asking the Court to reverse the City's own deliberate decision. The work is done; the funds spent. Under Section 945.10(a), that is the end of the story.[4]

Because this Court does not have the power to resurrect the controversy, it must dismiss the City's declaratory judgment claim as moot.

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[4] The analysis is the same under Ohio Rev. Code § 4939.08, which allows a municipality only to compel action; it does not provide for reimbursement after the fact.

2. Even if the City could create a live controversy, no provision of state or municipal law authorizes the City to later recover funds that it voluntarily expended in moving utility lines.

In this suit, the City asserts the authority to recover from a private party funds that it voluntarily expended in moving utility lines – expenditures made pursuant to a valid City Council ordinance and a valid contract with its own third-party contractor. To support this extraordinary claim, the City cites two provisions of the Toledo Municipal Code – sections 945.10(a) and 945.21 – and one provision of state law – Ohio Rev. Code §4939.08. But the City's claim is contrary to the plain language of these provisions, which do not come close to authorizing the City to recover already-expended funds from a private party.

a. Toledo Municipal Code §945.10(a) authorizes the City only to compel utility owners to relocate lines in certain circumstances; it does *not* authorize the City to perform the work, expend the funds, and then seek reimbursement after the fact.

The purpose of Chapter 945 of the Toledo Municipal Code "is to manage and control reasonable access to the public right of way[.]" Toledo Mun. Code §945.01. The chapter governs how utilities and other permit holders can use the City's public right of way for their wires, pipes, cables, and similar "facilities." See Toledo Mun. Code §945.02(f). Section 945.10(a), one of the provisions relied on by the City, provides that the City may require an owner of facilities, at the owner's expense, to relocate its facilities under certain conditions – for example, when there is a "need to construct, repair,

maintain, improve or use the right of way." Toledo Mun. Code § 945.10(a)(1). Subsection (b) then describes situations in which the City must compensate a permit holder for requiring it to relocate its facilities, including when the relocation is for a "non-transportation related aesthetic improvement." [5]

The City admits in its Complaint that it chose to proceed under subsection (b)(4) and to pay for the relocation of Buckeye's lines. (Compl. ¶ 9.) The City now claims that it has the right to recoup those costs under subsection (a). But no part of Section 945.10

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[5] Toledo Municipal Code § 945.10, subsections (a) and (b), provide in full:

> (a) Every owner or operator of facilities located in the right of way or on public property shall, at its own expense, temporarily or permanently remove, relocate, change, support, hold or alter the position of any facility when the City shall have determined that such removal, relocation, change, support, holding or alteration is reasonably necessary for any one of the following reasons:
>
> (1) the need to construct, repair, maintain, improve or use the right of way or public property;
>
> (2) the need to locate, construct, replace, maintain, improve or use any other City property;
>
> (3) the efficient performance of City operations.
>
> (b) No permit holder shall, without reasonable compensation, be required by the City to:
>
> (1) relocate its existing aerial facilities underground;
>
> (2) relocate, change, support, hold or alter the position of any facility for the benefit of a third party unless that party is performing services in the right of way on behalf of the City or installing facilities that will be owned by the City;
>
> (3) relocate, change, support, hold or alter the position of any facility for the benefit of a municipal utility providing the same service as and competing for customers with any permit holder;
>
> (4) relocate, change, support, hold or alter the position of any facility for a non-transportation related aesthetic improvement.

provides that the City may undertake a relocation on its own and then later seek compensation from the owner of the facilities. The statute is wholly prospective. That is, the City has the power to compel an owner to relocate facilities at the owner's expense under subsection (a), assuming the project meets the conditions for that subsection. The code allows the City to compel *action* at the time the City determines such action is necessary; it does not allow the City to go back to compel *reimbursement*. Thus, the plain language of Section 945.10(a) is directly contrary to the City's claim that it can recoup funds from Buckeye after the fact.

Caselaw confirms this result. In *Nibco Inc. v. City of Lebanon*, the Sixth Circuit Court of Appeals addressed whether the City of Lebanon could recover from an electric utility customer a $1.27 million undercharge that was the result of a clerical error by a city employee. 680 F. App'x 428, 429 (6th Cir. 2017). The court examined the plain language of the section of city code that authorized recovery of utility charges in certain circumstances. *Id.* at 431-32. The code provided for full recovery of unpaid utility charges in cases of theft of service and limited recovery in cases of meter malfunction. *Id.* at 431. The code did not, however, give the City authority to recover utility charges in other types of cases, including the case of clerical error. *Id.* at 431-32. The court held that the code section was unambiguous, and that it did *not* give the City authority to justify its backbilling: "The City's puzzling request to 'void' its own legislative 'silence' is, at

bottom, a thinly veiled plea that the federal judiciary rewrite its Code of Ordinances to provide a remedy that did not exist at the time of its errors." *Id.* (internal quote omitted.)

Here, the City's lack of authority to seek repayment under 945.10(a) is even more obvious than the result in *Nibco*. The city's position in *Nibco* was based on an honest clerical error; by contrast, the City in this case is attempting to reverse a deliberate policy choice to pay for the relocation of Buckeye's lines. Section 945.10(a) simply does not give the City the power to seek repayment of already-expended funds, and the City's claim under Section 945.10(a) must be dismissed as a matter of law.

In addition to the plain language of the statute, public policy supports this result. A municipality's public projects – which often involve significant amounts of public and private money – must be undertaken in a predictable process and in conformity with local and state law. Contractors, utilities, and the public all depend on adherence to defined procedures. A city cannot willy-nilly change its mind about which parties will be responsible for certain costs, especially after the work has already been performed; few contractors or private partners would be willing to participate in municipal projects under these conditions. The City cannot, for example, determine years after completing a public project that the project should actually be paid for by a special assessment on select private property owners. State and municipal law provide a *defined process* for special assessments. *See generally* Toledo Municipal Code Chapter 194. The same is true here. The City is attempting in this suit to hold a private party liable for costs that the

City voluntarily incurred, after the project has already occurred. The City's own Code prohibits this result, and rightly so.

b. Toledo Municipal Code §945.21 does not allow the City to seek reimbursement for funds already expended.

The City's argument under Toledo Municipal Code Section 945.21 fares no better. Section 945.21 is titled "Non-enforcement and waivers by the city." It provides that "[t]he permit holder shall not be relieved of its obligations to comply with any of the provisions of this chapter or of its right of way permit by reason of the City's failure to enforce prompt compliance." On its face, this provision is plainly intended to eliminate waiver or estoppel arguments by permit holders if the City is tardy in enforcing compliance with right-of-way regulations. So, for example, if Buckeye had failed to maintain its lines in accordance with its permits or the City code, the City could rely on Section 945.21 to enforce compliance at any time – even years after the problem had started.

Here, however, the City does not even allege that Buckeye failed to comply with any permit terms or with any provision of Chapter 945. Thus, Section 945.21 does not apply.

Further, Section 945.21 cannot be stretched to argue that Buckeye failed to comply with Section 945.10(a) by not relocating its lines at its own expense. The City admits in its Complaint that it intentionally decided to proceed under 945.10(b)(4) and to pay for the relocation itself – a decision that Buckeye fully agreed with at the time. That is a fact the Court can and must accept in ruling on this Motion to Dismiss. It was not as if the

City ignored Buckeye's position and is just now getting around to enforcement. The City *accepted* Buckeye's position and paid for the relocation. Thus, there is nothing for the City to enforce under Section 945.21.

In sum, Section 945.21 does not apply here, and it certainly does not authorize the City to obtain reimbursement for relocation expenses that it voluntarily paid.

c. Ohio Rev. Code §4939.08 does not allow the City to seek reimbursement for funds already expended.

The City's Complaint also cites Ohio Rev. Code §4939.08 as support for its position. But – like the Municipal Code sections discussed above – this statute does not apply here. Section 4939.08 states:

> If requested by a municipal corporation, in order to accomplish construction and maintenance activities directly related to improvements for the health, safety, and welfare of the public, an operator shall relocate or adjust its facilities within the public way at no cost to the municipal corporation, as long as such request similarly binds all users in or on such public way. Such relocation or adjustment shall be completed in accordance with local law.

This language is similar to that of Toledo Municipal Code 945.10(a), in that it authorizes a municipality only to compel an operator to relocate its facilities, *not* to seek reimbursement for work already performed, and especially when that work was performed with both parties in agreement about which party would bear the cost of the project. Thus, for the reasons explained above with respect to Toledo Municipal Code 945.10(a), the City cannot rely on Section 4939.08 to support its claim. Moreover, Section 4939.08 explicitly says that any such relocation "shall be completed in accordance with

local law." Thus, because "local law," i.e., the City's own Municipal Code, does not allow the City to recoup relocation expenses, it necessarily follows that Section 4939.08 does not authorize it either.

Thus, none of the local or state code provisions cited by the City support its claim for reimbursement, and the Court therefore must dismiss the Declaratory Judgment claim (Count I).

C. Count II (Unjust Enrichment) Claim must be dismissed for failure to state a claim.

"A cause of action for unjust enrichment arises from a contract implied in law or quasi-contract." *Longmire v. Danaci*, 10th Dist. No. 19AP-770, 2020-Ohio-3704, 155 N.E.3d 1014, ¶ 32. "[U]njust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another." *Hummel v. Hummel*, 133 Ohio St. 520, 528, 14 N.E.2d 923 (1938). To survive a motion to dismiss on this claim, the plaintiff must show "(1) the defendant received a benefit; (2) the defendant possessed an appreciation or knowledge of that benefit; and (3) the benefit was received under circumstances that would make it unjust for the defendant to retain the same without paying for it." *OBLH, L.L.C. v. O'Brien*, 11th Dist. Trumbull No. 2013-T-0111, 2015-Ohio-1208, ¶ 26.

Here, the City's unjust enrichment claim fails for four separate reasons. First, "the doctrine of unjust enrichment does not apply to a municipal corporation." 21 Ohio Jur. 3d Counties, Etc. § 81; *see also Aquatic Renovations Sys., Inc. v. Vill. of Walbridge*, 2018-Ohio-

1430, ¶ 46-51, 110 N.E.3d 877, 886 (6th Dist.); *City of Cuyahoga Falls v. Ashcraft*, 9th Dist. Summit No. 15129, 1991 WL 284188, *4. The reason for this rule is that the theory of unjust enrichment, like other forms of quasi-contract, "does not adhere to the formalities required to form a binding contract with a municipality." *Aquatic Systems*, ¶ 46. "If the manner in which the legislative authority and power to contract of a municipal corporation can be exercised is expressly prescribed, such prescribed manner is mandatory and exclusive." *Aquatic Systems*, ¶ 48 (quoting *Bryan v. Village of Swanton*, 6th Dist. Fulton No. F–76–4, 1976 WL 188442, * 4 (Nov. 2, 1976)). While cases in this area typically deal with attempts to enforce unjust enrichment claims *against* a municipality, the reasoning underlying these decisions applies with equal force to unjust enrichment claims *by* municipalities. A municipality should not be able to hold private parties liable for the costs of public projects based on the hazy equitable principle of unjust enrichment.

Second, there was no benefit conferred on Buckeye. Buckeye had fiber-optic cable lines serving its customers before the project, and it has fiber-optic cable lines serving its customers after the project. Buckeye's lines have been moved, but that was a benefit to the *City* as it pursued its Summit Street project, not to Buckeye. The Summit Street project was, as the Complaint admits, the City's idea. (Compl.¶ 3-5.) The Complaint simply fails to allege that the Summit Street project had any positive affect on or benefit to Buckeye. Indeed, the Complaint's allegations definitely demonstrate that it was *not* the case.

Third, the City's unjust enrichment claim fails because Buckeye did not passively accept an alleged benefit while the City pursued the Summit Street project. As the Complaint acknowledges, Buckeye and the City actively discussed the financial responsibility for moving Buckeye's lines, and "no agreement" was reached. The theory behind unjust enrichment is "quasi-contract" or "implied contract," but Buckeye *specifically rejected* any sort of implied contract. To use a hornbook analogy: a party may be liable on an unjust enrichment theory if he watches someone else mow his lawn (without an explicit agreement to do so), because there is an implied expectation that the mower will receive reasonable compensation. But here, the situation is that the parties actually discussed whether the mower would be paid, and the owner (Buckeye) said "You can mow the lawn if you really want to, but I'm not going to pay you." In these circumstances, there can be no implied contract or quasi-contract, and there is nothing unjust about the City's choice to pay for the cable relocation project.

Fourth, the City cannot satisfy the final element of an unjust enrichment claim: that it would be unjust for Buckeye to retain the benefit. As noted, Buckeye received no benefit here, but if one could be conceived, there is nothing unjust about the City retaining responsibility for the cable relocation *when that was the decision the City made*. As the City's Complaint makes clear, the parties actively discussed who would be responsible for the costs, and the City represented to the public and to Buckeye that the City would be. In pleading unjust enrichment, the City has invoked an equitable doctrine, and here, the

equitable concept of honest and fair dealing with another party bars the City from doing an about-face and holding Buckeye liable.

For these reasons, the unjust enrichment claim must be dismissed.

D. The City's Complaint establishes that the Summit Street project was proprietary in nature, not governmental, and Ohio law requires the City to pay for utility relocations for proprietary projects.

There is a separate and over-arching reason for dismissing the City's claims: Ohio law requires the City to pay for utility relocations in connection with *proprietary* projects, and the City's own allegations establish that the Summit Street project was proprietary. (The Court need not reach this issue to dismiss the Complaint in its entirety, as the foregoing arguments already require dismissal, but it is an additional reason for dismissal.)

It is a longstanding premise of Ohio law that "a municipality cannot require public utilities using public streets to relocate their facilities at their own expense to accommodate the municipality's proprietary functions." *State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 177-178 (1955).[6] In *Speeth*, the Ohio Supreme Court upheld the authority of the Cuyahoga Board of Commissioners to construct a subway under the public streets,

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[6] Although Ohio law does not classify cable companies as "public utilities," their facilities are treated in the same fashion as those of regulated public utilities when occupying the public right-of-way. See, e.g., Toledo Mun. Code §945.01(b). Also, Toledo's own Municipal Code echoes Ohio's common law rule, relieving utilities and other owners from the financial responsibility for relocating facilities when such relocation is the result of "a non-transportation related aesthetic improvement." Toledo Mun. Code §945.10(b)(4).

and in the course of the opinion also upheld the Board's authority to expend public funds to relocate the existing, privately owned utility lines. The Supreme Court explained:

> [I]f the county is authorized to build the subway under the subway act, the county, acting in a proprietary capacity, must assume and pay whatever damage, if any, is done thereby to other property in the process of such construction, and if that payment does not exceed the reasonable cost of rearranging, relocating or reconstructing such property, the county will only have paid its just debt and will not have made any loan of public credit to or in aid of a company, corporation, or association.
>
> The general rule recognized by the courts throughout the country is that in the absence of contract to that effect there is no power in a governmental subdivision to require public utilities using public streets to relocate their facilities at their own expense to accommodate the proprietary utility operations of such subdivision. A governmental subdivision in the exercise of its proprietary functions is in the same position as a private utility attempting to force such relocation. *City of Cincinnati v. Cincinnati & Suburban Bell Telephone Co.,* 123 Ohio St. 174, 174 N.E. 586; *City of Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32, 40 S.Ct. 76, 64 L.Ed. 121; *Milwaukee Electric Railway & Light Co. v. City of Milwaukee*, 209 Wis. 656, 245 N.W. 856; *In re Gillen Place*, 304 N.Y. 215, 106 N.E. 897; *City of New York v. New York Telephone Co.,* 278 N.Y. 9, 14 N.E.2d 831, and cases cited. In line with this doctrine, this court has held that the operation of a governmentally owned transit system is a proprietary and not a governmental function. *Cleveland Ry. Co. v. Village of North Olmsted*, 130 Ohio St. 144, 198

> N.E. 41, 101 A.L.R.426; *Zangerle v. City of Cleveland,* 145 Ohio St. 347, 61 N.E.2d 720; and *City of Shaker Heights v. Zangerle*, 148 Ohio St. 361, 74 N.E.2d 318.

Id. The distinction between governmental and proprietary functions is a long-standing one under Ohio law. A 1927 decision of the Ohio Supreme Court distinguished these functions as follows:

> In performing those duties which are imposed upon the state as obligations of sovereignty, such as protection from crime, or fires, or contagion, or preserving the peace and health of citizens and protecting their property, it is settled that the function is governmental[.]
>
> * * * *
>
> If, on the other hand, there is no obligation on the part of the municipality to perform them, but it does in fact do so for the comfort and convenience of its citizens, for which the city is directly compensated by levying assessments upon property, or where it is indirectly benefited by growth and prosperity of the city and its inhabitants, and the city has an election whether to do or omit to do those acts, the function is private and proprietary. (Emphasis added).

City of Wooster v. Arbenz, 116 Ohio St. 281, 285 (1927).

More recently, in *Duke Energy, Ohio, Inc. v. City of Cincinnati*, 2015-Ohio-4844, 50 N.E.3d 1018 (1st Dist.), *appeal not accepted*, 2016-Ohio-2807, the First District Court of Appeals found that the City of Cincinnati, not Duke Energy, was required to pay the cost of relocating Duke's electrical and gas lines to make way for a street railway project. The

City contended that that the streetcar system bore a substantial relation to the public's safety and welfare, because it was a public improvement project that would supplement existing transportation services. *Id.* ¶ 26. The Court rejected this position, concluding that, under the Ohio Supreme Court's controlling opinion in *Speeth*, the streetcar system was a proprietary operation of the City, and the City could not require Duke to bear its own expenses for relocation. *Id.* at ¶¶ 33-38.

Courts around the country have reached similar conclusions. *See, e.g., City of Albuquerque v. New Mexico Public Regulation Com'n*, 79 P.3d 297 (N.M. 2003) ("The fundamental common-law right applicable to franchises in streets is that the utility company must relocate its facilities in public streets when changes are required by public necessity,'" but if the changes are not necessary, "the municipality must pay the costs.") (quoting *The Law of Municipal Corporations* 34.74.10, at 224-25 (3d ed., rev.1995)); *Rochester Telephone Corp. v. Village of Fairport*, 84 A.D.2d 455, 446 N.Y.S.2d 823 (4th Dep't 1982) (holding that a municipality was liable for costs of aesthetic relocation); *N. States Power Co. v. City of Oakdale*, 588 N.W.2d 534, 542 (Minn.Ct.App.1999) ("We decline the invitation to extend the law with respect to municipal regulation of public utilities [for aesthetic or convenience considerations only], and instead apply the more traditional public interest tests of public health, safety, and general welfare.")

Here, the City's own allegations make clear that the Summit Street project was proprietary in nature. The Summit Street project was motivated by the City's selection

to host the 2021 Solheim Cup, "an internationally recognized LPGA event [which] is expected to generate many events and related public visitation in and around the downtown area of the City." (Compl. ¶ 3). The project is important to "support economic development in the downtown area." (*Id.* ¶ 5.) And the project involves "streetscape, public art, infrastructure, waterline elements, and substructure of the street." (Compl. ¶ 4.)

Streetscape and public art, as well as economic and tourism promotion more generally, are plainly proprietary in nature under Ohio law. *See Speeth*, 163 Ohio St. at 177-78; *Duke Energy*, 2015-Ohio-4844, ¶¶ 31-38. The secondary "waterline" component of the project is also proprietary, as Ohio classifies a municipal water utility as a proprietary function. See *Hill v. City of Urbana*, 79 Ohio St.3d 130 (1997); Ohio Rev. Code 2744.01(G)(2)(c) ("a 'proprietary function' includes, but is not limited to ... the establishment, maintenance, and operation of a utility, including ... a municipal corporation water supply system"). Finally, the Complaint's vague reference to "infrastructure improvements" does not change the character of the project from proprietary to governmental. Every construction project necessarily involves changes to "infrastructure." The question is whether the project is undertaken for proprietary or governmental purposes. And the City's own allegations make clear that the Summit Street project was proprietary in nature. Accordingly, as a matter of law, the City was

responsible for the costs of relocating Buckeye's lines, and its claims to the contrary must be dismissed.

CONCLUSION

For the foregoing reasons, Defendant Block Communications, Inc. respectfully requests that the Court dismiss the City of Toledo's Complaint, with prejudice.

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This is to certify that a copy of the foregoing was served by email this 22nd day of June, 2021, upon:

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