

STATE OF MICHIGAN
IN THE SUPREME COURT

DETROIT ALLIANCE AGAINST THE RAIN
TAX, a voluntary unincorporated association, and
DETROIT IRON AND METAL CO., AMERICAN
IRON & METAL CO., MCNICHOLS SCRAP IRON
& METAL CO., MONIER KHALIL LIVING
TRUST, and BAGLEY PROPERTIES, LLC,
individually, and on behalf of similarly situated
persons,

Plaintiffs-Appellants,

v.

CITY OF DETROIT, a municipal corporation,
the DETROIT WATER AND SEWERAGE
DEPARTMENT, and the DETROIT BOARD OF
WATER COMMISSIONERS,

Defendants-Appellees.

Supreme Court
Case No. _____

Court of Appeals Case
No. 339176

**DAART PLAINTIFFS’
REPLY TO DETROIT’S
ANSWER TO APPLICATION
FOR LEAVE TO APPEAL**

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Individually, and on behalf of all others similarly
situated, and END OF THE ROAD MINISTRIES,
INC., a Michigan Nonprofit Corporation, Individually
and on behalf of all others similarly situated,
Plaintiffs,

Court of Appeals
Case No. 337609

-v-

CITY OF DETROIT, a municipal corporation, by
itself and through its WATER AND SEWAGE
DEPARTMENT, its agent, the DETROIT BOARD
OF WATER COMMISSIONERS and GREAT
LAKES WATER AUTHORITY,
Defendants.

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ARGUMENT

THE CITY’S ANSWER IS UNRESPONSIVE TO DAART’S ARGUMENTS, ADVANCES ARGUMENTS THAT CANNOT BE RECONCILED WITH THE *BOLT* TEST FOR DISTINGUISHING A FEE FROM A TAX, AND, LIKE THE OPINION OF THE COURT BELOW, RELIES ON REASONING IN A CASE THAT WAS REPUDIATED AFTER THIS COURT’S DECISION IN *BOLT*.

As the Court of Appeals and the City did below, the City persists in this Court in conflating the undisputed facts that the City has an obligation under federal law and the orders of the federal court in the City’ now 42-year-old litigation¹ to remedy contamination caused by combined sewer overflows (“CSOs”) and impose the charges necessary to fund that effort with a conclusion that, for these reasons, the City’s Rain Tax *ipso facto* satisfies the *Bolt*² test.

This contention compounds the error of the City’s reliance on the incorrect reasoning of the Court of Appeals below, *i.e.*, that the *Bolt* test poses no obstacle to imposing storm water

¹ *United States, et al. v. City of Detroit, et al.*, Civil Action No. 77–71100 (ED Mich). The case had already been pending for a decade when the undersigned appeared in it and in one of the several appeals it has spawned. See *In re City of Detroit*, 828 F2d 1160 (CA 6, 1987) (City improperly attempted to disqualify and obtain removal of Judge Feikens by seeking a writ of mandamus).

The Orders in *United States v Detroit* have long required the City to exercise its authority to impose drainage fees to enable the City to comply with its regulatory obligations under the Clean Water Act and its NPDES permit to treat the City’s combined sewer overflows. The most recent amendment of the order, which occurred in 2015, after the City emerged from bankruptcy and the GLWA took control of the City’s WWTP, required the City to “continue to exercise its existing authority under the City Charter to assess drainage fees, charges or assessments,” as necessary to fund the efforts required to comply with those requirements. See City’s Answer, p 5, and City Exhibit 6. (Emphasis added).

This, not so incidentally, is the same order of which the City sought *ex parte* modification to support its meritless claim that federal law “preempts” the Headlee Amendment, discussed in the Application. Judge Cox denied the City’s request, deeming it improper. See Application, Ex. 5.

² *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998).

charges whenever (1) a City has combined sewers, and (2) imposes charges that (assertedly) generate no more revenue than necessary to fund the efforts required to eliminate CSOs and satisfy federal regulatory requirements.

The City contends, and the Court below essentially held, that neither *Bolt* nor *Jackson County v City of Jackson*, 302 Mich App 90; 836 NW2d 903 (2013), has any application here, because both Lansing and Jackson imposed their charges to fund the operation (and, in Lansing's case, some of the construction necessary to complete construction of) their separated sewer systems, and thus supposedly neither case involved a charge imposed for a "regulatory purpose" under the first prong of the *Bolt* test.

Clearly, that is not so. As DAART showed in its Application, at pp 30-31, as the Courts noted in both *Bolt* and *Jackson*, both cities acted for a regulatory purpose in imposing their charges. Each city had an obligation to comply with the same federal laws and NPDES permit requirements that obligate the City to correct its CSOs in this case. Lansing and Jackson simply chose a different regulatory solution to CSOs (sewer separation) than the City has chosen here (controlling peak flows in the combined sewer during rain events by constructing retention facilities to store combined sanitary and storm water effluent for gradual release and treatment at the WWTP).

There were two pertinent³ dispositive problems, in both *Bolt* and *Jackson*, that are also present here: First, with regard to the regulatory-purpose-versus-revenue prong of the *Bolt* test,

³ In each case the charge also violated the third prong of the test, that the charge must have an element of voluntariness. The Court below likewise held that the City Rain Tax violated that element of the *Bolt* test.

The element of volition is not at issue here, because the City did not cross-apply for leave to appeal the finding of the Court below that the City's charge does not comply with that prong of the test. Therefore, DAART devotes no further discussion to the volitional element, which the City has briefed in its Answer, p 41, as if it were at issue.

each city imposed the charge *both* to further the regulatory goal served by constructing and operating separated storm sewers, *and* to replace revenues drawn from other sources (thus violating the regulatory versus revenue prong of the *Bolt* test).

The City has done likewise here, replacing a combination of a meter-based drainage charge that applied to all 200,000+ DWSD customers and an impervious area charge to Wayne County for the service rendered in collecting and treating runoff from county owned highways, see *Detroit v Michigan*, 803 F2d 1411 (CA 6 1986), with a charge based solely and exclusively on an “impervious area,” the Rain Tax. This charge applies only to those owners of what the City calls “hardscape,” which admittedly comprises only 40 percent of the City’s total area. City’s Answer, p 15.

Even if the Court accepts, for purposes of determining its validity under the *Bolt* test, the City’s improbable⁴ claim that the Rain Tax is designed to raise only the revenue needed to accomplish the regulatory goal of remedying CSOs, here, as in both *Bolt* and *Jackson*, the Rain Tax clearly fails the second prong of the *Bolt* test.

Rather than basing the Rain Tax on the cost of providing (and the value of) the service it funds to each of those subject to it, the City inarguably violated the *Bolt* test’s second requirement: a “fee” is a payment “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.” 459 Mich at 167. In this case, however, the City admits that it imposed only on the owners of impervious area the entire cost of a regulatory program that remedies a problem caused by the entire City’s storm water discharges.

⁴ See DAART’s Application, pp 32-43, especially the discussion of the significance of the City’s enormous, ad hoc adjustments of the Rain Tax in response to political backlash.

Clearly, as a matter of simple mathematics, the Rain Tax cannot possibly be found to satisfy the second prong of the *Bolt* test: The largest single component of the 40 percent of the City that is impervious “hardscape”⁵ subject to the Rain Tax is the 23,000 acres of City-owned streets that the city has *exempted* from it by classifying City-owned streets as, in effect, sewers. By that simple expedient, the City efficiently transfers to the owners of the remaining 19.5625 square miles of the City (which is a mere 14.1 % of the City ‘s total land area) the entire cost of collecting and treating the storm water runoff from the entire 138.75 square miles of the City’s land area.⁶

Thus, by using “impervious area” as the sole proxy for storm water runoff (rather than using a combination of charges, as it did under the meter-based/impervious area system that was in place before the City substituted the Rain Tax), the City has imposed on the owners of only 14% of the land area of the City of Detroit the cost of treating the storm water runoff of the other 119.1875 square miles of the City’s land area.

Even acknowledging that an impervious surface discharges a greater percentage of the storm water that falls on it to the City ‘s sewers than the 60% of the City’s land area that is pervious, as a matter of undisputed hydrological fact, pervious area also is a source of significant storm water runoff during any rain event, as discussed in DAART’s Application, at 22-23.

Yet under the Rain Tax the owners of the mere 19.5625 impervious square miles of the City are required to pay for the treatment of all storm water runoff from the 86% of the City that

⁵ See the City’s Answer, p 15

⁶ The City’s total land area is 138.75 miles. Forty percent of that area is equal to 55.5 square miles. The 23,000 acres of city street is equal to 35.9375 square miles. The difference is 19.5625 square miles, which is the remaining impervious area subject to the Rain Tax. See <https://en.wikipedia.org/wiki/Detroit#Geography>

is subject to no charge whatsoever, which includes both pervious area comprising 60% of the City's land area, and the 26% of the City's land area that is impervious City-owned streets.

DAART submits that no "reasonable relationship" exists between "the amount of the fee and the value of the service or benefit" that the owners of the 14% of the City's land area are required to pay under the Rain Tax. Rather, the Rain Tax bears all of the earmarks of a tax, because it is a charge that "generates revenue to fund activities for the common good," for "public rather than private purposes." 459 Mich at 167. The owners of 14% of the City's property fund the storm water remediation program that benefits every resident of the City.

Finally, the City, like the Court below, persists in relying on the Sixth Circuit's pre-Headlee Amendment – and pre-*Bolt* -- decision in *Detroit v Michigan*, 803 F2d 1411 (CA 6 1986), asserting that "[t]he City's decision to exempt its roads from the drainage charge was upheld by a federal appellate court over thirty years ago in *City of Detroit, supra*." That is certainly true, but the Court in *City of Detroit* merely determined that, (1) because the Revenue Bond Act, MCL 141.118, provides that "free service shall not be furnished by a public improvement to" a public corporation; and (2) "the reasonable cost and value of any service rendered to a public corporation ... by a public improvement shall be charged against the public corporation and shall be paid for as the service accrues....;" and (3) the "drainage and treatment of storm water from WCRC's roads into the City of Detroit's sewer system constitutes a 'service rendered' within the meaning of [that] section;" (4) the City of Detroit had a statutory right to charge WCRC for "the reasonable cost and value" of this service." 803 F2d 1418-1421. As to the City's decision not to impose a similar charge on itself, the Court simply said that, since the City was ultimately liable for the bond payments, it was unnecessary for the City to do so. *Id.*, at 1416.

DAART agrees wholeheartedly with the City that the Sixth Circuit's holding that processing storm water discharged from streets is a "service." *Id.*, at 1418; City Answer, p 31. DAART also agrees that *City of Detroit's* holding is consistent with the notion that a drainage charge serves a regulatory purpose. *Id.*, at 1418, 1421; City Answer, p 32.

It does not follow, however, that, as the City asserts, "[i]t does not matter that *City of Detroit* predates *Bolt*." City Answer, p 32, n 32.

On the contrary, precisely because *City of Detroit* was concerned solely with interpreting the Revenue Bond Act, and did not address the requirements of the Headlee Amendment, this Court's decision in *Bolt*, and its holding (applied again in *Jackson*) that the cities' failure in both of those cases to impose any impervious area charge on their streets was an indication that the Ran Taxes in those cases were imposed to achieve a common good, rather than as a charge proportional to the benefit conferred upon those subject to it.

This point is briefed at some length in DAART's Application, at pp 25-30. As the Court put it in *Bolt v City of Lansing (on remand)*, 238 Mich App 37; 604 NW2d 745 (1999), this Court's decision in *Bolt* "established a different analytical framework for distinguishing user fees from a tax." *Bolt (On remand)*, 238 Mich App at 46-47. The city's pretense that it did not, and that the exemption of city streets has no significance in the application of the second *Bolt* factor is, to say the least, disingenuous.

RELIEF

DAART incorporates here the prayer for relief in its Application for Leave to Appeal.

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Dated: February 5, 2019