

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,

Case No. 158852

Court of Appeals Case No. 339176

v.

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

Defendants-Appellees.

---

**AMICUS BRIEF OF GREAT LAKES WATER AUTHORITY IN SUPPORT OF DEFENDANTS-APPELLEES**

**DyKEMA**

Jill M. Wheaton (P49921)

Kathryn J. Humphrey (P32351)

DYKEMA GOSSETT PLLC

400 Renaissance Center, Ste. 3700

Detroit, MI 48243

(313) 568-6848

[khumphrey@dykema.com](mailto:khumphrey@dykema.com)

[jwheaton@dykema.com](mailto:jwheaton@dykema.com)

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES .....	II
SUPPLEMENTAL QUESTION PRESENTED.....	III
INTEREST OF AMICUS CURIAE .....	1
FACTUAL BACKGROUND.....	3
Formation of GLWA in 2014 .....	3
The Sewer Systems that Contribute to GLWA’s Wastewater Treatment Facilities.....	7
How GLWA Pays for The Costs of Its Sewer System. ....	9
How GLWA Charges Its Customer Communities.....	10
CWA Compliance, NPDES Permitting, and Combined Sewer Overflows. ....	12
Bolt v City of Lansing.....	13
ARGUMENT .....	15
I.    THE COMBINED NATURE OF THE SEWER SYSTEM IN THIS CASE DISTINGUISHES IT FROM THE REASONING IN <i>BOLT</i> , AND THE COURT OF APPEALS DID NOT ERR. ....	16
II. <i>BOLT</i> SHOULD BE LIMITED TO ITS FACTS. ....	17
A.    The Unique Fact Pattern in <i>Bolt</i> Makes Its Reasoning Inapplicable to Cases Involving Combined Sewer Systems.....	17
B. <i>Bolt</i> ’s Reasoning Ignores the Reality of Running a Combined Sewer System and Should Not Be Applied to Charges that Relate to Such Systems. ....	18
CONCLUSION.....	22
INDEX TO EXHIBITS.....	23

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Bohn v City of Taylor</i> , unpublished opinion of Court of Appeals, issued Jan. 20, 2019 (Case 339306).....	20
<i>Bolt v City of Lansing</i> 459 Mich 152, 164; 587 NW2d 264 (1998).....	<i>passim</i>
<i>Decker v NW Env'tl Def Ct.</i> , 568 US 597; 133 S Ct 1326; 185 L Ed 2d 447 (2013).....	12
<i>Gottesman v City of Harper Woods</i> , unpublished opinion of Court of Appeals, issued Dec. 3, 2019 (Case 344568).....	18, 19, 20
<i>Merrelli v St Clair Shores</i> , 355 Mich 575; 96 NW2d 144 (1959).....	14
<i>Nat'l Wildlife Fed'n v Consumers Power Co.</i> , 862 F2d 580 (CA 6, 1988).....	12
<i>Ripperger v City of Grand Rapids</i> , 338 Mich 682; 62 NW2d 585 (1954).....	16
<i>Vernor v Secretary of State</i> , 179 Mich 157; 146 NW 338 (1914).....	14
<b>Statutes</b>	
33 USC 1284(b).....	10
33 USC 1284(b)(1).....	10
33 USC 1251.....	8
MCL 124.281–124.294.....	4, 10
MCL 141.113.....	9
MCL 141.121(1).....	10
MCL 141.121(2).....	10
<b>Other Authorities</b>	
Const 1963, art 9, §§ 25–34.....	1

**SUPPLEMENTAL QUESTION PRESENTED<sup>1</sup>**

Did the Court of Appeals err in concluding that *Bolt v City of Lansing*, 459 Mich 152, 164; 587 NW2d 264 (1998), is distinguishable from the present case on the basis that Detroit’s sewer system is a combined system rather than a separate storm and sanitary sewer system?

Plaintiffs-Appellants answer:	Yes
Defendants-Appellees answer:	No
Amicus GLWA answers:	No
The Court of Appeals would answer:	No
This Court should answer:	No

---

<sup>1</sup> Counsel for a party did not author this brief, in whole or in part, and did not make a monetary contribution intended to fund the preparation or submission of this brief.

### INTEREST OF AMICUS CURIAE

The Great Lakes Water Authority (“GLWA or “Authority”) is a regional water and sewer authority.<sup>2</sup> GLWA currently provides wastewater services to 79 communities served through 18 wholesale sewer-service contracts with municipal and other public-entity customers, as well as the City of Detroit, which is served by the Authority pursuant to a Water and Sewer Services Agreement. These communities provide wastewater collection and transportation services to their retail customers; in turn, GLWA takes the wastewater from the communities, treats it, and returns it to the Detroit River. GLWA collects service charges from contract customers, including Defendant-Appellee the City of Detroit, in order to pay for the treatment of that water.

Plaintiffs-Appellants filed this original action, *Detroit Alliance Against the Rain Tax, et al. v. City of Detroit, et. al.*, in the Court of Appeals, under Const 1963, art 9, §§ 25–34, popularly known as the Headlee Amendment. It was consolidated below with *Binns, et. al. v City of Detroit, et. al.* (Court of Appeals Case No. 337609), in which GLWA was also a Defendant. Both actions challenge the constitutionality of a drainage charge assessed in connection with the operation of a combined sewer system.

In a unanimous unpublished November 6, 2018 decision, the Court of Appeals rejected Plaintiffs-Appellants’ challenges, holding that the charge was a valid user fee and not a tax in violation of the Headlee Amendment. Plaintiffs in both cases filed applications for leave to appeal to this Court. The Court has asked for supplemental briefing and argument on the Application in this case, and held the Application in *Binns* in abeyance pending same. (*See* Jan. 24, 2020 Orders in Case Nos. 158853 and 158856.)

---

<sup>2</sup> Given the nature of the allegations in this case, GLWA will focus here on its wastewater operations, and not its potable water operations.

The Court of Appeals' decision concerns a matter of great importance to GLWA, as a provider of wastewater services to the City of Detroit and many other local municipalities. Specifically, the Court of Appeals correctly found that Defendants-Appellees' drainage charge was a valid user fee. And it is through such user fees that retail customers of communities like the City of Detroit are able to pay GLWA's legally required charges for wastewater treatment. GLWA runs the largest single-site wastewater treatment facility in North America. That operation is governed by state and federal laws that supply not only substantive standards for the treatment and discharge of wastewater, but the charge structure GLWA must have in place to finance such activities.

As a wastewater service provider, GLWA is familiar with the very issues this Court asked to have supplementally briefed—separated and combined sewer systems; the differences between the two; and the significance of Detroit having a combined system in assessing the nature of the challenged drainage charge. GLWA provides services to some municipalities with separated sanitary systems and others with combined sanitary systems. The differences between the two greatly impacts the timing, volume, and overall quality of wastewater flow received by GLWA.

Because a combined system like the one operated by Defendants-Appellees commingles sanitary and storm wastewater, GLWA must handle and treat the entire flow as it would sanitary wastewater. As a result, the collection of stormwater has a direct impact on the volume of combined storm and sanitary wastewater GLWA receives for treatment. That contribution to volume, in turn, requires Defendants-Appellees to account for the cost of treating not only sanitary, but stormwater flows as well, when defraying the costs of its combined sewer services.

For this reason (among others) the Court of Appeals correctly determined that the challenged drainage charge was a valid user fee. In the context of a combined system like

Defendants-Appellees’, the provision of sewer services cannot be separated between sanitary and stormwater flows. It all ends up at GLWA and requires the same treatment protocols as if it were separated sanitary wastewater. Defendants-Appellees’ drainage charge, accordingly, is nothing more than a valid extension of similar user charges connected with a users’ contribution of sanitary wastewater to the system.

It should also be noted that, as the wastewater treater, GLWA depends on communities’ ability to collect sufficient rates from their retail customers to cover the municipalities’ costs, including maintaining, operating and improving local sewer systems, as well as GLWA’s charges for the maintenance, operation, and improvement of the regional conveyance system and treatment facility. Because sewer systems like the City of Detroit’s are connected with and dependent on GLWA’s ability to provide wastewater treatment services, any limit on a served community’s ability to charge its customers has ramifications (both functional and financial) for the entire system.<sup>3</sup>

Because of GLWA’s familiarity with the issues, its understanding of the systems in question, and its interest in a correct outcome, it can provide meaningful guidance to this Court in resolving the issues raised in this appeal. GLWA is an appropriate *amicus curiae*.

### **FACTUAL BACKGROUND**

#### ***Formation of GLWA in 2014***

GLWA is a regional water and sewer authority that provides water and wastewater services to communities in southeast Michigan. It was formed in 2014, under Act 233 of 1955, MCL 124.281 *et seq.*, based on a Memorandum of Understanding (“MOU”) among the Defendant-

---

<sup>3</sup> GLWA also operates a drinking water system and provides potable water to 127 communities in southeastern Michigan. That water, sourced from the Great Lakes, is treated and transported through the GLWA water distribution system. Forty percent of Michigan’s residents live in communities that obtain their drinking water from GLWA.

Appellee City of Detroit (“the City”), the Counties of Macomb, Oakland and Wayne, and the State. As stated above, GLWA runs the largest single-site wastewater treatment facility in North America (“WWTP” or “Treatment Plant”).<sup>4</sup>

The creation of GLWA, as a regional authority to assume operation and control of the Detroit regional water and sewerage systems, was a central part of Detroit’s reorganization from bankruptcy. On June 12, 2015, the City leased to GLWA the sewer facilities that are used to treat wastewater for 79 communities, including the City of Detroit. GLWA establishes charges for wastewater treatment services to those communities. As a result, Defendant-Appellee Detroit Water and Sewerage (“DWSD”)—which had previously provided wholesale wastewater treatment to the region—is now, along with other communities, a customer of GLWA.

### ***Two Types of Sewer Systems.***

GLWA operates what is referred to as a Combined Sewer System (“CSS”). Such a system stands in contrast to a Separated Sewer System (“SSS”). Appreciating the differences between these two systems is crucial to understanding the nature of the charges that must be in place to operate them, which is in turn relevant to the issue on which this Court requested supplemental briefing.

Broadly speaking, wastewater comes from two major sources: sanitary and stormwater.

- *A municipal sanitary sewer* captures wastewater from sinks, toilets, bathtubs, and similar drain sources. It then conveys that water—along with human waste, toilet paper, soap, shaving cream, bleach, grease, food particles, cleaning solvents, and everything else that is washed down a drain—away. Typically, sanitary wastewater has a greater concentration of contaminants by volume than does stormwater.

---

<sup>4</sup> GLWA is in the process of transitioning the Treatment Plant into a Water Resources Recovery Facility, which includes the ability to turn roughly one billion gallons of biosolids into fertilizer. Nonetheless, for consistency with the litigation and briefing to this point, GLWA will refer herein to the plant as a Treatment Plant.

- A *municipal stormwater sewer* carries wastewater that flows off sidewalks, streets, parking lots, roofs, driveways, patios, and other surfaces. These flows can also carry dirt, salts, pesticides, oils, and grease. It need not be raining or snowing for water and its contaminants to make their way into a stormwater system. Snow melt, car washing, lawn upkeep, construction work, groundwater infiltration and other human activities also contribute to the influx of wastewater into a stormwater sewer system. Typically (although not always) the concentration of contaminants in stormwater is lower than that found in sanitary wastewater.

These two sources of wastewater provide the basis for the two main types of systems that handle them.

- A *separated sewer system* has two separate networks of sewer pipes to handle the two sources of wastewater flow. Sanitary sewer flow is channeled to one destination, while stormwater flows to another. The stormwater flow is typically discharged to surface waters without treatment. Sanitary flow, on the other hand, is treated for much higher concentrations of materials and contaminants that must be removed. The methods of collection and discharge of stormwater differ from those applied to sanitary flow, and the costs are lower to manage stormwater than to treat sanitary flow.

Figure 1 (on the next page) shows an example of a “generic” separated sewer system in a city or town in which separated stormwater is discharged directly to a stream or river:

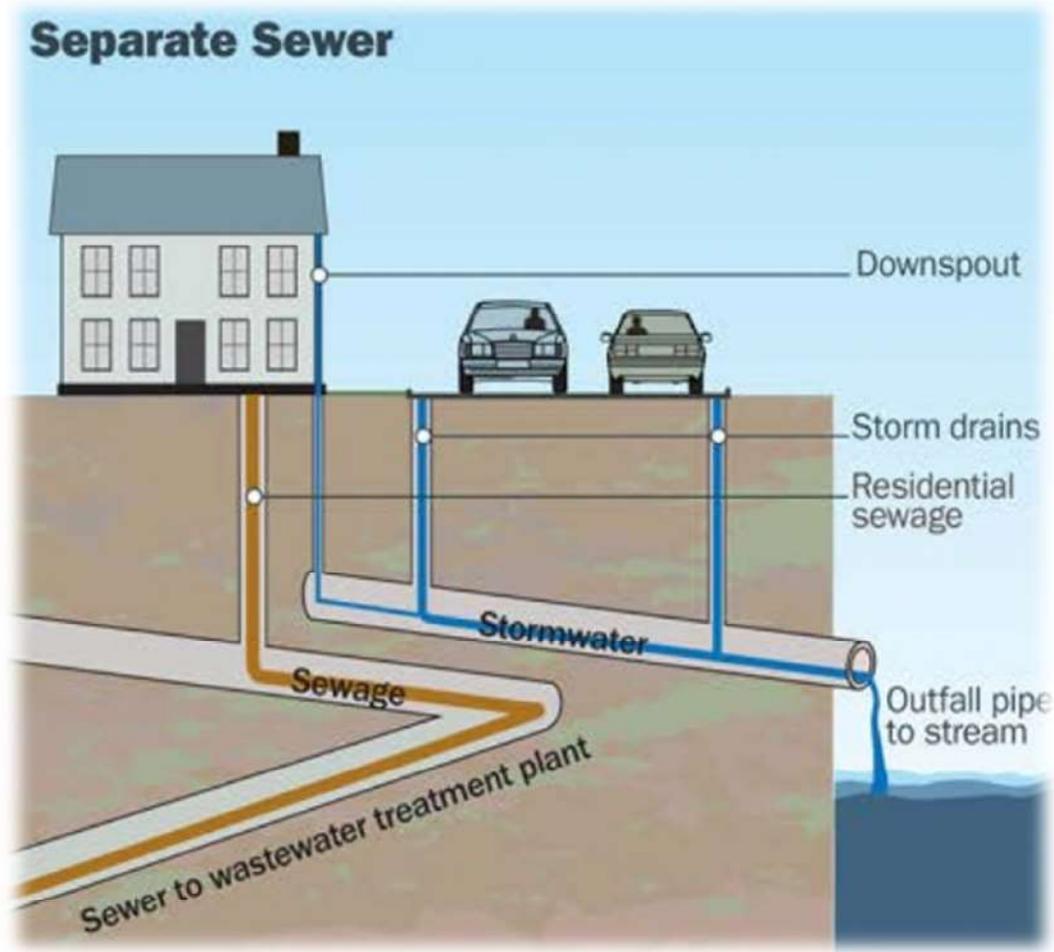


Figure 1

- In contrast to a separated system, a *combined sewer system* conveys both sanitary and stormwater through the same set of pipes to the same destination. Those waste flows merge into a single channel that sends waste to a wastewater treatment plant for treatment.<sup>5</sup> As a result, the entire combined flow must be treated as though it were sanitary waste, even though significant volumes come from stormwater sources.

Figure 2 (on the next page) shows an example of a “generic” combined sewer system:

<sup>5</sup> During storms, a combined sewer system may fill to capacity because of the influx of rainwater. In such circumstances, some systems have a dam or other mechanism that permits an “overflow” (discussed below) to go directly to a discharge point, often a river. Figure 2 shows such a dam.

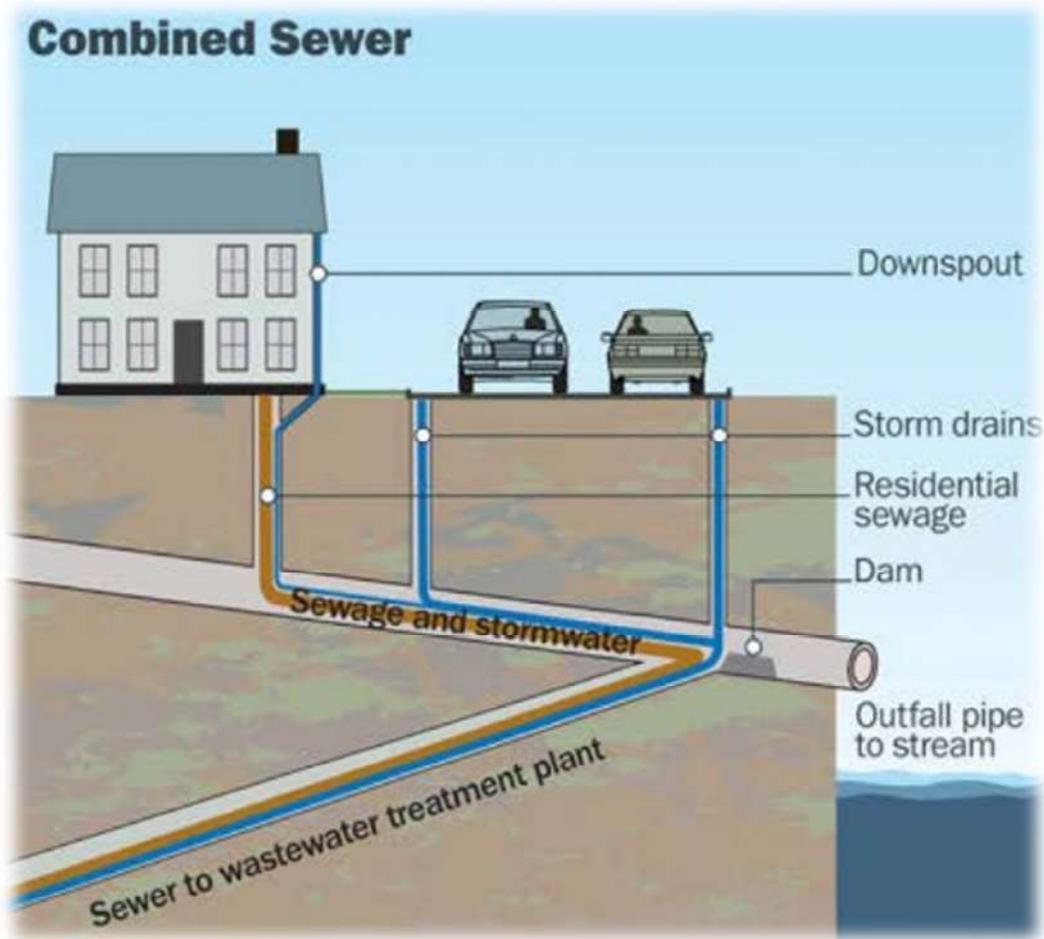


Figure 2

Older municipal sewer systems are more likely to be combined systems; newer communities are more likely to have installed separated systems.

***The Sewer Systems that Contribute to GLWA's Wastewater Treatment Facilities.***

GLWA has a 195-mile conveyance system, to which the 79 communities served by GLWA connect more than 3,000 miles of local sewer mains, pipes, and appurtenances. GLWA's sewer system serves approximately 2.8 million people in the tri-county area. Figure 3 (on the next page) depicts the areas receiving wastewater treatment services from GLWA:

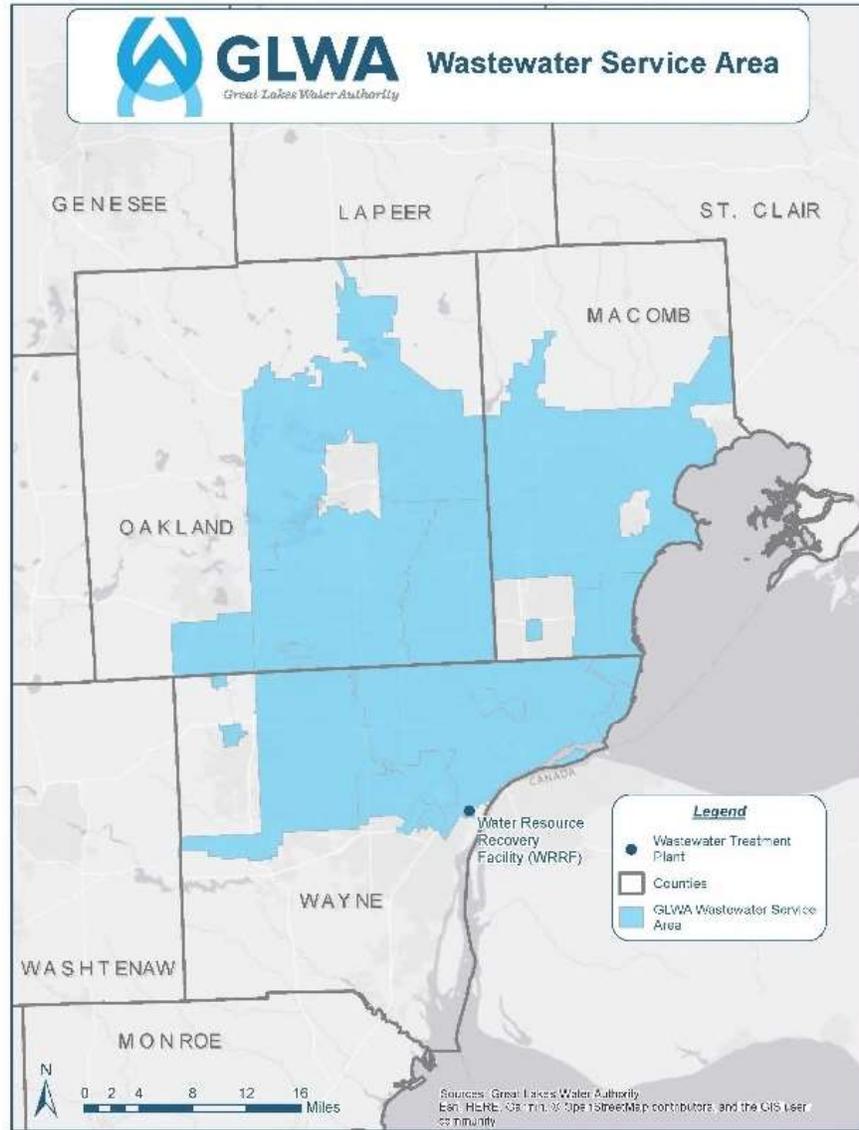


Figure 3

In order to provide wastewater treatment services to this vast area, GLWA operates the largest single-site Treatment Plant in North America. The discharge from the Treatment Plant is regulated and monitored by the Michigan Department of Environment, Great Lakes, and Energy (“MEGLE”), under authority delegated to the it by USEPA under the federal Clean Water Act, 33 USC 1251, *et. seq.* (“CWA”).

GLWA receives wastewater from combined and from separated sewer systems. Three-quarters of the area GLWA serves sends only sanitary flows to GLWA because those communities operate *separated* sewer systems. As discussed above, in those systems, one set of pipes conveys sanitary flow to GLWA for treatment, while stormwater is conveyed to a different destination. Communities with separated sewer systems must manage two types of transportation costs and must contribute their proportionate share to GLWA for the treatment of their sanitary flows. A community with a separated system sends a significantly smaller volume of flow to the Treatment Plant, because its flow is not mixed with stormwater.

The remaining quarter of the area served by GLWA conveys both sanitary and stormwater flows, because those communities operate *combined* sewer systems that, within the boundaries of the community, merge the sanitary and stormwater flows. The combined flow then connects to the GLWA system and is transported to the Treatment Plant. A community with a combined sewer system bears its proportionate share of the cost of GLWA treating its entire flow, which is both sanitary and stormwater.<sup>6</sup>

Given this, GLWA's system is itself a combined system. All the flow that arrives at the Treatment Plant must be treated as sanitary waste, even though (over the course of a given year) half or more of it may be stormwater.

### ***How GLWA Pays for The Costs of Its Sewer System.***

Bonds are a necessary vehicle for financing public improvements such as sewerage systems. The Michigan Revenue Bond Act of 1933, MCL 141.113, *et. seq.*, requires that, before

---

<sup>6</sup> It is generally the older communities that operate combined sewer systems, including Birmingham, Ferndale, Royal Oak, Berkley, Oak Park, Huntington Woods, Hazel Park, Pleasant Ridge, Clawson, Detroit, Dearborn, Redford, Inkster, Hamtramck, Highland Park, Grosse Pointe Farms, Eastpointe, and parts of Dearborn Heights, Roseville and St. Clair Shores.

bonds are issued for a public service, the rates for the project be fixed. MCL 141.121(1). Those rates must be sufficient to pay for the costs of the improvements, the interest and future principal of the bonds, and other attendant required expenses. The law prohibits rate revisions that fail to generate sufficient revenue to operate and maintain the improvement and repay bondholders who financed the construction. MCL 141.121(2). A system like GLWA's, therefore, must generate revenue to sustain and improve itself. GLWA, however, lacks the ability to tax. *See* Municipal Sewage and Water Supply Systems Act of 1955, MCL 124.281–124.294, and GLWA Articles of Incorporation, Article 4.C.

Federal law requires that each user of a sewer system pay a proportionate share of the cost of that system, either through direct user charges or through *ad valorem* taxes (typically, property taxes based on the value of the property served). 33 USC 1284(b). Because GLWA cannot impose taxes, its only means of paying the costs of the sewer system is to charge its wholesale users, the communities, which in turn charge their retail customers. GLWA must have in place:

*a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share (except as otherwise provided in this paragraph) of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant . . . .*

33 USC 1284(b)(1) (emphases added). The “recipients” are the communities to which GLWA provides sewer services. GLWA has no billing or collecting relationship with individual homes or businesses, only with the cities, towns, villages, or counties who connect local sewer mains and pipes to the GLWA sewerage collection system.

### ***How GLWA Charges Its Customer Communities.***

In order to comply with federal law defining a user charge system for sewer services, GLWA must determine (as did DWSD before it) the proportionate share for each contracted

customer served, including the City of Detroit. To do so, GLWA convenes multiple Work Groups each year made up of engineering, scientific, financial, and technical employees, representatives of served communities, and engineering and technical consultants. Those Work Groups determine the best available information for factors used in—or that affect—the sewer-share allocation process.<sup>7</sup> That process requires that data be collected, verified, and analyzed in order to provide a principled means of allocating proportionate shares of sewer system costs.

Why is this relevant to the distinction between a separated system and a combined system? Because, although the GLWA system is a combined one, many of its customers contribute only sanitary flow to the Treatment Plant, and the costs of treating those communities' flows differ from the costs of treating flows that includes stormwater. Although treating sanitary waste is more expensive than treating stormwater, GLWA must treat all flows received at the Treatment Plant as though they were fully sanitary flows; the stormwater cannot be “pulled out” and treated separately. At the same time, GLWA must allocate its costs in a proportional manner. A community that adds no stormwater to the system is receiving the service of treatment of sanitary sewage *only*, and its proportionate share should reflect that more limited service. On the other hand, a community that contributes mixed sanitary sewage and stormwater is likely contributing not only greater *volumes* to be treated, but also receiving the *additional* service of treatment of its stormwater as well as its sanitary sewage. That community's proportionate share will reflect that greater service. The individuals living in a city with a combined sewer system are paying their

---

<sup>7</sup> The methodology currently used to set charges acknowledges that certain costs should be allocated among customers based on the *volumes* they contribute to the system, and other costs based on the amount of *pollutant loadings* they contribute.

city (through sewer charges) an amount that permits that city to pay GLWA's sewer charges for that city's proportionate share.

***CWA Compliance, NPDES Permitting, and Combined Sewer Overflows.***

“A central provision of the [CWA] is its requirement that individuals, corporations, and governments secure National Pollutant Discharge Elimination System (NPDES) permits before discharging pollution from any point source into the navigable waters of the United States.” *Decker v NW Env'tl Def Ct.*, 568 US 597, 602; 133 S Ct 1326; 185 L Ed 2d 447 (2013). USEPA administers the NPDES permit system, and may delegate permit issuing authority to state governments. *Nat'l Wildlife Fed'n v Consumers Power Co.*, 862 F2d 580, 582 (CA 6, 1988). USEPA delegated its authority to the State of Michigan. GLWA—like DWSD in years past and the City of Lansing in *Bolt*—is allowed to discharge municipal flows into waterways only to the extent permitted by the State of Michigan. The NPDES permit (“the Permit”) that allows GLWA to operate the Treatment Plant was issued by the State of Michigan Department of Environmental Quality.<sup>8</sup>

The Permit includes various effluent limitations and monitoring requirements, including provisions regarding “combine sewer overflows” (“CSOs”). A CSO occurs when the combined volume of sanitary wastewater plus stormwater is greater than can be treated by the Treatment Plant, and thus is discharged directly into a body of navigable water without treatment. Under the Permit, in a CSO event, GLWA is authorized to discharge untreated wastewater into nearby receiving waters. To minimize these discharges, and as Defendants lay out in their supplemental brief, Detroit was required to construct significant CSO control facilities. (*See Appellees' Supp.*

---

<sup>8</sup> Although initially issued to DWSD, GLWA is now a co-permittee since it operates the Treatment Plant.

Br., pp 7–9.) The maintenance of CSO control measures are required by the Permit and these costs, in turn, must be passed on to the municipalities GLWA serves.

***Bolt v City of Lansing.***

With that factual background in place, we turn to the relevant law. The Court asked the parties to brief whether *Bolt* is distinguishable from the instant case on the basis that Detroit’s sewer system is a combined rather than separated system.

The facts in *Bolt* were somewhat unusual. Prior to implementing the user charge at issue, Lansing had neither an entirely separate *nor* an entirely combined sewer system. Around three quarters of the property owners in the city were served by a separated system, while the remaining users contributed to a combined system. 459 Mich at 165. The combined portion of Lansing’s sewer system created a regulatory problem. Specifically, as the *Bolt* dissent discussed, Lansing was found to be in noncompliance with its NPDES permit for failure to adequately control CSOs. *Id.* at 171, n 1. Lansing had to eliminate combined sewer overflows or adequately treat the combined discharges. Over a decade later—and after an initial phase of sewer improvements—the city developed a final CSO control plan to separate the combined portions of its sewer system and eliminate the overflow discharges. *Id.*

This factual backdrop is important for understanding exactly what was going on in *Bolt*. The stormwater service charge at issue was imposed to help finance this CSO control program, in order to comply with the CWA and Lansing’s NPDES permit. *Id.* at 155. That CSO control program required significant capital expenditures. But those expenditures did not go to municipal improvements unrelated to the service of treating wastewater. Those dollars were, in fact, applied to improvements that allowed Lansing to continue to provide those services in compliance with state and federal law.

In assessing the nature of the user charge in *Bolt*, the Court outlined “three primary criteria to be considered when distinguishing between a fee and a tax.” *Id.* at 161. The first “is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose.” *Id.* (citing *Merrelli v St Clair Shores*, 355 Mich 575, 583–84; 96 NW2d 144 (1959); *Vernor v Secretary of State*, 179 Mich 157, 167–70; 146 NW 338 (1914)). “A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service.” 459 Mich at 161–62. Third and finally, the Court considered “voluntariness.” *Id.* at 162.

Applying these three criteria, the Court concluded that Lansing’s stormwater service charge was, in fact, a tax. The charge failed the first two criteria because, *inter alia*, Lansing instituted the charge “to fund fifty percent of the \$176 million dollar cost of implementing the CSO control program over the next thirty years,” a major portion of which “constitute[d] capital expenditures.” *Id.* at 163. “This constitutes an investment in infrastructure,” the Court reasoned, “as opposed to a fee designed simply to defray the costs of a regulatory activity.” *Id.*

The Court also found the charge constituted a tax because “the charges imposed [did] not correspond to the benefits conferred.” *Id.* at 165. Three quarters of the city were already served by a separated sewer system, yet they would pay the same amount as the other quarter of users who would benefit from further separation. “A true ‘fee,’” the Court noted, “is not designed to confer benefits on the general public, but rather to benefit the particular person on whom it is imposed.” *Id.* at 165. The Court found this conclusion “buttressed by the fact that the acknowledged goal of the ordinance is to address environmental concerns regarding water quality” but “[i]mproved water quality in the Grand and Red Cedar Rivers and the avoidance of federal penalties for discharge violations are goals that benefit *everyone in the city, not only property owners.*” *Id.* at 166 (emphasis added).

The Court further found the ordinance creating the charge to “lack . . . a significant element of regulation.” *Id.* at 166. It “regulated” based upon only the amount of rainfall shed from a parcel of property without considering the presence of pollutants; failed to distinguish between those responsible for greater and lesser levels of runoff; and excluded street rights of way. *Id.* at 166–67. The Court also noted that stormwater was ultimately discharged into the river untreated. *Id.* at 167.

Finally, the Court concluded that the ordinance failed the voluntariness criterion because the charge lacked “any element of volition.” *Id.* “The property owner has no choice whether to use the service and is unable to control the extent to which the service is used.” *Id.* at 167–68.

In this case, the Court of Appeals found that the DWSD charge at issue was not a tax under *Bolt*. As discussed earlier, Plaintiffs filed an Application for Leave to Appeal and this Court asked the parties to brief the question of whether the Court of Appeals erred in distinguishing *Bolt* on the grounds that the DWSD operates a combined sewer system rather than a separated one. Because the application of *Bolt* to sewerage charges is an issue that GLWA may also face, it submits this *amicus* brief in support of Defendants-Appellees, and in support of the Court of Appeals’ opinion.

## ARGUMENT

The Court should deny the application because *Bolt* is indeed distinguishable. Unlike *Bolt*, the combined nature of Detroit’s sewer system means that all users benefit from the collection and treatment of both stormwater and municipal wastewater (sanitary flow). Both stormwater and municipal wastewater, mixed together in Detroit’s combined system, must be treated as a single flow. Once collected, the two flows cannot be separated and a charge assessed in connection with the provision of sewage collection and treatment is a proper fee. In addition, this case does not involve the creation of an entirely new separated sewer system (as was the situation in *Bolt*), but

instead, involves capital expenditures related to the maintenance and improvement of an existing system.

Leave should also be denied because, in any event, *Bolt* should be limited to its unique facts. *Bolt* involved a hybrid system which, after construction, would be fully separated, with that separation financed by the challenged charge. The proportionality and infrastructure concerns this scenario caused will generally not apply to charges related to existing combined or separated sanitary sewer systems, which are the norms. And applying *Bolt* to combined systems hobbles municipalities' ability to efficiently fund their wastewater systems.

**I. THE COMBINED NATURE OF THE SEWER SYSTEM IN THIS CASE DISTINGUISHES IT FROM THE REASONING IN *BOLT*, AND THE COURT OF APPEALS DID NOT ERR.**

The combined nature of Detroit's sewer system differentiates it from the Lansing system in *Bolt* for three principal reasons. First, Detroit operates an entirely combined sewer system. As a result, all users of the system benefit from the ultimate collection and treatment of both stormwater and municipal wastewater. By contrast, in *Bolt*, the city's separation of only one quarter of the sewer system was funded through a charge levied against all users of the system. This disconnect is, in part, what drove the Court in that matter to conclude that the charge did not proportionately benefit the users charged. In a completely combined system, like the one Detroit (and GLWA) operates, any charge that funds the treatment of stormwater in turn provides a service that redounds to the benefit of all users charged.

Second, because Detroit (and GLWA) operates a combined sewer system, both stormwater and municipal water must be collected and treated as a single flow. A charge assessed in connection with the provision of sewage collection and treatment is a proper fee. *See Ripperger v City of Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585 (1954). Because stormwater in a combined system must ultimately be conveyed and treated along with sanitary flows, Detroit's

drainage fee is not meaningfully different from fees associated with the collection of sanitary wastewater. Charging users of the system for their contribution of stormwater serves the same regulatory purpose as charging them for their contribution of sanitary wastewater.

Third, this case does not involve the creation of an entirely new separated sewer system (which was the case in *Bolt*). To the extent the City of Detroit's drainage charge supports capital expenditures, those outlays go to the maintenance and improvement of an extant combined system. And the maintenance and improvement of that system is required by, and necessary to ensure compliance with, state and federal environmental laws. In other words, spending money to keep up the combined sewer system is a cost that is appropriately defrayed in part through a drainage charge.

At the end of the day, this case is nothing like *Bolt*. It does not involve a charge levied against users who do not benefit from the service provided; the charge at issue supports the regulatory activity of collecting and treating mixed storm and municipal water; and it does not implicate the development of an entirely new stormwater infrastructure. The Court of Appeals did not err in distinguishing this case from *Bolt*; it did not err in finding the charge at issue was not a tax; and this Court should deny the Application.

## **II. *BOLT* SHOULD BE LIMITED TO ITS FACTS.**

In addition to being distinguishable, *Bolt* should be limited to its unique facts, and does not warrant the grant of leave and reversal here.

### **A. The Unique Fact Pattern in *Bolt* Makes Its Reasoning Inapplicable to Cases Involving Combined Sewer Systems.**

Generally, a Headlee challenge to a sewer fee will implicate a charge related to one of two types of sewer system: entirely separated or (as here) entirely combined. *Bolt*, however, was neither. What's more, the challenged charge related to Lansing's attempt to change the very nature

of the system—by separating out the combined stormwater portion and rendering the entire system separate.

Both of these unique factors played a crucial role in the *Bolt* Court’s analysis. The hybrid nature of the system created what the Court perceived as the proportionality problem. In the Court’s eyes, three quarters of the property owners charged would not benefit from the separation because they were already served by (and many had paid for) a separated sewer system. 459 Mich at 165. And the investment in infrastructure and capital expenditures the Court found objectionable were not related to mere upkeep or even improvement of an existing system; rather, they went to converting the very nature of the system itself. This aspect of the charge too was crucial in the Court’s analysis. In short, it was the transitional nature of the city’s action in *Bolt* and the attendant infrastructure and capital outlay that drove the Court’s conclusion that the stormwater service charge did more than merely defray the costs of collecting and treating wastewater.

Given the unique nature of the charge at issue in *Bolt*, the reasoning of that case should be limited to its facts.

**B. *Bolt*’s Reasoning Ignores the Reality of Running a Combined Sewer System and Should Not Be Applied to Charges that Relate to Such Systems.**

*Bolt* should also be limited to its facts because applying it to municipalities that operate combined sewer systems thwarts the ability of those municipalities to collect the fees necessary to provide wastewater services consistent with state and federal regulations. Consider, for example, *Gottesman v City of Harper Woods*, unpublished opinion of the Court of Appeals, issued Dec. 3, 2019 (Case No 344568), 2019 Mich. App. LEXIS 7657 (attached as Ex. 1), in which an application for leave to appeal to this Court is pending.

In that case, the stormwater and sanitary sewers of the City of Harper Woods are connected to the Northeast Sewage Disposal System (NESDS), “a complex combined sewer system that serves several municipalities.” *Id.* at \*1. “Before reaching the NESDS, the flow from defendant’s storm water sewers merges with combined storm water and waste water flow from other cities . . . .” *Id.* at \*1–2. In 2014, the MDEQ called for \$36 million in improvements, nearly \$17 million of which was the responsibility of the City of Harper Woods. *Id.* at \*2. To pay for the required improvements, the City began assessing a stormwater charge. *Id.*

The court’s reasoning in *Gottesman* (finding the charge to be a tax) highlights the problems with applying *Bolt*’s analysis uncritically to a combined sewer system. On the first factor, the court found that “a service is rendered in the form of removal and treatment of storm water runoff, and federal and state regulations have required improvements” to the sewer system. *Id.* at \*16. The challenged charge was implemented to pay for these improvements, “indicat[ing] a regulatory component,” which would “benefit all property owners who are required to pay it.” *Id.* Noting that “there is also evidence of a revenue-generating purpose for the Charge,” the Court of Appeals noted that “the question . . . is whether the revenue-generating purpose outweighs the regulatory purpose of the Charge.” *Id.* at \*17.

The court’s attempt to undertake this “weighing” demonstrates how inapt this mode of analysis is for combined sewer systems. It held, “it appears that the primary motivating factor for the Storm Water Charge at issue was the improvements required by state and federal law” and, accordingly, “the regulatory purpose is not minimal.” *Id.* “However,” the court continued, as in *Bolt*, “defendant’s ordinance does not consider the presence of pollutants on each parcel or distinguish between those responsible for greater and lesser levels of runoff.” *Id.* On proportionality, the court found that “[t]he ordinance does not consider the individual

characteristics of the property, such as pollutants, the type or extent of improvements thereon, or how said improvements affect the amount of runoff flowing from the property.” *Id.* at \*19. And, following *Bolt*, it found problematic the fact that the stormwater system benefits not only the property owners who are subject to the charge, but also the general public. *Id.* These factors, together with the fact that the charge was “involuntary,” led the court to conclude that the challenged charge was in fact a tax. *Id.* at \*20.

The first problem this reasoning highlights is the role “investments in infrastructure” play in evaluating a Headlee challenge in the context of wastewater treatment. For combined sewer systems, “investments in infrastructure” and “cost defrayal” are not mutually exclusive. In any sewer system—but especially in a combined one—“investment in infrastructure” will constitute a *necessary component* of “defray[ing] the costs of a regulatory activity.” The second problem with the *Bolt* Court’s focus on capital expenditures is that it produces an unworkable rule. The “weighing” inquiry lacks analytic shape and forces courts to draw distinctions based on categories that do not, in fact, exclude one another. *See also, e.g., Bohn v City of Taylor*, unpublished opinion of Court of Appeals issued Jan. 20, 2019 (Docket No 339306) (attached at Ex. 2) (distinguishing *Bolt* as a involving “a rate increase to fund a completely new alteration to the existing sewer system that benefitted only 25% of the property owners” as opposed to a charge related to “maintenance and repairs of the existing system” that would also “be used to fund a large-scale project to replace and update much of that system which will benefit all users of the City’s sewer services.”).

The second problem is that an uncritical application of *Bolt* leads to counterintuitive conclusions regarding whether a charge is regulatory in nature. As it points out in its supplemental brief, the City of Detroit “operates its combined sewer system for the very purpose of accepting the polluted sanitary and storm water generated by residents in the City, whereby GLWA treats

the effluent at both its wastewater treatment facility and/or its CSO facilities so that it no longer contains harmful toxins, and disposing of it in an orderly and methodical fashion post-treatment.” (Appellees’ Supp. Br., p 26.) Viewed in *toto*, that is an undeniably regulatory activity. And financing it through a user charge is likewise in the nature of a fee, not a tax. Unlike Lansing in *Bolt*, Defendants here are not accomplishing their regulatory ends through the partial separation of a sewer system. But that distinction does not ultimately matter. When viewed from the correct vantage—namely, the overall activity of conveying and treating wastewater—a charge financing that activity is inherently regulatory in nature.

In sum, *Bolt*’s three-part test led *Gottesman* to reject (as an impermissible “tax”) a charge that was: (1) levied on all users of a combined sewer system and (2) served to defray costs associated with operating that system—costs mandated by law. It is difficult, outside of the contortions of *Bolt*, to see that as anything other than a valid user fee. The application of *Bolt* to cases involving combined sewer systems, in other words, leads to results that defy common sense.

*Gottesman* also underscores the bind this sort of analysis puts on municipalities operating combined sewer systems. The natural result of a holding like *Gottesman* is that a municipality has two choices when it comes to defraying the costs of treating combined sewage: (1) institute a tax subject to vote; or (2) implement a fee, with the risk that a court will second-guess its determination regarding the fee’s “regulatory” adequacy or formula for proportionality. The former may be politically untenable, and may result in the necessary monies not received, while the latter introduces unnecessary uncertainty into a process that should be relatively straightforward.

GLWA doesn’t even have this first option. As discussed above, GLWA lacks the ability to tax. It cannot impose taxes on those served by its sewer system. Thus, a finding that fees like the one at issue in *Gottesman* or in this case are taxes would threaten GLWA’s ability, more than

others, to collect the fees it is obligated—by federal law—to collect in order to maintain facilities to treat combined wastewater.

For all of these reasons, *Bolt*'s reasoning is unsuitable for wastewater charges, especially in the context of combined sewer systems; should be limited to its facts; and does not warrant the grant of leave or reversal of the Court of Appeals here.<sup>9</sup>

**CONCLUSION**

The Court of Appeals did not err, and leave to appeal should be denied.

Respectfully submitted,

By: s/Jill M. Wheaton  
Jill M. Wheaton (P49921)  
Kathryn J. Humphrey (P32351)  
Dykema Gossett PLLC  
400 Renaissance Ctr, 37<sup>th</sup> Floor  
Detroit, MI 48243  
Telephone: 313-568-6848  
[JWheaton@dykema.com](mailto:JWheaton@dykema.com)  
[KHumphrey@dykema.com](mailto:KHumphrey@dykema.com)

Dated: July 6, 2020

\_\_\_\_\_  
\_\_\_\_\_

<sup>9</sup> Given the unique nature of *Bolt*—and the fact that its reasoning will often confuse rather than clarify the Headlee analysis in the context of wastewater charges—should the Court grant leave, it should do so to revisit, and possibly overrule, *Bolt*.

INDEX TO EXHIBITS

1. *Gottesman v City of Harper Woods*, unpublished opinion of Court of Appeals, issued Dec. 3, 2019 (Case No 344568)
2. *Bohn v City of Taylor*, unpublished opinion of Court of Appeals, issued Jan. 20, 2019 (Case No 339306)

4850-4118-4954.14

**1**

## Gottesman v. City of Harper Woods

Court of Appeals of Michigan

December 3, 2019, Decided

No. 344568

### Reporter

2019 Mich. App. LEXIS 7657 \*; 2019 WL 6519142

KELLY GOTTESMAN, on Behalf of Himself and All Others Similarly Situated, Plaintiff-Appellee/Cross-Appellant, v CITY OF HARPER WOODS, Defendant-Appellant/Cross-Appellee.

**Notice:** THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

**Prior History:** [\*1] Wayne Circuit Court. LC No. 17-014341-CZ.

**Judges:** Before: LETICA, P.J., and M. J. KELLY and BOONSTRA, JJ.

## Opinion

---

PER CURIAM.

Defendant appeals by leave granted<sup>1</sup> the trial court's order granting partial summary disposition in favor of plaintiff, and denying defendant's motion for partial summary disposition with respect to Count I of plaintiff's

class action complaint, which alleged that defendant's storm water service charge (the Storm Water Charge or Charge) violates the Headlee Amendment, [Const 1963, art 9, § 31](#). Plaintiff cross-appeals the trial court's later order denying his motion for partial summary disposition and granting defendant's motion for partial summary disposition on Counts II and III of the complaint, which alleged assumpsit and unjust enrichment based on defendant's alleged violation of [MCL 141.91](#).<sup>2</sup> We affirm in part, reverse in part, and remand for further proceedings.

### I. FACTS AND PROCEEDINGS

This case arises from plaintiff's challenge to the Storm Water Charge imposed by defendant on its property owners. Defendant's storm water and sanitary sewers are connected to the Northeast Sewage Disposal System (NESDS), a complex combined sewer system that serves several municipalities. Before reaching the NESDS, the flow [\*2] from defendant's storm water sewers merges with combined storm water and waste water flow from other cities and then passes through the Milk River Intercounty Drain, also known as the Milk River System. When the level of flow is elevated, excess flow can be temporarily stored in a combined sewer overflow retention treatment basin within the Milk River System. If the retention basin reaches its capacity, the excess combined flow is treated and then discharged into public waters.

In 2014, the Michigan Department of Environmental Quality (MDEQ) called for improvement of the Milk River System to come into compliance with certain state and federal regulations. The estimated cost of the improvements exceeded \$36 million, and defendant was apportioned nearly \$17 million of that cost. To pay for the required improvements, defendant began assessing the Storm Water Charge under an ordinance it adopted

---

<sup>1</sup> See *Gottesman v Harper Woods*, unpublished order of the Court of Appeals, entered December 3, 2018 (Docket No. 344568).

---

<sup>2</sup> Plaintiff's cross-appeal also raises a challenge to the trial court's order denying, without prejudice, plaintiff's motion for an order awarding a refund and to enjoin defendant from imposing the Storm Water Charge in the future.

in 1992 when the Milk River System required an earlier improvement. Section 27-110 of the ordinance provides:

All owners of real property within the city, other than the city itself, shall be charged for the use of the stormwater system based on the amount of impervious area which is estimated and determined to [\*3] be contributory to the stormwater system. The impact of the stormwater from the property on the system shall be determined on the basis of the flat rates contained in this article.

The flat rates are measured in terms of "residential equivalent unit[s]" (REUs), which § 27-100 of the ordinance defines as follows:

That area of residential property defined to be impervious to account for the dwelling unit, garage, storage buildings or sheds, driveways, walks, patios, one-half of the street frontage and other impervious areas calculated to be an average by randomly sampling fifty (50) residential parcels that area being determined to be three thousand two hundred fifty (3,250) square feet.

Section 27-120 describes the following method for calculating the Storm Water Charge to be levied upon real property owners within the city:

(a) The total cost of the debt retirement and operation and maintenance of the stormwater system shall be calculated annually in conjunction with the city's budget process and shall become an integral part thereof.

(b) The amount of the total land area of commercially used property shall be determined. That amount shall then be divided by the residential equivalent unit (herein defined at [\*4] three thousand two hundred fifty (3,250) square feet) to determine the total number of equivalent units for commercial property.

(c) The amount of total land area of institutionally used property that is impervious shall be determined. That amount shall then be divided by the residential equivalent unit (herein defined as three thousand two hundred fifty (3,250) square feet) to determine the total number of equivalent units for institutional property.

(d) The amounts determined from (b) and (c) above shall be added to the amount of residential parcels in the city (determined to be five thousand four hundred fifty (5,450) at the time of enactment of this article) to determine total number of equivalent units to be billed. That total shall then be divided into the total estimated amount of debt retirement and operation and maintenance costs, as defined in

section 27-100, to determine the billing unit amount. (e) Each parcel of real property in the city shall then be charged on the basis of their number of residential equivalent units times the billing unit amount.

With respect to vacant properties and residential parcels with less than 3,500 square feet in total land area, § 27-125 provides a schedule of reduced [\*5] rates.<sup>3</sup> The Storm Water Charge is included as a user charge on all tax bills, § 27-130, and unpaid charges "constitute a lien against the property affected" and "shall be collected and treated in the same fashion as other tax liens against real property," § 27-135. Finally, § 27-140 provides property owners with the right to appeal the determination of a Storm Water Charge.

Plaintiff filed a class action complaint alleging several theories of liability against defendant, three of which are relevant to this appeal.<sup>4</sup> In Count I, plaintiff alleged a violation of the Headlee Amendment, [Const 1963, art 9, § 31](#). In Count II, plaintiff alleged assumpsit for money had and received for an alleged violation of [MCL](#)

<sup>3</sup> Specifically, § 27-125 incorporates the following chart:

 [Go to table1](#)

#### Land Area (Square Feet)

#### Stormwater Service Charge

Residential property equal to or less

No charge

than 300 sq. ft. and vacant property

Residential property equal to or less

One-third billing unit

than 1,000 sq. ft. but greater than

300 sq. ft.

Residential property less than 3,500

One-half billing unit

sq. ft. but greater than 1,000 sq. ft.

Residential property equal to or

[141.91](#),<sup>5</sup> and, in Count III, plaintiff alleged unjust enrichment on the same basis. The trial court granted partial summary disposition in plaintiff's favor pursuant [\*6] to [MCR 2.116\(C\)\(10\)](#) on the basis of its finding that the Charge is a tax that violates the Headlee Amendment. Defendant filed an interlocutory application for leave to appeal the trial court's decision on that issue. Thereafter, plaintiff moved for summary disposition on Counts II and III of his complaint. The trial court granted summary disposition in favor of defendant pursuant to [MCR 2.116\(I\)\(2\)](#) on those claims, finding that plaintiff had a legal remedy available that precluded resort to equitable remedies. Plaintiff subsequently filed a motion seeking a refund for the Headlee Amendment violation and to enjoin defendant from continuing to impose the Storm Water Charge. After this Court granted defendant's application for leave to appeal regarding the Headlee Amendment issue, the trial court denied plaintiff's motion for a refund and injunction without prejudice.

## II. DEFENDANT'S APPEAL

On appeal, defendant argues that the trial court erred by denying summary disposition in its favor on Count [\*7] I because (1) the Storm Water Charge is a user fee, not a tax, and therefore, does not violate the Headlee Amendment; (2) it had authority to legally assess user charges under Chapter 21 of the Drain Code of 1956 (Drain Code), [MCL 280.1 et seq.](#); and (3) the Storm Water Charge is authorized by defendant's 1951 Charter and, therefore, exempt from analysis under the Headlee Amendment.

### A. WHETHER THIS STORM WATER CHARGE IS A TAX OR A USER FEE

First, defendant argues that the trial court erred by denying summary disposition in its favor on Count I because the Storm Water Charge is not a tax as a matter of law. We disagree.

---

One billing unit  
greater than 3,500 sq. ft.

<sup>4</sup> The trial court certified the plaintiff class on March 22, 2018.

<sup>5</sup> [MCL 141.91](#) provides:

Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

The grant or denial of summary disposition is reviewed "de novo to determine if the moving party is entitled to judgment as a matter of law." [Maiden v Rozwood](#), 461 Mich 109, 118; 597 NW2d 817 (1999). As stated in *Maiden*:

A motion under [MCR 2.116\(C\)\(10\)](#) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter [\*8] of law. [*Id.* at 120 (citations omitted).]

Whether a charge is a tax or a user fee is a question of law that is also reviewed de novo. [Bolt v City of Lansing](#), 459 Mich 152, 158; 587 NW2d 264 (1998).

### 1. THE HEADLEE AMENDMENT AND THE BOLT FACTORS

The Headlee Amendment was adopted by referendum and became effective December 23, 1978. It amended [Const 1963, art 9, § 6](#), and added §§ 25-34. [American Axle & Mfg, Inc v Hamtramck](#), 461 Mich 352, 355-356; 604 NW2d 330 (2000). [Const 1963, art 9, § 31](#), added the requirement of voter approval of new taxes. *Id.* at 356. It provides, in relevant part:

Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. [[Const 1963, art 9, § 31.](#)]

If, however, a charge is a user fee, then it is not affected by the Headlee Amendment. [Bolt](#), 459 Mich at 159.

As explained by our Supreme Court in *Bolt*, "[t]here is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment[.]" and doing so requires the consideration of several factors. *Id.* at 160-161. "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 [\*9] benefit. A

tax on the other hand, is designed to raise revenue." *Id. at 161* (quotation marks and citations omitted). There are three main factors that are considered in distinguishing between a tax and a fee. *Id.* "The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose. A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service." *Id. at 161-162* (citations omitted). The third criterion is voluntariness. *Id. at 162*.

In *Bolt*, the Court considered a challenge to the city of Lansing's storm water service charge. *Id. at 154*. The city decided to separate its remaining combined sanitary and storm sewers, at a cost of \$176 million over 30 years. *Id. at 155*. The project was financed through an annual storm water service charge, which was imposed on each parcel of real property using a formula that attempted to roughly estimate each parcel's storm water runoff. *Id.* "Estimated storm water runoff [was] calculated in terms of equivalent hydraulic area (EHA)," which was "based upon the amount of pervious and impervious areas within the parcel multiplied by the runoff factors applicable to each." *Id. at 155-156* (quotation marks omitted). However, residential parcels [\*10] that measured two acres or less were charged flat rates derived from a predetermined number of EHA units per 1,000 square feet. *Id. at 156*.

The Court concluded that the charge failed the first and second criteria because a major portion of the cost involved capital expenditures, which constituted "an investment in infrastructure as opposed to a fee designed simply to defray the cost of regulatory activity," and the city made no attempt to allocate the portion of the capital costs that would have a useful life in excess of 30 years to the general fund. *Id. at 163-164*. In addition, the Court concluded that the charges did not correspond to the benefits conferred because approximately 75% of property owners were already served by separated storm and sanitary sewers, which many paid for through special assessments. *Id. at 165*. The charge, however, applied to all property owners, rather than only those who actually benefited. *Id.* Further, the improved water quality and avoidance of federal penalties were goals that benefited everyone, not just property owners within the city. *Id. at 166*. The Court also concluded that the ordinance lacked "a significant element of regulation" because it did not consider the presence of pollutants on [\*11] each parcel, it failed to distinguish between those responsible for greater and lesser levels of runoff, and there was no end-of-pipe treatment before the storm water was

discharged into the river. *Id. at 166-167*. With regard to the third criterion, the Court concluded that the charge lacked any element of voluntariness. *Id. at 167*. The Court also noted several additional factors supporting the conclusion that the charge was a tax, including that the "storm water enterprise fund" derived from the charge replaced the portion of the program that was previously funded through property and income taxes, the charge could be secured by placing a lien on property, and the charge was billed through the city assessor's office and could be sent with property tax statements. *Id. at 168-169*. Accordingly, the Court concluded that the storm water service charge was a tax and not a valid user fee. *Id. at 169*.

In *Jackson Co v City of Jackson*, 302 Mich App 90, 93; 836 NW2d 903 (2013), this Court similarly concluded that the city of Jackson's storm water management charge was a tax that was imposed in violation of the Headlee Amendment. The city of Jackson maintained and operated separate storm water and waste water management systems that were historically funded from general and street funds generated through the collection of various [\*12] taxes and fees. *Id. at 94*. In 2011, however, the city adopted an ordinance that established a storm water utility to operate and maintain the storm water management program. *Id. at 95*. The program was funded through an annual storm water system management charge imposed on each parcel of real property. *Id.* The charge was calculated using a formula that estimated the amount of storm water runoff from each parcel. *Id.* Storm water runoff was again calculated in terms of EHA, which estimated the amount of storm water leaving each parcel based on the impervious and pervious surface areas. *Id. at 95-96*. Parcels with two acres or less were charged a flat rate. *Id. at 96*. Property owners could receive credits for actions taken to reduce storm water runoff, and an administrative appeal was also available. *Id. at 97*.

This Court concluded that the management charge served the dual purposes of financing the protection of waterways, as required by state and federal regulations, and general revenue-raising, but that the minimal regulatory purpose was outweighed by the revenue-raising purpose. *Id. at 105-106*. In particular, this Court concluded that, as in *Bolt*, the ordinance contained few provisions that truly regulated the discharge of storm and surface water [\*13] runoff and failed to require the city or property owners to treat storm and surface water runoff. *Id. at 106*. This Court further concluded that the most significant motivation for adopting the ordinance and fee was to protect the city's general and street

funds, which previously funded the city's activities. [Id. at 106-107](#). This Court also concluded that there was a lack of correspondence between the charge and a particularized benefit conferred because the general public benefited in the same manner as the property owners who were required to pay the charge. [Id. at 108-109](#). In addition, the charge lacked proportionality because it failed to consider property characteristics relevant to runoff generation and allowed the city to maintain a working capital reserve of 25% to 30% of the storm water utility's total expenses. [Id. at 110-111](#). Finally, this Court concluded that the charge was effectively compulsory and the lack of volition supported the conclusion that the management charge was a tax. [Id. at 111-112](#).

In *Binns v City of Detroit*, unpublished per curiam opinion of the Court of Appeals, issued November 6, 2018 (Docket Nos. 337609; 339176),<sup>6</sup> this Court upheld a drainage charge assessed by the city of Detroit and its agencies, the Detroit Water [\*14] and Sewage Department (DWSD) and the Detroit Board of Water Commissioners (BWC), in a case involving original actions under the Headlee Amendment. The city has a combined storm water runoff and waste water sewer system. *Id.* at 3. The combined sewage is treated before being released back into the environment and federal and state regulations required more than \$1 billion in investments into the combined sewer overflow (CSO) facilities in order to prevent untreated sewage from spilling into public waterways. *Id.* In 2016, DWSD revised its method of calculating the drainage charge for property owners in Detroit based on impervious surface area. *Id.* at 4.

Applying the *Bolt* factors, this Court concluded that the city's drainage charge was a user fee rather than a tax. *Id.* at 14. First, this Court concluded that the drainage charge served a regulatory purpose, rather than a revenue-raising purpose, because the federally-mandated treatment of combined sewage constituted the provision of a service. *Id.* at 14-15. Therefore, "[t]he regulatory weakness identified in *Bolt* and *Jackson Co* concerning the release of untreated storm water back into the environment" was not present. *Id.* at 16. This Court further concluded that there was an adequate

correspondence [\*15] between the charges imposed and the benefits conferred because the charge benefited all property owners and the city's method of assessing the charge involved a high degree of precision. *Id.* This Court also concluded that there was no evidence of a revenue-raising purpose and the city had never used general fund expenses to pay for its combined sewer system treatment and disposal services. *Id.* at 16-17. Further, "the fact that the drainage charge [was] used in part to service debt incurred to pay for federally required capital investments [did] not by itself require the conclusion that the drainage charge constitutes a tax." *Id.* at 17. Unlike in *Bolt*, the charge was not used to fund future expenses for large-scale capital improvements, but rather "to amortize present debt costs incurred to pay for capital improvements in conformance with accepted accounting principles." *Id.* at 18.

With regard to the second *Bolt* factor, this Court concluded that the charge was reasonably proportionate to the necessary costs of service because it was calculated on the basis of aerial photography and city assessor data and no charge was imposed on parcels containing fewer than .02 impervious acres, which was the margin of error from [\*16] flyover views. *Id.* at 18-19. In addition, there were procedures to dispute the impervious area measurement and substantial credits available to property owners who took steps to reduce the amount of storm water flowing from their properties into the DWSD sewer system. *Id.* at 19. Finally, this Court concluded that, although the charge was effectively compulsory, this factor was not dispositive given its consideration of the other two factors. *Id.* at 20-21.

## 2. APPLICATION

With regard to the first factor, we must determine whether the Storm Water Charge serves a regulatory or revenue-raising purpose. See [Bolt, 459 Mich at 161](#). In this case, a service is rendered in the form of removal and treatment of storm water runoff, and federal and state regulations have required improvements to the Milk Water System. Defendant has instituted the Storm Water Charge in order to pay for the required improvements. This indicates a regulatory component. *Binns*, unpub op at 14-15. In addition, unlike in [Bolt, 459 Mich at 165](#), the improvements will benefit all property owners who are required to pay it.

On the other hand, there is also evidence of a revenue-generating purpose for the Charge. Before 1992,

<sup>6</sup>Unpublished opinions are not binding under the rule of stare decisis, but may be considered for their instructive or persuasive value. [Cox v Hartman, 322 Mich App 292, 307; 911 NW2d 219 \(2017\)](#). We further note that an application for leave to appeal this Court's decision in *Binns* is currently pending before the Supreme Court.

defendant levied ad valorem property taxes to pay for storm water costs. Thus, [\*17] as was the case in [Bolt, 459 Mich at 168](#), there is evidence that the Charge may have the effect of increasing revenues by omitting the storm water costs from the expenses covered by defendant's general fund. The question, however, is whether the revenue-generating purpose outweighs the regulatory purpose of the Charge. See [Jackson, 302 Mich App at 106](#). In this case, despite the previous use of general funds, it appears that the primary motivating factor for the Storm Water Charge at issue was the improvements required by state and federal law. Therefore, like in *Binns*, unpub op at 14-16, the regulatory purpose is not minimal. However, as in [Bolt, 459 Mich at 166-167](#), defendant's ordinance does not consider the presence of pollutants on each parcel or distinguish between those responsible for greater and lesser levels of runoff.

The use of the Storm Water Charge to, in part, service debt incurred to pay for the required improvements is another relevant consideration. See *Binns*, unpub op at 17. The fact that the Charge is used in part to service such debt does not by itself require the conclusion that the Storm Water Charge is a tax because the payment of debt can be part of the cost of providing service. In *Binns*, this Court concluded that the charge was not [\*18] used to fund future expenses, but to amortize present debt costs incurred. See *id.* In this case, however, defendant has admitted that it has not yet been required to make its first payment on the project. The debt service charges will not be fully implemented until the completion of the project in 2019.<sup>7</sup>

---

<sup>7</sup>Plaintiff also presents a persuasive argument that defendant's ordinance does not allow debt service for the 2016 project. Section 27-150 provides that "[a]ll funds collected for stormwater service shall be placed in a separate fund and shall be used solely for the debt retirement, construction, operation, repair and maintenance of the stormwater system." Section 27-100 defines "debt retirement" as "[t]he annual required payment of principal and interest accrued to the City of Harper Woods by the Milk River Drainage Board for the city's proportionate share of the retirement of capital improvement bonds issued for the Milk River Improvement Project." It also defines the "Milk River Improvement Project" as "[t]hat project undertaken in 1991 by the Milk River Drainage District for increased retention and treatment of stormwater runoff generated primarily by the cities of Harper Woods and Grosse Pointe Woods." Harper Woods Ordinance § 27-100. Although the question of whether defendant violated the ordinance is not before us, the suggestion that the Storm Water Charge violates the ordinance supports the conclusion that it is not a valid user fee.

With regard to the second factor, the charge must be reasonably proportionate to the costs of the service. See [Bolt, 459 Mich at 161-162](#). Like in [Bolt, 459 Mich at 156](#), and [Jackson, 302 Mich App at 110](#), defendant determines the amount of the Storm Water Charge imposed on each property owner based on estimated figures. When the ordinance was adopted in 1992, defendant randomly sampled 50 residential parcels and determined that, on average, the residential parcels had 3,250 square feet of impervious areas. Based on that sampling, defendant's ordinance assumes that all residential properties in excess of 3,500 square feet have the same approximation of impervious area. The ordinance does not consider the individual characteristics of the property, such as pollutants, the type or extent of improvements thereon, or how said improvements affect the amount of runoff flowing from the property. Indeed, all residential properties that are not exempt from the Charge [\*19] pay either one-third, one-half, or a full billing unit<sup>8</sup> based strictly on the square footage of the property, regardless of how much of the property is actually impervious or pervious. The Charge imposed for a commercial property is likewise based on the full property size, without accounting for the true nature of the particular property. Although mathematical precision is not required, [Jackson, 302 Mich App at 109](#), defendant's inflexible approximation approach is a far cry from the more particularized method involving individual measurements of impervious areas this Court found acceptable in *Binns*, unpub op at 18-19. In further contrast to *Binns*, defendant's ordinance provides no exemption or financial incentive for property owners who are able to demonstrate that their properties contribute less storm water to the system as a result of various proactive measures.<sup>9</sup>*Id.* at 18. Also, as in [Bolt, 459 Mich at 166](#), and [Jackson, 302 Mich App at 108-109](#), the storm water system benefits not only the property owners who are subject to the Charge, but also the general public at large.<sup>10</sup> Moreover, based on the testimony of

---

<sup>8</sup> In 2016, a "billing unit" was \$210.

<sup>9</sup> The ordinance permits a property owner to appeal the Storm Water Charge to the city manager and authorizes the city manager to "adjust such charges as he or she may deem appropriate when unusual or unique situations are presented and an adjustment is justified." Harper Woods Ordinance, § 27-140. The ordinance, however, provides no guidance as to what type of "unusual or unique situations" would warrant an adjustment or the extent of the available adjustment.

<sup>10</sup> While a benefit to the public at large does not always negate

defendant's city manager, it appears that defendant is collecting far more than is required to operate the system, particularly given that its debt repayments have [\*20] not yet become due.

With regard to the third factor, defendant concedes that the Storm Water Charge is not voluntary. While this factor is not dispositive, in this case the first factor presents a close question and the second factor supports the conclusion that the Storm Water Charge is a tax. In addition, as in [Bolt, 459 Mich at 168](#), the fact that the Storm Water Charge may be secured by placing a lien on property supports the conclusion that the Charge is a tax. Considering the totality of the circumstances, the trial court did not err by concluding that the Storm Water Charge is not a valid user fee, but a tax that violates the Headlee Amendment. Therefore, the trial court properly denied summary disposition in favor of defendant on Count I.

#### B. WHETHER THE DRAIN CODE AUTHORIZED THE STORM WATER CHARGE

Next, defendant argues that the trial court erred by denying summary disposition in its favor on Count I because it could legally assess user charges to property owners under the Drain Code as a matter of law. We disagree.

Defendant argued below that the Storm Water Charge was authorized by Chapter 21 of the Drain Code and, therefore, did not violate the Headlee Amendment; however, the trial court did not address this issue. Nonetheless, "where the lower [\*21] court record provides the necessary facts, appellate consideration of an issue raised before, but not decided by, the trial court is not precluded." [Hines v Volkswagen of America, Inc., 265 Mich App 432, 443-444; 695 NW2d 84 \(2005\)](#). Because the facts necessary to resolve this issue have been provided, we may consider it. The denial of a motion for summary disposition is reviewed de novo. [Maiden, 461 Mich at 118](#). The proper interpretation of a statute is a question of law that is also reviewed de novo. [In re Complaint of Rovas Against SBC Mich, 482 Mich 90, 97; 754 NW2d 259 \(2008\)](#). Application of the Headlee Amendment is a question of law that is reviewed de novo. [Oakland Co v Michigan, 456 Mich 144, 149; 566 NW2d 616 \(1997\)](#) (opinion by KELLY, J.).

---

the regulatory character of a charge, "a charge is not a regulatory fee in the first instance unless it is designed to confer a particularized benefit on the property owners who must pay the fee." [Jackson, 302 Mich App at 108](#).

"The plain language of art 9, § 31, excludes from its scope the levying of a tax, or an increased rate of an existing tax, that was authorized by law when that section was ratified." [American Axle, 461 Mich at 362](#). This is true even when the tax, although authorized, was "not being levied at the time Headlee was ratified and even though the circumstances making the tax or rate applicable did not exist before that date." [Id. at 357](#). Thus, if the Charge in this case was a tax that was authorized under the Drain Code—a comprehensive act that predates ratification of the Headlee Amendment in 1978—then it does not violate the Headlee Amendment.

Defendant argues that the Storm Water Charge was authorized under § 539(4) of the Drain Code, which provides:

This section shall not be construed to prevent the assessing of [\*22] public corporations at large under this chapter. In place of or in addition to levying special assessments, the public corporation, under the same conditions and for the same purpose, may exact *connection, readiness to serve, availability, or service charges* to be paid by owners of land directly or indirectly connected with the drain project, or combination of projects, subject to [MCL 280.]489a. [[MCL 280.539\(4\)](#) (emphasis added).]

[MCL 280.489a](#) sets forth procedural prerequisites a public corporation must follow before filing a petition for construction of a drain project in the event it "determines that a part of the land in the public corporation will be especially benefited by a proposed drain so that a special assessment, fee, or charge may be levied by the public corporation . . . ." Defendant acknowledges that it did not follow the procedures laid out in [MCL 280.489a](#) (or [MCL 280.538a](#), the analogous statute concerning intercounty, as opposed to intracounty, drains). However, relying on [Downriver Plaza Group v Southgate, 444 Mich 656, 663; 513 NW2d 807 \(1994\)](#) (holding that city's authority to assess user fees was not impaired by failure to comply with prepetition procedure because compliance was impossible where construction of drain system was completed before [MCL 280.489a](#) went into effect), defendant argues that its [\*23] noncompliance should be excused because the improvements to the Milk Water System were required by the MDEQ under [MCL 280.423\(3\)](#),<sup>11</sup> and did not

---

<sup>11</sup> [MCL 280.423\(3\)](#) authorizes the MDEQ to issue an order of determination identifying unlawful discharge of sewage or

arise from a drain project petition submitted to the Michigan Department of Agriculture and Rural Development.

We find defendant's reliance on [MCL 280.539\(4\)](#) unpersuasive. Moreover, it serves merely to distract from the critical issue before us, i.e., whether the Drain Code authorized a tax in the first place. Even if it was impossible for defendant to have complied with the procedural requirements set forth in the Drain Code, the fact remains that [MCL 280.539\(4\)](#) authorizes various types of charges; it does not authorize a tax. Consequently, and although we have concluded that the Storm Water Charge is a tax, it was not a tax authorized by the [\*24] Drain Code, and the Drain Code therefore does not provide a basis for exempting the Charge from the requirements of the Headlee Amendment.

#### C. WHETHER DEFENDANT'S CHARTER AUTHORIZED THE STORM WATER CHARGE

Finally, defendant argues that the trial court erred by denying its motion for summary disposition on Count I because the Storm Water Charge was authorized by its 1951 Charter and, therefore, is exempt from analysis under the Headlee Amendment. We disagree.

Defendant raised this argument below, but the trial court did not address it. As noted, however, "where the lower court record provides the necessary facts, appellate consideration of an issue raised before, but not decided by, the trial court is not precluded." [Hines, 265 Mich App at 443-444](#). Because the facts necessary to address this issue have been provided, we may consider it. Again, both the denial of a motion for summary disposition, [Maiden, 461 Mich at 118](#), and application of the Headlee Amendment, [Oakland Co, 456 Mich at 149](#) (opinion by KELLY, J.), are subject to de novo review on appeal.

Again, the Headlee Amendment "excludes from its

---

waste, the user or users responsible for the unlawful discharge, and the necessity of remedial measures to purify the flow of the drain. In addition,

[t]he order of determination constitutes a petition calling for the construction of disposal facilities or other appropriate measures by which the unlawful discharge may be abated or purified. The order of determination serving as a petition is in lieu of the determination of necessity by a drainage board pursuant to chapter 20 or 21 or section 122 or 192 or a determination of necessity by a board of determination pursuant to section 72 or 191, whichever is applicable. [\[MCL 280.423\(3\).\]](#)

scope the levying of a tax, or an increased rate of an existing tax, that was authorized by law when that section was ratified." [American Axle, 461 Mich at 362](#). Defendant relies on several provisions of its 1951 Charter that it argues provides pre-Headlee authorization [\*25] for the Storm Water Charges. In particular, defendant relies on §§ 2.2, 14.1, 14.2, and 14.3 of the Charter. Section 2.2 provides, in relevant part:

[T]he city shall have power with respect to and may, by ordinance and other lawful acts of its officers, provide for the following . . . :

(f) *Street, alleys, and public ways.* The establishment and vacation of streets, alleys, public ways and other public places, and the use, regulation, improvement and control of the surface of such streets, alleys, public ways and other public places and of the space above and beneath them . . .

Chapter 14 governs "Municipal Utilities." Section 14.1 gives defendant the power to improve and maintain public utilities for supplying water and sewage treatment. Section 14.2 gives the city council the power to fix just and reasonable rates and other charges to supply those public utility services. Section 14.3 provides that "[t]he council shall provide by ordinance for the collection of all public utility rates and charges of the city[.]" and further provides "[t]hat the city shall have as security for the collection of such utility rates and charges a lien upon the real property supplied by such utility[.]"

While the cited charter provisions give defendant the power to make [\*26] improvements to the storm water system and also to set rates and charges for supplying water and sewage treatment, none of these provisions give defendant the authority to impose a tax. In [Bolt, 459 Mich at 172-173](#) (BOYLE, J., dissenting), the dissent pointed out that the Lansing City Charter similarly allowed the city to operate and maintain public utilities and impose "just and reasonable rates" and other charges. The majority, although not expressly addressing the issue, did not conclude that there was pre-Headlee authorization for the tax at issue in that case. The majority did, however, note that "even though the city may be authorized to implement the system [under the Revenue Bond Act], its method of funding the system may not violate the Headlee Amendment." [Id. at 168 n 17](#) (opinion of the Court). In contrast, in [American Axle, 461 Mich at 360](#), the statute that provided pre-Headlee authorization expressly allowed for the assessment of the amount of a judgment on the "tax

roll." Defendant's 1951 Charter did no such thing, but merely authorized certain "rates" and "charges." Therefore, we conclude that defendant's 1951 Charter did not provide pre-Headlee authorization for the tax imposed by defendant in this case, and that the trial court properly denied summary [\*27] disposition in favor of defendant on Count I.

### III. PLAINTIFF'S CROSS-APPEAL

On cross-appeal, plaintiff argues that (1) he may plead and prove both legal and equitable theories of relief and obtain a recovery under both claims, and (2) after invalidating the Storm Water Charge, the trial court should have enjoined defendant from collecting the Charge in the future.

#### A. EQUITABLE REMEDIES

First, plaintiff argues that the trial court erred by granting summary disposition in favor of defendant on Counts II and III of his complaint because he is not prohibited from seeking equitable remedies for the alleged violation of [MCL 141.91](#), in addition to pursuing relief under the Headlee Amendment. We agree.

The denial of a motion for summary disposition is reviewed de novo. [Maiden, 461 Mich at 118](#). "Whether a claim for unjust enrichment can be maintained is a question of law that we review de novo." [Karaus v Bank of New York Mellon, 300 Mich App 9, 22; 831 NW2d 897 \(2012\)](#). In addition, this Court reviews trial court rulings regarding equitable matters de novo. *Id.*<sup>12</sup>

After the trial court granted plaintiff's motion for summary disposition on Count I, plaintiff filed a renewed motion for partial summary disposition on Counts II and III. Counts II and III of the complaint alleged claims for assumpsit and unjust enrichment based on [\*28] the alleged violation of [MCL 141.91](#). The trial court denied plaintiff's motion for summary disposition on Counts II and III, finding that there was a legal remedy available pursuant to [MCL 600.308a](#) and the Michigan Constitution, and instead granted summary disposition in favor of defendant under [MCR 2.116\(I\)\(2\)](#).

The trial court's ruling was based on the principle that "[e]quity does not apply when a statute controls." [Gleason v Kincaid, 323 Mich App 308, 318; 917 NW2d](#)

[685 \(2018\)](#). "In other words, when an adequate remedy is provided by statute, equitable relief is precluded." *Id.* As stated by our Supreme Court in [Tkachik v Mandeville, 487 Mich 38, 45; 790 NW2d 260 \(2010\)](#):

A remedy at law, in order to preclude a suit in equity, must be complete and ample, and not doubtful and uncertain . . . . Furthermore, to preclude a suit in equity, a remedy at law, both in respect to its final relief and its modes of obtaining the relief, must be as effectual as the remedy which equity would confer under the circumstances . . . . [Quotation marks and citations omitted.]

Defendant does not dispute that plaintiff could seek both legal and equitable relief in his complaint. According to defendant, however, because plaintiff prevailed on his Headlee Amendment claim, he cannot also recover on his unjust enrichment and assumpsit claims. Plaintiff, on the other hand, argues that [\*29] his claims alleging a violation of [MCL 141.91](#) are separate, there is no legal remedy available for a violation of [MCL 141.91](#), and those claims are not subject to the same one-year limitations period as the Headlee Amendment claim.

The parties do not dispute that plaintiff's Headlee Amendment claim is subject to a one-year limitations period, see [MCL 600.308a\(3\)](#), whereas plaintiff's claims in Counts II and III for equitable relief are subject to a six-year limitations period, see [MCL 600.5813](#). Accordingly, if plaintiff prevails on Counts II and III, he would be entitled to a refund of the Storm Water Charge since September 28, 2011 (six years before the complaint was filed). Given that plaintiff would be entitled to recover the Charge for several more years under Counts II and III than under Count I, we agree with plaintiff that the legal remedy available for the Headlee Amendment violation is not an adequate substitute for the remedy that equity would confer for the alleged violation of [MCL 141.91](#). Therefore, even though plaintiff prevailed on Count I, he should have been permitted to pursue his claims in Counts II and III and the trial court erred by granting summary disposition in favor of defendant on those counts.<sup>13</sup>

#### B. INJUNCTIVE RELIEF

<sup>13</sup> The trial court did not otherwise address the elements of plaintiff's claims in Counts II and III. While plaintiff argues that those claims were established on the basis that the Storm Water Charge is a tax, he acknowledges that there could be a question of fact regarding the balance of equities. Therefore, those claims must be considered by the trial court on remand.

<sup>12</sup> "An action for money received is one of assumpsit. It is, in many cases, a substitute for a bill in equity and is governed by equitable principles." [Lulgjuraj v Chrysler Corp, 185 Mich App 539, 545; 463 NW2d 152 \(1990\)](#).

Plaintiff also argues that the trial court abused its [\*30] discretion by denying his request to enjoin defendant from collecting the Storm Water Charge in the future. We disagree.

"Granting injunctive relief is within the sound discretion of the trial court." Kernen v Homestead Dev Co, 232 Mich App 503, 509; 591 NW2d 369 (1998). This Court reviews the trial court's decision for an abuse of discretion. *Id.* "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." Hammel v Speaker of House of Representatives, 297 Mich App 641, 647; 825 NW2d 616 (2012) (quotation marks and citation omitted; alteration in original).

"Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." Kernen, 232 Mich App at 509 (quotation marks and citation omitted). In this case, the trial court denied plaintiff's request for an injunction without any explanation, other than noting that this Court had granted defendant's application for leave to appeal regarding the Headlee Amendment issue. By noting that leave had been granted, and denying the motion without prejudice, the trial court suggested that it merely believed injunctive relief was not proper *at that time*, but might be granted at a later date. The decision to deny injunctive relief until the interlocutory appeal [\*31] regarding the Headlee Amendment issue was resolved was within the trial court's discretion and did not fall outside the range of reasonable and principled outcomes.

#### IV. CONCLUSION

We affirm the trial court's order granting summary disposition in favor of plaintiff on Count I, reverse the order granting summary disposition in favor of defendant on Counts II and III, and remand to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Anica Letica

/s/ Michael J. Kelly

/s/ Mark T. Boonstra

**Table1** ([Return to related document text](#))

**Table1** ([Return to related document text](#))

---

End of Document

2

## Bohn v. City of Taylor

Court of Appeals of Michigan

January 29, 2019, Decided

No. 339306

### Reporter

2019 Mich. App. LEXIS 161 \*; 2019 WL 360730

LEONARD S. BOHN, Individually and as Representative of a Class of Similarly Situated Persons and Entities, Plaintiff-Appellant, v CITY OF TAYLOR, Defendant-Appellee.

**Notice:** THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

**Subsequent History:** Appeal granted by [Bohn v. City of Taylor](#), 2019 Mich. LEXIS 586 (Mich., Apr. 5, 2019)

**Prior History:** [\*1] Wayne Circuit Court. LC No. 15-013727-CZ.

[Bohn v. City of Taylor](#), 2018 Mich. App. LEXIS 1912 (Mich. Ct. App., Apr. 26, 2018)

**Judges:** Before: MURRAY, C.J., and SERVITTO and SHAPIRO, JJ.

## Opinion

PER CURIAM.

Plaintiffs brought suit alleging that defendant's water

and sewer rates were unreasonable and that they constituted disguised taxes in violation of the [Const 1963, art 9, §§ 25-34](#), popularly known as the Headlee Amendment. Plaintiffs appeal the trial court's order granting defendant summary disposition under [MCR 2.116\(C\)\(10\)](#). For the reasons set forth below, we affirm.<sup>1</sup>

### I. BACKGROUND

Defendant City of Taylor (the City) operates and maintains a water and sewer system. Plaintiffs brought suit alleging numerous improprieties [\*2] in the City's water and sewer ratemaking. On appeal, plaintiffs challenge only the computation of the City's sewer rates as well as the fact that the City no longer directly pays for public fire protection costs.

Specifically, plaintiffs raise two issues relating to the determination of the City's sewer rates. The parties agree that the first step of ratemaking is to determine the utility's revenue requirements. The parties also agree that, as a general matter, a utility may recover depreciation expenses through its rates. However, plaintiffs maintain through their expert, Kerry Heid, that it

---

<sup>1</sup> A trial court's decision whether to grant summary disposition is reviewed de novo. [Pace v Edel-Harrelson](#), 499 Mich 1, 5; 878 NW2d 784 (2016).

In reviewing a motion under [MCR 2.116\(C\)\(10\)](#), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [[Bank of America, NA v Fidelity Nat'l Title Ins Co](#), 316 Mich App 480, 488; 892 NW2d 467 (2016) (quotation marks and citations omitted).]

is improper for the City to include depreciation as an expense when it uses the cash-basis approach to determining its revenue requirements. The City admits that it is improper to include depreciation when calculating cash-basis revenue requirements. But the City, relying on its expert, Eric Rothstein, contends that the term "depreciation" was improperly used in its calculations and that the term was merely used as a "proxy" to provide funding to calculate its capital expenditures.

Plaintiffs also take issue with the accumulation of a reserve fund which will be used to fund maintenance, repairs, [\*3] and improvements to the City's sewer system. Plaintiffs contend that the sewer reserve fund, which now totals over \$10,000,000, shows that the City's sewer rates are in excess of the City's actual costs. Plaintiffs also maintain that it is improper for the City to use funds received from sewer rates to pay for future capital improvements to the sewer system. However, plaintiffs concede that it is appropriate for the City to maintain a reserve fund for the purposes of maintaining and repairing its sewer system, and the City argues that plaintiffs failed to establish that the amount in the City's fund is unreasonable. The City also contends that the reserve fund is properly maintained to address near-term needs and therefore does not raise concerns of "intergenerational inequity."

Lastly, plaintiffs claim that it is improper for the City to incorporate the cost of public fire protection into its service rates. Plaintiffs assert that the City should pay for those costs out of its general fund and that it is violating a City ordinance by failing to do so. Yet plaintiffs have not produced evidence that the City actually includes fire protection costs in its service rates. Further, the City [\*4] contends that it is appropriate to pass the cost of public fire protection directly to consumers.

The parties filed competing motions for summary disposition. In a written opinion and order, the trial court determined that plaintiffs failed to establish a genuine issue of material fact as to whether the sewer rates constitute an unlawful tax and whether the rates were unreasonable. The trial court also determined that plaintiffs failed to establish that the City includes the cost of fire protection in its water rates.

## II. ANALYSIS

### A. REASONABLENESS OF SEWER RATES

The City's Charter provides that the city council "shall

have the power to fix from time to time such just and reasonable rates and other charges as may be deemed advisable for supplying the inhabitants of the City and others with such public services as the City may provide. . . ." Taylor Charter, § 17.3. The Charter does not provide any standards for determining "just and reasonable rates." But Taylor Ordinance, § 50-25(c), provides:

The rates and charges hereby established shall be based upon a methodology which complies with applicable federal and state statutes and regulations. The amount of the rates and charges shall be sufficient to provide [\*5] for debt service and for the expenses of operation, maintenance and replacement of the system as necessary to preserve the same in good repair and working order. The amount of the rates and charges shall be reviewed annually and revised when necessary to ensure system expenses are met and that all users pay their proportionate share of operation, maintenance and equipment replacement expenses.

It is well established that municipal utility rates are presumptively reasonable. [\*Trahey v Inkster\*, 311 Mich App 582, 594; 876 NW2d 582 \(2015\)](#). "The determination of 'reasonableness' is generally considered by courts to be a question of fact." [\*Novi v Detroit\*, 433 Mich 414, 431; 446 NW2d 118 \(1989\)](#). "[T]he presumption of reasonableness may be overcome by a proper showing of evidence." [\*Trahey\*, 311 Mich App at 594](#). It is a plaintiff's burden "to show that any given rate or ratemaking practice is unreasonable." *Id.* "Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." [\*Id.\* at 595](#).

Under the cash-basis method of utility ratemaking, a municipality first determines "the cash needs of the utility for a given period, *i.e.*, the dollars needed to pay the expense of operation, meet debt obligations, and make such capital improvements [\*6] as would not require bond financing, *e.g.*, limited new plant construction, plus recurring replacements, renovation and extensions of existing plant." [\*Plymouth v Detroit\*, 423 Mich 106, 115; 377 NW2d 689 \(1985\)](#). Plaintiffs first argue that the City improperly includes depreciation when it calculates its expenses under the cash-basis method of ratemaking. Plaintiffs' expert, Heid, reached this conclusion by relying on ratemaking manuals which provide that depreciation is not to be included when

determining cash-needs revenue requirements. The City's expert, Rothstein, agrees that depreciation, which is a non-cash expense, should not count as an expense under a cash-basis ratemaking approach. But Rothstein opined that the City had simply used the label of "depreciation expense" as a proxy for properly included costs, i.e., for investment in infrastructure renewal and rehabilitation.

To begin, we note that the City is not required by law or ordinance to adhere to any ratemaking approach. Nor must the City abide by any particular ratemaking manual or guideline. Thus, we decline to hold that the City's failure to strictly follow the cash-basis approach renders its rates unreasonable or that the inclusion of depreciation in its rates is illegal or [\*7] improper. To the contrary, it is common for utilities to set rates to cover the costs of depreciation. See [64 Am Jur 2d, Public Utilities, § 125](#), p 516. Further, it is permissible to include a capital investment component in utility rates. See [Bolt v Lansing, 459 Mich 152, 160, 164-165; 587 NW2d 264 \(1998\)](#).

That said, we agree with plaintiffs that the City should not be allowed to accomplish a "double recovery" by counting a single expense twice in determining its revenue requirements. However, plaintiffs have not provided evidence showing that the City has engaged in such a practice. While plaintiffs note that the City has included debt service payments as a budgeted expense in its sewer rates analysis, plaintiffs have not proffered any evidence that those payments are related to the depreciated items. Indeed, Heid admitted that he did not identify any specific items in defendant's budget that were funded through debt, that he did not identify any specific instances in which defendant collected for the same amount twice, and that he could not be aware of any such instances without going through each individual item of defendant's budget.

Thus, while plaintiffs argue that the City may have obtained a double recovery by including depreciated expenses in its sewer rates, they have failed [\*8] to provide any supporting evidence on that matter. By contrast, Rothstein consulted with the City officials and determined that the City did not include depreciation expense and capital expenditure projections separately but rather used depreciation expense to inform its estimate of required capital expenditures. Heid also acknowledged that it is sometimes appropriate for utilities to use depreciation as a proxy for other expenses. Although the evidence must be viewed in a light most favorable to plaintiffs, they have failed to offer

specific evidence that would give rise to a factual dispute regarding the depreciated expenses. Therefore, plaintiffs have failed to present clear evidence that the inclusion of depreciation costs in the City's sewer rates was improper or that this practice renders those rates unreasonable.

Next, plaintiffs challenge what they deem to be an excessive sewer reserve fund. Taylor Ordinances, § 50-24, provides that "[a]ll funds, including surplus funds, if any, shall be kept in separate accounts for the benefit of the bondholders, the operation and maintenance of the water and sewer divisions, and for no other purpose." Heid agreed that the City should be allowed [\*9] to maintain a reserve fund for maintenance and repair of the sewer system. Indeed, rate-based public utilities commonly maintain a capital reserve to provide fiscal stability. [Jackson Co v City of Jackson, 302 Mich App 90, 111; 836 NW2d 903 \(2013\)](#). Plaintiffs have not proffered any evidence as to how much money should actually be in the City's sewer fund. Heid testified that he does not know what work needs to be done to the City's sewer system and does not know how much the City needs in reserves for sewer replacements. Accordingly, plaintiffs have not shown that the amount of the City's sewer reserve fund is unreasonable per se.

Instead, plaintiffs contend that the City must have a specific plan for capital improvements equivalent to the amount in the reserve fund and that without such a plan, the fund's existence is evidence that the rates are excessive. Plaintiffs do not provide any authority (legal or otherwise) to support this contention. Setting that aside, we note that numerous witnesses testified that the City has undertaken or initiated actions and processes to assess its aging sewer system and to prepare and pursue a plan to repair and rehabilitate that system. There was also testimony that the City's reserves are insufficient to meet its infrastructure [\*10] renewal needs.

Plaintiffs counter that this a "post-hoc" justification and the City did not accumulate the reserve pursuant to any kind of capital improvement plan. For purposes of this appeal, we assume that to be true. However, we do not see how the lack of a capital improvement plan renders the accumulation of a reserve fund improper. First, there can be no plan to address the City's *unexpected* maintenance and repairs costs, which is one of the purposes of the fund. Second, Heid opined that the size of the reserve fund is largely due to the City's inclusion of depreciated expenses in its rates. Thus, the reserve fund is inherently aimed toward the replacement and

renewal of the sewer system. In other words, by including depreciation expenses in its rates, the City is saving for the day when the depreciated items will need to be replaced. This does not mean, however, that the City must at all times have a plan in place for infrastructure replacements. Presumably, large improvement projects are not continuously planned and executed. Rather, such projects occur periodically as the pipes and other infrastructure decays. The evidence shows that the City is currently inspecting its system [\*11] and planning infrastructure improvements, for which it will use the reserve fund. Plaintiffs fail to explain why the City must constantly have a capital improvement plan to justify the accumulation of funds that will eventually be used to fund the renewal and replacement of the sewer system.

In sum, plaintiffs fail to establish that any of the City's ratemaking practices are improper or unreasonable. Nor have plaintiffs proffered any evidence that the City's sewer rates are unreasonable. Heid admitted that he does not know what a reasonable rate is without performing a full cost of service study and that he would not be testifying concerning the amount of a reasonable rate. In general, "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates." Novi, 433 Mich at 427. "Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." Id. at 430. In the absence of a complete study of the rate structure and all of its components, it is speculative to suggest that the City's sewer rates are unreasonable. Accordingly, plaintiffs [\*12] have failed to demonstrate a genuine issue of material fact on that matter, and the trial court correctly granted summary disposition under MCR 2.116(C)(10).

## B. THE HEADLEE AMENDMENT

The pertinent provision of the Headlee Amendment, Const 1963, art 9, § 31, states:

Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

The levying of a new tax without voter approval violates

this section of the Headlee Amendment. Jackson Co, 302 Mich App at 99. However, a charge that constitutes a user fee is not subject to the Headlee Amendment. Id. The plaintiff bears the burden of establishing the unconstitutionality of the charge at issue. Id. at 98. A court decides, as a question of law, whether a charge is a permissible fee or an illegal tax. Westlake Transp, Inc v Public Serv Comm, 255 Mich App 589, 611; 662 NW2d 784 (2003).

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." Bolt, 459 Mich at 160. In general, "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 [\*13] the service or benefit. A tax, on the other hand, is designed to raise revenue." Id. at 161 (quotation marks and citations omitted). In Bolt, our Supreme Court identified three key criteria to use in distinguishing between a user fee and a tax: (1) a user fee serves a regulatory purpose rather than a revenue-raising purpose; (2) a user fee is proportionate to the necessary costs of the service; and (3) a user fee is voluntary in that property owners are able to refuse or limit their use of the service. Id. at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." Wheeler v Shelby Charter Twp, 265 Mich App 657, 665; 697 NW2d 180 (2005) (brackets, quotation marks, and citations omitted).

Water and sewer rates are generally considered user fees rather than taxes because they represent a fee paid in exchange for a service. See Bolt, 459 Mich at 162. Water and sewer rates are not always considered user fees, however, because they must be proportionate to the cost of the service. See Bolt, 338 Mich at 162 n 12. That said, as discussed above, plaintiffs have not presented evidence that the City's sewer rates themselves are unreasonable particularly in light of Heid's concession that he had [\*14] not performed a rate study and that he held no opinion concerning the reasonableness of the rates. Considering that plaintiffs fail to overcome the presumption that the City's rates are reasonable, we find no basis from which to conclude that the those rates are not proportionate to the cost of service. Instead, the rates constitute a valid user fee because users pay their proportionate share of the expenses associated with the operation and maintenance of the sewer systems. See Taylor Ordinances, § 50-25(c).

Consideration of the other *Bolt* criteria does not alter the conclusion that the City's sewer rates constitute a user fee rather than a tax. The first *Bolt* factor indicates that the rates comprise a valid user fee because the rates serve a regulatory purpose of providing sewer services to the City's residents. Although the rates generate funds to pay for the operation and maintenance of the sewer system, this by itself does not establish that the rates serve a primary revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." [\*Graham v Kochville Twp\*, 236 Mich App 141, 151; 599 NW2d 793 \(1999\)](#).

Plaintiffs, relying on [\*Bolt\*, 459 Mich 152; 587 N.W.2d 264](#), contend that it is impermissible [\*15] for the City to incorporate costs in its sewer rates which will be used to fund future capital improvements. In *Bolt*, the City of Lansing imposed a "storm water service charge" on property owners to fund the separation of the remaining portion of its combined sanitary and storm systems. [\*Id.\* at 155](#). The Supreme Court determined that the storm water service charge failed to satisfy the first and second criteria because the charge did not correspond to the benefits conferred. [\*Id.\* at 165](#). 75% of the property owners in Lansing were already served by a separate storm and sanitary sewer system, but those property owners would be charged the same amount as the 25% who would benefit most from the construction. *Id.* Further, the cost of this project was \$176 million over 30 years. [\*Id.\* at 155](#). The Court noted that the charge was "an investment in infrastructure that will substantially outlast the current 'mortgage' that the storm water charge requires property owners to amortize. At the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter." [\*Id.\* at 164](#) (citation omitted).

*Bolt* is primarily distinguishable because it involved a rate increase to fund a completely [\*16] new alteration to the existing sewer system that benefitted only 25% of the property owners. In this case, as discussed, the reserve fund is being used for maintenance and repairs of the existing system, and will be used to fund a large-scale project to replace and update much of that system which will benefit all users of the City's sewer services. Further, if one accepts the premise—as plaintiffs do—that the City may incorporate replacement costs into its rates, then we see no reason why surplus funds cannot be used to replace aging infrastructure. As for concerns that the City's ratepayers are funding improvements for future generations, we find Rothstein's reasoning on this point persuasive:

The practical reality is that Taylor's current customers, like all utility customers, benefit from prior customers' investments that put in place a (depreciating) system to which they can connect and receive service. Equitably, current users are asked to pay to renew and replace these assets, as well as pay their share of system upgrades. Future users are asked to pay for their shares of system capacity and will likewise be responsible to pay for asserts renewals and replacements.

The users of [\*17] the City's sewer system contribute to that system's wear and tear, an expense that the City recoups by including depreciation as a revenue requirement in its rate analysis. Accordingly, the users pay a fee proportionate to the necessary costs of the service. And in order for the sewer system to serve its regulatory purpose, it must be maintained and periodically replaced and updated. For those reasons, we conclude that the first two *Bolt* criteria establish that the City's sewer rates constitute a user fee rather than a tax.

As for the third *Bolt* factor, plaintiffs contend that the City's sewer services are not voluntary under statute and the City's ordinances. Even assuming that the sewer charges were deemed effectively compulsory in this case, "the lack of volition does not render a charge a tax; particularly where the other criteria indicate the challenged charge is a user fee and not a tax." [\*Wheeler\*, 265 Mich App at 666](#). We are unconvinced, in the absence of showing that the sewer rates are unreasonable, that those rates should be considered a tax as opposed to a user fee. Considering the *Bolt* criteria in totality, we conclude that plaintiffs have not established that the City has imposed an unconstitutional [\*18] tax.

Accordingly, plaintiffs have not demonstrated a genuine issue of material fact in support of their claims alleging violations of the Headlee Amendment and [\*MCL 141.91\*](#).<sup>2</sup> Therefore, the trial court properly granted summary disposition to the City pursuant to [\*MCR 2.116\(C\)\(10\)\*](#).

---

<sup>2</sup> [\*MCL 141.91\*](#) provides:

Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

## C. FIRE PROTECTION

Plaintiffs claim that the City violated an ordinance by incorporating the costs of public fire protection into its service rates. Specifically, the water department, in addition to its primary task of providing potable water, maintains equipment and operations sufficient to assure necessary pressure for the functioning of fire hydrants. The cost paid to the water department for this service is known as "fire hydrant rental." As a general matter, the experts agreed that it is appropriate for a municipality to recover this cost through water rates. Plaintiffs argue that this practice is nevertheless improper here because it violates Taylor Ordinance, § 50-25(g), which provides [\*19] in relevant part:

The reasonable cost and value of all water and sewer service rendered to the city and its various departments by the water and sewer system, including rentals for fire hydrant service for each fire hydrant connected to the system, during all or any part of the fiscal year, shall be charged against the city and will be paid for as the service accrues for the city's current funds, including the proceeds of taxes which will be levied in an amount sufficient for that purpose.

It is undisputed that the City no longer pays \$44,000 a year in rental fees for all of the fire hydrants on public property as it did until 2010. However, plaintiffs have not provided any evidence that public fire protection costs are improperly passed on to plaintiffs through the City's water rates. Tellingly, Heid testified that "there is nothing to suggest that the customers are actually paying any amount for those public fire protection services." Nor could Heid determine the amount of such a charge in the absence of a rate study. Further, Heid agreed that, at the end of the day, residents will pay for public fire protection either on their water bills or on their tax bills. Given this testimony, [\*20] plaintiffs have failed to produce evidence demonstrating a genuine issue of material fact concerning whether the costs for public fire protection are improperly included in defendant's water rates or the amount of any such charge. For the same reasons, plaintiffs fail to establish that the City is receiving "free service" from the water and sewer department in contravention of [MCL 141.118\(1\)](#)<sup>3</sup> by not

paying for public fire protection costs.

Affirmed.

/s/ Christopher M. Murray

/s/ Deborah A. Servitto

/s/ Douglas B. Shapiro

---

End of Document

---

public or private, or to a public agency or instrumentality. The reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both, and those charges, when so paid, shall be accounted for in the same manner as other revenues of the public improvement. [\*21]

---

<sup>3</sup> [MCL 141.118\(1\)](#) provides:

Except as provided in [subsection \(2\)](#) [which is inapplicable here], free service shall not be furnished by a public improvement to a person, firm, or corporation,