EXHIBITS TO PLAINTIFF'S BRIEF IN SUPPORT OF ORIGINAL COMPLAINT

1. *Bolt v. City of Lansing*, 459 Mich. 152, 166, 587 N.W.2d 264 (1998).
2. *Dekalb County v. U.S.*, 108 Fed. Cl. 681 (U.S. Court of Claims 2013).
3. *County of Jackson v. City of Jackson*, 302 Mich. App. 90, 836 N.W.2d 903 (2013).
4. *Gottesman v. City of Harper Woods*, COA Case No. 344568, 2019 Mich. App. LEXIS 7657.
5. *Patrick v. City of St. Clair Shores*, Case No. 2017-003018-CZ (Macomb County Circuit Court).
6. *Binns v. City of Detroit*, a Court of Appeals Opinion.
7. Binns, Supreme Court Opinion December 11, 2020.
8. FY 2020 CAFR at p. 4-11.
9. Stormwater Utility Regulations.
10. City of Ann Arbor "Stormwater FAQs"
11. Plaintiff's billing and payment records
12. "Stormwater Rates and Credits"
13. Stormwater Utility Rate Study, Final Report May 3, 2018
14. FY 2014 CAFR
15. Forestry Plan
16. City's website re: Forestry Plan
17. City website page concerning "Routine Street Tree Pruning"
18. Transcript of October 19, 2020 meeting at which the Council approved the tree pruning contract
19. Transfers from Stormwater to General Fund
20. City FY 2020 Budget
21. 2016 CAFR Excerpts
22. City Charter Section 15
23. *Lewiston Independent School District v. City of Lewiston*, 151 Idaho 800, 264 P.3d 907 (2011).
24. *Oneida Tribe of Indians v. Village of Hobart*, 891 F. Supp. 2d 1058, 1067 (N.D. Ill. 2012).

25. Drainage Manual, MDOT / Drainage Manual, which sets forth "runoff coefficients" for various types of surfaces.

26. EPA publication "Funding Stormwater Programs"

27. *Binns* Supreme Court Oral Argument Transcript

28. *Youmans v. Bloomfield Township*, __ Mich. App. __, __ N.W.2d __ (2021)

29. *Gottesman v. Harper Woods* MSC Order September 29, 2021

30. City Stormwater System Ordinance, Chapter 33, Section 2.202

31. City Stormwater Rate Ordinance, Chapter 33, Section 2:69

EXHIBIT - 1

Warning
As of: Apr 17, 2014

ALEXANDER BOLT, Plaintiff-Appellant, v CITY OF LANSING, Defendant-Appellee.

No. 108511

SUPREME COURT OF MICHIGAN

459 Mich. 152*; *587 N.W.2d 264*; *1998 Mich. LEXIS 3239

October 6, 1998, Argued
December 28, 1998, Decided
December 28, 1998, Filed

SUBSEQUENT HISTORY: [**1] Updated Copy December 14, 1999.

PRIOR HISTORY: Court of Appeals, SAAD, P.J., and WAHLS, J. and MARKMAN, J. (Docket No. 912944). *221 Mich App 79; 561 N.W.2d 423 (1997).*

DISPOSITION: Decision of the Court of Appeals reversed and case remanded to that Court for further proceedings consistent with this opinion.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff property owner appealed a decision of the court of appeals (Michigan), which held that a storm water service charge imposed by defendant city did not violate the Headlee Amendment, *Mich. Const. art. 9, §§ 25*-31, because it constituted a valid user fee.

OVERVIEW: Plaintiff property owner filed suit against defendant city, alleging that a storm water service charge imposed by Lansing, Mich., Ordinance 925 was unconstitutional under the Headlee Amendment, *Mich. Const. art. 9, §§ 25*-31. The court of appeals held that the storm water service charge did not violate the Headlee Amendment, because the charge constituted a valid user fee. Plaintiff appealed. On de novo review, the court reversed, holding that the storm water service charge was a tax and not a valid user fee, thereby remanding for further proceedings. The court distinguished between a fee and a tax, and concluded that the charges imposed did not correspond to the benefits conferred, and that the charge applied to all property owners, not just those who actually benefitted. Furthermore, the charge lacked any element of volition, also supporting the conclusion that the charge was a tax.

OUTCOME: The court reversed the judgment in favor of defendant city, which held that a storm water service charge was a fee, and held that the charge constituted a tax which violated the state constitution, and remanded for further proceedings.

CORE TERMS: storm, parcel, ordinance, sewage, user fee, property owners, water service, disposal, sewer, runoff, landowner, water system, Headlee Amendment, sewer system, stormwater, combined, public improvement, charter, special assessments, voluntariness, user, residential, impervious, storm sewers, revenue bonds, pollutant, conferred, municipal, sanitary, overflow

LexisNexis(R) Headnotes

Tax Law* > *State & Local Taxes* > *Use Tax* > *General Overview
[HN1] See *Mich. Const. art. 9, § 31*.

Tax Law > State & Local Taxes > Administration & Proceedings > General Overview
[HN2] A "fee" is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A "tax," on the other hand, is designed to raise revenue.

Real Property Law > Zoning & Land Use > Impact Fees
[HN3] Exactions which are imposed primarily for public rather than private purposes are taxes. Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed.

Real Property Law > Zoning & Land Use > Impact Fees
Tax Law > State & Local Taxes > Administration & Proceedings > General Overview
[HN4] In distinguishing between a fee and a tax, 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.

Real Property Law > Zoning & Land Use > Impact Fees
Tax Law > State & Local Taxes > Administration & Proceedings > General Overview
[HN5] A proper fee must reflect the bestowal of a corresponding benefit on the person paying the charge, which benefit is not generally shared by other members of society.

Real Property Law > Zoning & Land Use > Impact Fees
Tax Law > State & Local Taxes > Public Utilities Tax > General Overview
[HN6] Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component, sewerage may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax.

COUNSEL: Honigman, Miller, Schwartz & Cohn (by Frederick M. Baker, Jr.), Lansing, MI, and Witzel & Zoeller, P.C. (by Jeffrey Zoeller), East Lansing, MI, for the plaintiff-appellant.

James D. Smiertka, City Attorney, and Jack C. Jordan, Chief Deputy City Attorney, Lansing, MI, for the defendant-appellee.

Amici Curiae: R. Bruce Laidlaw, Ann Arbor, MI and Abigail Elias, Ann Arbor, MI for Michigan Municipal League and City of Ann Arbor. Dykema, Gossett, P.L.L.C. (by Stewart L. Mandell and Angela R. White), Detroit, MI, for Lansing Regional Chamber of Commerce. William R. Wingard, East Lansing, MI for Citizens to Abolish the Rain Tax Ordinance.

JUDGES: Chief Justice Conrad L. Mallett, Jr., Justices James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor BRICKLEY, KELLY, [**2] and TAYLOR, JJ., concurred with WEAVER, J., BOYLE, J. (dissenting). MALLETT, C.J., and CAVANAGH, J., concurred with BOYLE, J.

OPINION BY: ELIZABETH A. WEAVER

OPINION

[*154] BEFORE THE ENTIRE BENCH

WEAVER, J.

We granted leave to appeal in this case to determine whether the storm water service charge imposed by Lansing Ordinance No. 925 is a valid user fee or a tax that violates the Headlee Amendment, *Const 1963, art 9, § 31*. [1] We hold that the storm water service charge is a tax, for which approval is required by a vote of the people. Because Lansing did not submit Ordinance 925 to a vote of the people as required by the Headlee Amendment, the storm water service charge is unconstitutional and, therefore, null and void.

1 *456 Mich. 949, 576 N.W.2d 169 (1998).*

I

Part of the Lansing wastewater disposal system combines sanitary and storm sewers. During periods of heavy precipitation, the combined system often [*155] overflows, discharging combined storm water and untreated or partially treated sewage into the Grand and Red Cedar [**3] Rivers. In an effort to comply with the Clean Water Act (CWA) and the National Pollutant Discharge Elimination Standards (NPDES) permit-program requirement to control combined sewer overflows, [2] the city of Lansing elected to separate the remaining combined sanitary and storm sewers. [3]

2 The CWA allows cities to obtain permits to discharge specified levels of pollutants into navigable waterways.

3 Approximately seventy-five percent of the property owners are already served by a separated storm and sanitary sewer system.

The estimated cost of implementing the combined sewer overflow (CSO) control program is $ 176 million over the next thirty years. In 1995, as a means of funding the separation, the Lansing City Council adopted Ordinance 925, which provides for the creation of a storm water enterprise fund "to help defray the cost of the administration, operation, maintenance, and construction of the stormwater system . . . ." [4] The ordinance provides that costs for the storm water share of the CSO program [**4] (fifty percent of total CSO costs, including administration, construction, and engineering costs) will be financed through an annual storm water service charge. This charge is imposed on each parcel of real property located in the city using a formula that attempts to roughly estimate each parcel's storm water runoff.

4 The fund replaced that portion of the system that was previously funded by general fund revenues secured through property and income taxes.

Estimated storm water runoff is calculated in terms of equivalent hydraulic area (EHA). As defined by the ordinance, EHA is "based upon the amount of pervious and impervious areas within the parcel multiplied by [*156] the runoff factors applicable to each." Impervious land area, which impedes water absorption, thus increasing storm water runoff, is defined as the surface area within a parcel that is covered by any material which retards or prevents the entry of water into the soil. Impervious land area includes, but is not limited to, surface areas covered by buildings, [**5] porches, patios, parking lots, driveways, walkways and other structures. Generally, all non-vegetative land areas shall be considered impervious.

Pervious land area is defined as "all surface area within a parcel which is not impervious . . . ."

Residential parcels measuring two acres or less are not assessed charges on the basis of individual measurements, but, rather, are charged pursuant to flat rates set forth in the ordinance. [5] These rates are based on a predetermined number of EHA units per one thousand square feet. [6] For residential parcels over two acres, commercial parcels, and industrial parcels, the EHA for an individual parcel is calculated by multiplying the parcel's impervious area by a runoff [*157] factor of 0.95 and pervious area by a runoff factor of 0.15 and adding the two areas. [7]

5 Residential property is defined under the ordinance as "those platted or unplatted parcels, either public or private, with or without buildings, and located within the city of Lansing, and those parcels which are used for, or probably will be used for residential purposes."

6 Under the ordinance, the annual flat rates applied to residential parcels measuring less than two acres are as follows:

PARCEL SIZE DEVELOPED PARCEL UNDEVELOPED PARCEL

* * *

3,500 $ 35.95 $ 7.34

3,500-7,000 $ 59.83 $ 18.43

7,000-10,500 $ 84.60 $ 31.06

10,500-2 acres $ 120.17 $ 88.20

[**6]

7 Industrial property is defined as "those platted or unplatted parcels used for manufacturing and processing purposes with or without buildings; those parcels used for utilities sites for generating plants, pumping stations, switches, substations, compressing stations, warehouses and right of way, flowage land and storage areas; and those parcels used for removal or processing of gravel, stone, or mineral ores, whether valued by the local assessor or by the state geologist." Commercial property is defined as "those platted or unplatted parcels used for commercial purposes, whether wholesale, retail, or service, with or without buildings; those parcels used by fraternal societies; those used for religious or governmental purposes; schools; colleges; and those parcels used as golf courses, boat clubs, ski areas, or apartment buildings with more than 4 units."

Charges not paid by the deadline are considered delinquent and subject to delayed payment charges, rebilling charges, property liens (if the charge remains unpaid for six months or more), and attorney fees if a civil suit is filed to collect [**7] delinquent charges. The ordinance further provides for a system of administrative appeals by property owners contending that their properties have been unfairly assessed. In April 1996, the director of public service promulgated amended administrative rules that provide a twenty-five percent credit for properties with no storm water system service and a fifty percent credit for properties with neither storm nor sanitary sewer service. [8]

8 At some point, it appears that the rules issued by the public service director were amended to include a one hundred percent credit. The most

recent version of the rules regarding detention credits, which reflects a revision date of March 3, 1998, provides for a twenty-five percent credit to appealed properties "which do not front a curb and guttered street and whose stormwater run-off did not reach a; [sic] storm sewer, drainage ditch, or stream, directly or by sheet flow through adjacent properties." The rules provide a fifty percent credit to appealed properties "satisfying the criteria for a 25% credit, and who's's [sic] residence was not connected to the City's sanitary sewer system." The rules award one hundred percent credit to appealed properties satisfying the criteria for twenty-five percent credit and located "within a drainage district which could not be served by an existing public storm sewer outlet." It also appears that credits were established through the Lansing City Council Appeal Review, which awards a twenty-five percent credit "to any property fronting a non-curb and guttered street which did not have any storm sewer on their block" and one hundred percent credit to "any property which fronts a gravel street and does not have a catch basin directly in front of their property or does not have a storm sewer in their block" and to "a property with no street frontage with no adjacent property fronting a street with storm sewer in that block."

[*158] [**8] The city began billing property owners for the storm water service charge in December 1995, with payment being due on March 15, 1996. Plaintiff was billed $ 59.83 for his 5,400 square-foot parcel. On March 4, 1996, plaintiff filed his complaint, alleging that Ordinance 925 violates *Const 1963, art 9, §§ 25* and *31* (the Headlee Amendment). [9] The Court of Appeals, in a two-to-one decision, concluded that the storm water service charge did not violate the Headlee Amendment because it constituted a valid user fee. [10]

9 Plaintiff filed his action in the Court of Appeals pursuant to *Const 1963, art 9, § 32*, which provides in pertinent part that "any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article . . . ."

10 *221 Mich. App. 79; 561 N.W.2d 423 (1997).*

II

Whether the storm water service charge imposed by Ordinance 925 is a "tax" or a "user fee" is a question of [**9] law that this Court reviews de novo. *Saginaw Co v John Sexton Corp of Michigan, 232 Mich. App. 202, 209; 591 N.W.2d 52 (1998)*. If, as plaintiff contends, the charge is a tax, it unquestionably violates the Headlee Amendment, *Const 1963, art 9, § 31*, which provides in relevant part: [HN1] [*159]

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.

However, if the charge is a user fee, as the city maintains, the charge is not affected by the Headlee Amendment.

The Court of Appeals majority ruled that the storm water service charge was a valid user fee. In so holding, the Court analogized to the case of *Ripperger v Grand Rapids, 338 Mich. 682, 686-687; 62 N.W.2d 585 (1954)*, in which this Court concluded that sewage disposal charges to landowners were not a tax. [11] The Court of Appeals stated:

From this analysis in *Ripperger,* [**10] we conclude that, here, charges for storm water collection, detention, and treatment (which even plaintiff concedes was properly subject to a fee and not a tax when combined with sewage disposal) do not lose their character as a fee by virtue of being separated from sewage collection and disposal. Therefore, for the reasons stated in *Ripperger*, we hold that the result does not change by separating the systems-the charge here is a user fee, not a tax. [*221 Mich. App. 79, 87; 561 N.W.2d 423 (1997).*]

11 In *Ripperger*, a pre-Headlee case, the sewer service charge was based on the metered water usage for the winter quarter. In determining that the sewer charge was not a tax, the *Ripperger* Court concluded with very little analysis that the same reasoning that treated water rates paid by consumers as the price paid for a commodity applied equally to the sewage charges imposed by the city of Grand Rapids. *Ripperger, 338 Mich. at 685-686.*

[*160] There is no bright-line test [**11] for distinguishing between a valid user fee and a tax that violates the Headlee Amendment. As noted by the Court of Appeals, the difficulty in resolving the issue is that the Headlee Amendment fails to define either the term "tax" or "fee," an omission that the Headlee Blue Ribbon Commission urged the Legislature to rectify. Headlee Blue Ribbon Commission, A Report to Governor John Engler, Executive Summary, and § 5, pp 26-31 (September 1994). A primary rule in interpreting a constitutional provision such as the Headlee Amendment is the rule of "common understanding":

"A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.* 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people,* and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding,* and ratified the instrument in the belief that [**12] that was the sense designed to be conveyed.'" [*Traverse City School Dist v Attorney General, 384 Mich. 390, 405; 185 N.W.2d 9 (1971)*, quoting Cooley's Const Lim 81 (emphasis in original).]

In addition, to clarify meaning, the courts may consider the circumstances leading to the adoption of the constitutional provision and the purpose sought to be accomplished. *Id.*

The Headlee Amendment "grew out of the spirit of 'tax revolt' and was designed to place specific limitations on state and local revenues. The ultimate purpose was to place public spending under direct control." *Waterford School Dist v State Bd of Ed, 98 Mich. App. 658, 663;* [*161] *296 N.W.2d 328 (1980).* More recently, this Court has stated,

The Headlee Amendment was "part of a nationwide 'taxpayers revolt' . . . to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level." [*Airlines Parking, Inc v Wayne Co, 452 Mich. 527, 532; 550 N.W.2d 490 (1996).*]

Determining whether the storm [**13] water service charge is properly characterized as a fee or a tax involves consideration of several factors. Generally, [HN2] a "fee" is "exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit." *Saginaw Co, supra at 210*; *Vernor v Secretary of State, 179 Mich. 157, 164, 167-169; 146 N.W. 338 (1914).* A "tax," on the other hand, is designed to raise revenue. *Bray v Dep't of State, 418 Mich. 149, 162; 341 N.W.2d 92 (1983).*

"[HN3] Exactions which are imposed primarily for public rather than private purposes are taxes. Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed." [Citations omitted.]

In resolving this issue, this Court has articulated three primary criteria to be considered when distinguishing between a fee and a tax. [HN4] The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose. *Merrelli v St Clair Shores, 355 Mich. 575, 583-584; 96 N.W.2d 144 (1959),* [**14] quoting *Vernor, 179 Mich. at 167-170.* A second, and related, criterion is that user fees must be proportionate [*162] to the necessary costs of the service. *Id.*; *Bray, supra at 160.* As was summarized in *Vernor,*

To be sustained [as a regulatory fee], the act we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license, and the regulation of the business to which it applies. [*179 Mich. at 167.*]

In *Ripperger,* this Court articulated a third criterion: voluntariness. Quoting from *Jones v Detroit Water Comm'rs, 34 Mich. 273, 275 (1876),* the *Ripperger* Court stated:

"The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water. No one can be compelled to take water unless he chooses, and the lien, although [**15] enforced in the same way as a lien for taxes, is really a lien for an indebtedness, like that enforced on mechanics' contracts, or against ships and vessels. The price of water is left to be fixed by the board in their discretion, and the citizens may take it or not as the price does or does not suit them."

We believe the same reasoning that was applied to water charges in the above-mentioned case should be applied to sewage charges in the present case. [*338 Mich. at 686.*]

Thus, one of the distinguishing factors in *Ripperger* was that the property owners were able to refuse or limit their use of the commodity or service. [12]

> 12 The *Ripperger* Court also noted that the amount paid reflected the price of the service received, thus reiterating the second criterion that the fee must be proportionate to the cost of the service. Accordingly, rather than standing for the proposition that sewage charges are always user fees, as the Court of Appeals majority contended, *221 Mich. App. at 86-87, Ripperger* actually articulated relevant criteria for determining whether a charge is a fee or a tax.

[*163] [**16] In instituting the storm water service charge, the city of Lansing has sought 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 this cost (approximately sixty-three percent) constitutes capital expenditures. [13] This constitutes an investment in infrastructure as opposed to a fee designed simply to defray the costs of a regulatory activity. [14] Consequently, the ordinance fails both the first and second criteria. We find the analysis of the dissenting Court of Appeals judge on this point persuasive:

No effort has been made to allocate even that portion of the capital costs that will have a useful life in excess of [*164] thirty years to the general fund. This is 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. Accordingly, the "fee" is not structured to simply defray the costs of a "regulatory" activity, but rather to fund a public improvement designed to provide [**17] a long-term benefit to the city and all its citizens. The revenue to be derived from the charge is clearly in excess of the direct and indirect costs of actually using the storm water system over the next thirty years and, being thus disproportionate to the costs of the services provided and the benefits rendered, constitutes a tax. See *Merrelli v St Clair Shores, 355 Mich. 575, 585-588; 96 N.W.2d 144 (1959).*

13 The total estimated cost through the year 2038 is $ 205,523,226. Of that total, $ 8,600,000 is for capital improvement project/separated sewer costs, $ 85,991,953 is for storm CSO costs through 2018 (i.e., fifty percent of the total CSO control program costs), and $ 34,679,234 is for storm NPDES permitting costs. Adding these three components together, $ 129,271,187, or 62.89 percent of the costs incurred, are for what can be termed capital improvements. Approximately ten percent of the total cost, or $ 20,567,039, is allocated to administration and billing costs. Operation and maintenance costs are forecasted at $ 55,685,000. Table 1, Stormwater Utility Ad Hoc Committee Report (August, 1995).

[**18]

14 The dissent makes much of the fact that the ordinance does not raise revenue for the general revenue fund. However, this does not preclude us from determining that the purpose of the storm water charge is to generate revenue. "Where revenue generated by a regulatory 'fee' exceeds the cost of regulation, the 'fee' is actually a tax in disguise." *Gorney v Madison Heights, 211 Mich. App. 265, 268; 535 N.W.2d 263 (1995).* Additionally, the dissent would conclude that the user fee is proportionate to the costs of the service because the EHA method used to compute the charge is "a logical system" that estimates "the proportionate amount of runoff" that each parcel contributes. However, this argument fails to address the fact that a major portion of the costs constitutes capital expenditures and, consequently, an investment in infrastructure that will serve the city for many years after property owners have paid for it.

I do not believe that the capital investment component of a true fee may be designed to amortize such an expense, and to enable the city to fully recoup [**19] its investment, in a period significantly shorter than the actual useful service life of the particular public improvement. This fundamental principle of basic accountancy guides public utility regulators, *Ass'n of Businesses Advocating Tariff Equity v Public Service Comm, 208 Mich. App. 248, 261; 527 N.W.2d 533 (1994)* ("conceptually, ratepayers are charged for the amortization expense when it occurs and, therefore, rates coincide with the expense and are not retroactive"), as well as tax assessors, *Consumers Power Co v Big Prairie Twp, 81 Mich. App. 120, 133-135; 265 N.W.2d 182 (1978).* It ought to apply equally here.

This is not to say that a city can never implement a storm water or sewer charge without running afoul of art 9, § 31. [HN5] A proper fee must reflect the bestowal of a corresponding benefit on the person paying the charge, which benefit is not generally shared by other members of society. *Nat'l Cable Television Ass'n v United States & Federal Communications Comm, 415 U.S. 336, 340-342; 94 S. Ct. 1146; 39 L. Ed. 2d 370 (1974).* [HN6] Where the charge for either storm or sanitary sewers reflects [**20] the actual costs of use, metered with relative precision in accordance with available technology, [*165] including some capital investment component, sewerage may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax. See *Ripperger v Grand Rapids, 338 Mich. 682, 686-687; 62 N.W.2d 585 (1954).* [*221 Mich. App. at 91-92.*]

Two related failings of the ordinance support our conclusion that the storm water service charge fails to satisfy the first and second criteria. First, the charges imposed do not correspond to the benefits conferred. Approximately seventy-five percent of the property owners in the city are already served by a separated storm and sanitary sewer system. In fact, many of them have paid for such separation through special assessments. Under the ordinance, these property owners are charged the same amount for storm water service as the twenty-five percent of the property owners who will en-

joy the full benefits of the new construction. [15] Moreover, the charge applies to all property owners, rather than only to those who actually benefit. A true "fee," however, is not designed to confer [**21] benefits on the general public, but rather to benefit the particular person on whom it is imposed. *Bray, supra at 162*; *Nat'l Cable Television Ass'n, 415 U.S. at 340-342*.

> 15 The appeal process and available credits do not make the charge proportionate to the necessary costs of the service because there is no credit for the seventy-five percent of the property owners who are already served by a separated sewer system. As explained during oral arguments, if the appeals process were to credit the seventy-five percent already served by a separated system, it would eviscerate the purpose of the ordinance. Thus, this appeal process, however structured, simply cannot save the ordinance from violating the Headlee Amendment.

The distinction between a fee and a tax is one that is not always observed with nicety in judicial decisions, but according to some authorities, any payment exacted by the [*166] state or its municipal subdivisions as a contribution toward the cost of maintaining governmental [**22] functions, where the special benefits derived from their performance is merged in the general benefit, is a tax. [*71 Am Jur 2d, State and Local Taxation, § 15*, p 352.]

In this case, the lack of correspondence between the charges and the benefit conferred demonstrates that the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public.

This conclusion is buttressed by the fact that the acknowledged goal of the ordinance is to address environmental concerns regarding water quality. Improved 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. As stated by the Court of Appeals dissent,

The extent of any particularized benefit to property owners is considerably outweighed by the general benefit to the citizenry of Lansing as a whole in the form of enhanced environmental quality. . . . When virtually every person in a community is a "user" of a public improvement, a municipal government's tactic of augmenting its budget by purporting to charge a "fee" for the "service" rendered [**23] should be seen for what it is: a subterfuge to evade constitutional limitations on its power to raise taxes. [*221 Mich. App. at 96.*]

The second failing that supports the conclusion that the ordinance fails to satisfy the first two criteria is the lack of a significant element of regulation. See *Bray, 418 Mich. at 161-162*; *Vernor, 179 Mich. at 167-169*. The ordinance only regulates the amount of rainfall shed from a parcel of property as surface runoff; it does not consider the presence of pollutants on each parcel [*167] that contaminate such runoff and contribute to the need for treatment before discharge into navigable waters. Additionally, the ordinance fails to distinguish between those responsible for greater and lesser levels of runoff and excludes street rights of way from the properties covered by the ordinance. Moreover, there is no end-of-pipe treatment for the storm water runoff. Rather, the storm water is discharged into the river untreated.

Ordinance 925 also fails to satisfy the third criterion--voluntariness--because the charge lacks any element of volition. One of the distinguishing factors of a tax is that it is compulsory by law, "whereas [**24] payments of user fees are only compulsory for those who use the service, have the ability to choose how much of the service to use, and whether to use it at all." Headlee Blue Ribbon Commission Report, *supra*, § 5, p 29. [16] The charge in the present case is effectively compulsory. The property owner has no choice [*168] whether to use the service and is unable to control the extent to which the service is used. The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property.

> 16 The dissent disputes that voluntariness is a factor to consider in determining whether the charge is a fee or a tax. The dissent cites *Cincinnati v United States, 153 F.3d 1375, 1378 (Fed, 1998)*, to support its argument that a municipal assessment is not an impermissible tax simply because it is involuntarily imposed. First, we would note that the criteria we have articulated are not to be considered in isolation. The lack of volition in this case is one of several factors supporting our conclusion that the storm water charge is a tax. Second, we would note that the court in *Cincinnati* declined to answer the question when an involuntarily imposed assessment might be a permissible fee. *Id.*
>
> Further, we note that the Headlee Blue Ribbon Commission's definition of user fee, which the dissent quotes in footnote 14 to support its argument that the storm water charge in this case should be classified as a user fee, explicitly mentions voluntariness:

> A "fee for service" or "user fee" is a payment made for the *voluntary receipt* of a measured service, in which the revenue from the fees are used only for the service provided. [Headlee Blue Ribbon Commission Report, *supra*, § 5, p 30 (emphasis added).]

[**25] Additional factors, while not dispositive, also support the conclusion that the storm water charge in this case is a tax. First, for purposes of the storm water share of the CSO control program, the "storm water enterprise fund" replaces the portion of the program that was previously funded by the general fund revenues from property and income taxes. [17] Second, the fact that the storm water service charge may be secured by placing a lien on property is relevant. While ordinarily the fact that a lien may be imposed does not transform an otherwise proper fee into a tax, [18] this fact buttresses the conclusion that the charge is a tax in the present case, where the charges imposed are disproportionate to the costs of operating the system and to the value of the benefit conferred, and the charge lacks an element of volition. Moreover, although allegedly chosen because it was the most cost-effective method of billing, we think it [*169] significant that the storm water charge is billed through the city assessor's office and that the bill may be sent with the December property tax statements.

> 17 In response to this conclusion, the dissent notes that the Revenue Bond Act permits the city to implement a sewer system. However, whether the city was authorized under the Revenue Bond Act to implement a sewer system is not at issue in the present case. What is at issue is how that system is to be funded. It stands to reason that even though the city may be authorized to implement the system, its method of funding the system may not violate the Headlee Amendment.

[**26]

> 18 See *Jones, supra at 275*.

III. Conclusion

We conclude that the storm water service charge imposed by Ordinance 925 is a tax and not a valid user fee. To conclude otherwise would permit municipalities to supplement existing revenues by redefining various government activities as "services" and enacting a myriad of "fees" for those services. To permit such a course of action would effectively abrogate the constitutional limitations on taxation and public spending imposed by the Headlee Amendment, a constitutional provision ratified by the people of this state. In fact, the imposition of mandatory "user fees" by local units of government has been characterized as one of the most frequent abridgments "of the spirit, if not the letter," of the amendment.

> The danger to the taxpayer of this burgeoning phenomenon [the imposition of mandatory user fees] is as clear as are its attractions to local units of government. The "mandatory user fee" has all the compulsory attributes of a tax, in that it must be paid by law without regard to the usage of a service, and becomes [**27] a tax lien of the property. However, it escapes the constitutional protections afforded voters for taxes. It can be increased any time, without limit. This is precisely the sort of abuse from which the Headlee Amendment was intended to protect taxpayers. [Headlee Blue Ribbon Commission Report, *supra*, § 5, pp 26-27.]

Therefore, we reverse the decision of the Court of Appeals and remand this case to that Court for further proceedings consistent with this opinion.

[*170] BRICKLEY, KELLY, and TAYLOR, JJ., concurred with WEAVER, J.

DISSENT BY: PATRICIA J. BOYLE

DISSENT

BOYLE, J. (*dissenting*).

In its opinion today, the majority holds that the Lansing "storm water service charge is a tax, for which approval is required by a vote of the people," slip op at 1. I respectfully dissent. Because the storm water disposal system benefits every landowner who uses the system and the Lansing ordinance reasonably calculates the fee on the basis of each landowner's use, I find that the ordinance imposes a fee, not a tax, on Lansing residents. I would affirm the decision of the Court of Appeals.

I

A rather complex procedural quagmire spawned this case. Section 301 of the Federal Water Pollution [**28] Control Act, commonly known as the "Clean Water Act" (CWA), prohibits the discharge of any pollutant by any person, including municipalities, into navigable waters of the United States and mandates compliance with water quality standards. *33 USC 1311, 1362*. A person or municipality responsible for a discharge of pollutants into any waters of the United States from a point source is subject to the CWA, which prohibits any discharge into United States waters without a permit. In order to avoid sanctions for discharging the pollutants, a discharger must obtain and comply with a permit under the National Pollutant Discharge Elimination Standards (NPDES) program. *33 USC 1342*. Any discharge of pollutants without a permit or in violation of a permit's conditions is subject to federal civil and criminal penalties and citizen suits.

[*171] The Michigan Department of Environmental Quality (DEQ), formerly the Michigan Depart-

ment of Natural Resources (DNR), administers the NPDES permit program established under the Federal Water Pollution Control Act. As a discharger of pollutants, the city of Lansing previously had to obtain a NPDES permit. [1] [*172] According [**29] to the Federal Register, the Environmental Protection Agency likely will force the city to seek a new, specific "storm-water NPDES permit" from the DEQ. [2]

1 In 1977, the DNR (now the DEQ) issued the city of Lansing's first NPDES permit, but required the city to submit a facilities plan by June 30, 1978, to the DNR Water Resource Commission (WRC) to implement a combined sewer overflow (CSO) control program. On September 27, 1978, the WRC issued to the city a notice of noncompliance and order to comply for failing to submit a complete facilities plan that would address combined sewer overflows by the June 30, 1978, deadline. On May 10, 1979, the DNR agreed to draft a NPDES permit that included submission dates for the city's final facilities plan, and on June 25, 1979, the city submitted its draft of the facilities plan to the DNR for review and comment.

On August 1, 1979, the DNR-WRC issued a notice of violation and order to comply. Further, the DNR-WRC issued a citation to the city for failure to control its combined sewer overflows and submit its facilities plan addressing the combined sewer overflows by June 30, 1978. In conjunction with this notice, the DNR issued a notice of intent to place a moratorium on sewer construction permits within the city.

In response, the Lansing City Council passed a resolution calling for public hearing on the draft facilities plan, and in December, 1979, gave notice of public hearing. Finally, on January 21, 1980, the Lansing City Council passed a resolution authorizing submission of the final facilities plan, and on January 23, 1980, a public hearing was held on the facilities plan. The facilities plan included a recommendation for a long-term CSO control plan, which was to be implemented as phase II after certain preliminary phase I sewer system improvements were completed. Phase I of the facilities plan was implemented between 1983 and 1989, bringing the city into compliance under its original NPDES permit.

On August 14, 1987, the DNR-WRC issued public notice of its intention to issue a revised NPDES permit, which it issued on October 1, 1987, and later modified on August 17, 1989. The 1987 NPDES permit required the city to develop a final CSO control plan before December 1, 1991, that would eliminate or result in adequate treatment of combined sewage discharges containing raw sewage. After a public hearing, the Lansing City Council passed a resolution on April 25, 1991, adopted a CSO project plan, which called for the separation of the city's remaining combined sanitary and storm sewers. The DNR ultimately approved the city's CSO final project plan on March 9, 1992, and the plan was incorporated into the NPDES permit given to the city on May 20, 1993. This permit required that the city implement the final plan in accordance with certain compliance dates set forth in a six-phase construction schedule. In the absence of any revisions or amendments, the city must adhere to the plan.

In 1994, the city formed an ad hoc committee to assist the city in establishing a system to fund the project. In August, 1995, the committee recommended the creation of a storm water enterprise fund as the means to finance the plan. On October 9, 1995, the Lansing City Council, by Ordinance No. 925, created the Stormwater Enterprise Fund, presumably because the system proved the most cost-effective to meet the federal requirements. The ordinance provides that any person who owns a parcel of land within the city that uses the city's storm water system must pay a user fee to support the cost of the storm water utility. The money from these user fees proceeds directly into the Stormwater Enterprise Fund, which the city uses to fund fifty percent of the CSO separated sewer costs. A different fund, the Sewage Enterprise Fund, supplies the revenue for the remaining fifty percent.

[**30]

2 Although unclear, the parties state that, under proposed EPA guidelines, once the city of Lansing implements the separated storm water/sewer system, it will result in a storm water system that serves more than 100,000 people and the city must request and obtain a specific storm water permit from the DEQ. See 40 CFR, parts 122 and 123.

The city of Lansing derives its authority to impose a legitimate special assessment or user fee for storm water detention, transportation, treatment, and disposal under the home rule city act. *MCL 117.1a-117.38*; MSA 5.2071(1)-5.2118. [3] The Lansing City Charter also provides that the city may take action to provide for the public welfare, health and safety, [4] and grants the [*173] city the authority to impose special assessments to "make public improvements within the city." [5] The

Lansing City Charter also allows the city to operate and maintain public utilities. [6] To implement and maintain the public utilities, the city of Lansing may charge "just and reasonable rates" and "such other charges as may be deemed advisable for supplying all [**31] other municipal services to the inhabitants of the City and others." Lansing City Charter, § 8-303.

3 In implementing its powers under this act, the city of Lansing adopted the Lansing City Charter of 1978, which provides:

> The City has the comprehensive home rule power conferred upon it by the Michigan Constitution, subject only to the limitations on the exercise of that power contained in the Constitution or this Charter or imposed by statute. The City also has all other powers which a city may possess under the Constitution and the laws of this state. [Lansing City Charter, § 1-201.]

4 The City shall take such action, and adopt such ordinances, as shall be necessary to provide for the public peace and health and for the safety of persons and property within the City. [Lansing City Charter, § 3-310.]

5 Section 7-401 of the Lansing City Charter provides:

> The City Council shall have the power to make public improvements within the City and, as to public improvements which are of such a nature as to benefit especially any property or properties within a district, the Council shall have the power to determine, by resolution, that the whole or any part of the expense of any public improvement shall be defrayed by special assessment upon the property in districts especially benefitted, in proportion to the benefits derived or to be derived.

[**32]

6 Section 8-301 of the Lansing City Charter provides:

> The City shall have all the powers granted by law to own, operate, improve, enlarge, extend, repair, and maintain public utilities . . . including, but not by way of limitation, public utilities for supplying water and water treatment, sewage disposal and treatment, electric light and power, gas, steam, heat, public transportation, or any similar service to the municipality and the inhabitants thereof . . . .

Although nothing in the city charter defines "public improvement" or "public utilities," the Revenue Bond Act proves a useful guide. *MCL 141.101 et seq.;* MSA 5.2731 *et seq*. Under the Revenue Bond Act, the Legislature granted the city of Lansing, like any public corporation, authority "to purchase, acquire, construct, improve, enlarge, extend or repair 1 or more public improvements and to own, operate and maintain the [*174] same, within or without its corporate limits, and to furnish the services, facilities and commodities of any such public improvement to users within or without its corporate limits." *MCL 141.104* [**33] ; MSA 5.2734. The statute specifically states that the powers granted in the Revenue Bond Act "may be exercised notwithstanding that no bonds are issued hereunder." *MCL 141.104*; MSA 5.2734. The Legislature further defined, post-Headlee, "public improvements" as including "storm water systems, including storm sewers, plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment or disposal of storm water." *MCL 141.103(b)*; MSA 5.2733(b). In adding storm water language to the Revenue Bond Act in 1992, the Legislature notably aligned storm water treatment and disposal with other utilities listed under the term "public improvement," including the light, heat, and power utilities, garbage collection and disposal, sewage treatment and disposal, transportation systems, cable television systems, stadiums, and other municipal activities that fall within the traditional thinking of "public improvements" and utilities. *MCL 141.103(b)*; MSA 5.2733(b).

II

Determining whether a governmental exaction represents a tax, fee, or special assessment presents unique problems. This [**34] Court previously has addressed the distinction between a fee and a tax. In *Vernor v Secretary of State, 179 Mich. 157; 146 N.W. 338 (1914)*, we focused on the "reasonableness" of the motor vehicle regulation and found that licenses, like regulations, "will be upheld by the courts when plainly [*175] intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license, and the regulation of the business to which it applies." *Id. at 167*.

In *Ripperger v Grand Rapids, 338 Mich. 682; 62 N.W.2d 585 (1954)*, we determined that sewage charges for use of the sewage system did not constitute a "tax" on individual owners within the meaning of the Revenue Bond Act even though "the payment of a fee for the use of the sewer is, practically speaking, substantially like the enforced obligation of a tax. *Id. at 686-687*. We observed that "[a] public sewer system is a public utility the same as a water system" and that "'payments by the users for the service rendered [was] not a tax . . . .'" *Id. at 687* (citations omitted). We also stated that sewage fees are similar to the consumer's [**35] gas, water, or electric bills and that the prices are set by various city boards and agencies, not consumers. *Id.*

Subsequently, in *Merrelli v St Clair Shores, 355 Mich. 575; 96 N.W.2d 144 (1959)*, we examined building permits for certain work performed in the construction of buildings and again distinguished user fees from taxes:

In short, we have considered 2 sources of municipal funds, differing in governmental theory, each having inherent limitations resulting therefrom. One involves an exercise of the municipal power of taxation. Its purpose is to raise money. The other is an exercise of the police power of the community. Its purpose is the protection of the public health, safety, and welfare. True, certain moneys may be obtained in connection therewith, but such moneys are incidental to the accomplishment of the primary purpose of guarding the public. [*Id. at 583*. Accord *Bray v Dep't of State, 418 Mich. 149, 162; 341 N.W.2d 92 (1983).]* [*176]

The principles that emerge from this precedent identify two factors that are the focus for determining whether an exaction imposes a fee: the proportionality and reasonableness of [**36] the fee to the benefit conferred and the purpose of the regulation, specifically whether its purpose is to charge the user and not simply to raise revenue. [7] The Court of Appeals recently considered this distinction in *Saginaw Co v John Sexton Corp of Michigan, 232 Mich. App. 202, 209-210, 591 N.W.2d 52 (1998)*, finding that "although no bright-line test exists for distinguishing one from the other, a fee generally is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit." Citing *Merrelli, 355 Mich. at 582-584*.

7 The Court of Appeals has reached similar results. In *Gorney v Madison Heights, 211 Mich. App. 265, 268; 535 N.W.2d 263 (1995)*, the Court of Appeals stated that "in order for a fee to be deemed a tax, there must be no reasonable relationship between the fee and the expense of the service provided. . . . However, where revenue generated by a regulatory 'fee' exceeds the cost of regulation, the 'fee' is actually a tax in disguise." Citing *Dukesherer Farms, Inc v Director, Dep't of Agriculture, 405 Mich. 1; 273 N.W.2d 877 (1979). 211 Mich. App. at 269*. See also *Saginaw Co v John Sexton Corp, 232 Mich. App. 202; 591 N.W.2d 52 (1998)*.

[**37] However, the majority proposes a three-part test to distinguish a tax and a fee. Although I appreciate the majority's efforts to devise a valid test for this legal conundrum, I remain unconvinced that the test the majority proposes is accurate. Even if it is, Lansing Ordinance 925 meets all three parts of the majority's test.

A

First, the majority states that a user fee "must serve a regulatory purpose rather than a revenue-raising [*177] purpose." Slip op at 12. Lansing Ordinance 925 does not raise revenue for a general revenue fund. The specific language of the ordinance restricts the use of the funds raised by the storm water fee:

All funds collected for storm water service shall be placed in an enterprise fund and used solely for the administration, construction, operation, maintenance and replacement of the stormwater system. [Lansing Ordinance 925, § 1043.11.]

The funds collected under the ordinance are earmarked specifically for the storm water drainage system and do not serve to benefit the state by sending money into its general coffers. Even plaintiff acknowledges that the revenue derived from the exaction does not flow into a general revenue fund. [8]

8 In his brief, plaintiff Bolt states that he "readily concedes that the revenues derived from the Rain Tax do not flow into the City's General Fund, but are segregated cosmetically in a fund designed to finance the stormwater share of the CSO Control Program and the costs (in the future) of complying with the requirements of a stormwater NPDES permit."

[**38] *Id*.

Furthermore, this aspect of the tripartite test remains vague. At first blush, the criterion seems straightforward. Upon closer scrutiny, the test is problematic, leaving open the question whether *all* the funding must serve a regulatory purpose or whether only a portion of the funding used for regulatory purposes will suffice. The storm water management system at issue uses a significant portion of the regulatory fee for capital expenditures to implement the separated sewer system. However, the overall system will benefit each landowner who uses the system by increasing property values. The landowners here receive the benefit of having their storm water flow [*178] from their land into the sewer system, which prevents flooding in their basements. [9] The value of the landowner's property increases in the same manner that it does with a sewer or water system by increasing the value of the property when sold and ensuring that the landowner's storm water will be properly disposed. In this sense, the ordinance serves a regulatory purpose by benefiting each parcel individually and, as part of the larger picture, the community.

9 This litigation began because the city's sewage system could not handle the combined overflow of storm water and sewage flowing through the same pipes. After a heavy rainfall, the sewage

system would overflow, often into landowners' basements. The CSO program, according to the city, was implemented partly to resolve this problem.

[**39] B

Second, the majority states that the user fee must be proportionate to the necessary costs of the service. I agree. Although the ordinance uses the term "flat rate," it does not impose a universal charge on all properties in the city of Lansing. The ordinance imposes a fee structure based entirely upon the amount of storm water runoff by establishing a system for computing annual bills on the basis of parcel size, pervious/impervious area, and parcel development. To collect the annual revenue requirement, the ordinance uses the equivalent hydraulic area (EHA). Flat-rate parcels of land (residential parcels that are less than two acres) have a predetermined EHA and landowners pay a flat fee that varies according to the parcel's size and its development.

For commercial, industrial, or residential parcels over two acres, the city determines the EHA on an individual basis. For impervious areas, the ordinance [*179] states that out of every one hundred drops of rain, five drops are absorbed and ninety- five drops run off, ultimately to the storm water system. For pervious areas, eighty-five drops are absorbed and fifteen drops run off to the storm water sewer system. The city's public service [**40] department calculates the "total billable equivalent hydraulic area" for every parcel in the city and divides the figure by 1,000 to determine the parcel's EHA, which is expressed in 1,000 square feet. These rate classifications thus are based on the determination that industrial, commercial, and residential properties of more than two acres contribute more storm water runoff, because of increased impervious surfaces, than do smaller, usually single family residence parcels. The smaller parcels pay a flat rate depending on the parcel size, to compensate each owner proportionally for the runoff, and the other properties pay according to the EHA formula that applies equally to all properties in that category. Additionally, the ordinance allows both developed and undeveloped parcels to be billed on the basis of the impervious/pervious area test.

The public service department then calculates the annual storm water enterprise charge on the basis of an initial rate of $ 24 per 1,000 square feet of EHA. This base rate is used to calculate the rain fee for all individual parcels in Lansing on the basis of whether the parcel is a "flat rate" parcel that consists of residential property or [**41] a "measured parcel," consisting of commercial or industrial property or residential property over two acres.

Considering the fee method as a whole, the city used a logical system to compute the proportionate amount of runoff that each parcel contributes to the [*180] overall system. This established EHA scheme represents a system that is proportional to each landowner's "use" of storm water. The majority attacks the ordinance by arguing that other methods exist to better compute the quantity and quality of the runoff. This view ignores the substantial evidence in the record that consultants hired by the city proposed many alternatives before recommending the impervious-area method. The city considered three different alternatives for storm water treatment and disposal and found the EHA method to be the most cost-effective and efficient. Furthermore, an analysis of the ordinance requires that the charges must be fair and reasonable and bear a substantial relationship to the cost of the services and the facilities. *Vernor, supra at 167* (Courts will uphold regulations "when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost [**42] of issuing the license, and the regulation of the business to which it applies"). This standard implies that the city must charge the parcels proportionally, but that the parcels need not be measured with exact precision, a requirement that is a near impossibility.

C

Third, the majority claims that *Ripperger* established a "voluntariness" criterion. Aside from some cursory language quoted from an earlier case, nothing in *Ripperger* expressly dictates that the "voluntariness" factor was decisive in that case. Furthermore, our precedent does not establish that voluntariness somehow constitutes a determinative factor in considering [*181] a fee to be a tax. [10] If this were the case, then other fees, such as 9-1-1 emergency charges, sewer charges, and recycling fees, would be open to attack. Simply put, in some instances, the payment of a fee is compulsory. *Cincinnati v United States, 153 F.3d 1375, 1378 (Fed, 1998)* ("There may be some instances in which a municipal assessment is involuntarily imposed but would nonetheless be considered a permissible fee for services rather than an impermissible tax"). As the United States Court of Appeals for the Sixth Circuit stated [**43] in *Detroit Water & Sewage Dep't v Michigan, 803 F.2d 1411 (CA 6, 1986)*, the federal government now mandates that cities maintain and operate clean water systems and cities deserve some flexibility and leniency when courts define "user" to compensate for the storm water systems. [11]

10 The Headlee Blue Ribbon Report implies that "payment of a tax is compulsory by law; whereas payments of user fees are only compulsory for those who use the service . . . ." *Id.*, § 5, p 29. The majority seemingly gleans support

from this report, even though it is not binding precedent. Notably, this section of the report spawned a minority report, which acknowledged that "a certain amount of 'tightening' is appropriate to insure that the fees collected are used only to support the services provided," but still requested that the report recognize traditional user fees, such as recycling and emergency telephone fees. *Id*., § 5, p 42. The minority report "recommended that the legislature define, in statute, 'tax,' 'special assessment,' and 'user fee,' but to do so in such a way that each of them may continue to be used where it is appropriate to do so to fund appropriate services and programs." *Id.*, § 5, p 43.

[**44]

11 In its opinion, the Sixth Circuit stated:

> The storm water which constitutes the runoff from WCRC's roads may have come from God or nature in the first place, just as all water entering the DWSD's sewer system must have at one time or another. Nevertheless, the refuse or foreign matter that water accumulates as it courses through WCRC's roads must now be subjected by law to primary and secondary treatment to the extent such runoff enters Detroit's sewage treatment system. And to that extent, at least, WCRC is a user of the facility provided by DWSD. Any effort somehow to rely upon a different definition of "user" is essentially a matter of semantics more than of substance, given the state statutory scheme. [*Id. at 1421*.]

[*182] The majority engages in distinctions without logical significance by stating that sewage treatment constitutes a fee because a property owner can control the amount of sewage disposed, but the same property owner cannot control the amount of rainwater that falls on the ground. Although it is doubtful that most property owners think to control their sewage [**45] disposal and treatment or their phone calls to the emergency service, even assuming arguendo that voluntariness is a factor, the fee imposed in this case falls within the "voluntariness" definition. Landowners, if they choose, may establish rainwater collection systems on their land for catching the water. If they do so, then they may appeal to the city appeal process to seek an exemption from the annual fee payment. Evidence in the record establishes that the city has granted one hundred percent credits to some landowners who have shown that they contribute no rainwater to the system.

Additionally, landowners can choose the amount of the fee they will have to pay on the basis of whether they build on the land. More buildings on the land contributes to an increase in the fee. Thus, the initial rain fee imposed on the residents is similar to the initial fee that landowners must pay to hook up to the sanitary sewer. Once the initial fee is paid in the periodic installment (every month, annually), the user can "control" the amount of sewage disposed, thus making the sewage disposal voluntary. The same concept applies here. The landowner must pay an initial fee [*183] and then voluntarily can [**46] control the rainwater that flows from the property.

III

As additional support for its opinion, the majority lists two other factors that purportedly show the fee to be a disguised tax. First, the majority notes that "the 'storm water enterprise fund' replaces the portion of the program that was previously funded by the general fund revenues from property and income taxes." Slip op at 21. Simply because the storm water enterprise fund once was funded by property taxes does not necessarily invalidate the imposition of a regulatory fee now under Ordinance 925 and the Revenue Bond Act that allows the city to implement a sewer system. [12] The majority makes much of the fact [*184] that the city funded the first seventy-five percent of the storm water system's construction by using ad valorem taxes and special assessments. Although true, this argument ignores the fact that the question before this Court is the manner in which the city has chosen to fund the remaining twenty-five percent of the construction of the system and its maintenance and operation costs. Simply because the city may have improperly funded the construction earlier does not provide a legitimate legal argument for holding [**47] that the system in this present appeal is a tax rather than a user fee.

12 See *Sarasota Co v Sarasota Church of Christ, Inc, 667 So. 2d 180, 186 (Fla, 1996)* ("Although we do not find that the previous funding of stormwater services through taxation was inappropriate, we do find that the stormwater funding through the special assessment at issue complies with the dictates of chapter 403 and is a more appropriate funding mechanism under the intent of that statute"); *Vernor, 179 Mich. at 163-164* (finding the license fee for motor vehicles, which was previously classified as a user fee, to be a tax under the amended statute). See also *Detroit, supra*, in which the United States Court of Appeals for the Sixth Circuit approvingly quoted the following:

> The rule of the above cited cases is that the original construction of a sewerage system does not bind the city to forever maintain it from general taxation, nor may it be implied that a citizen may forever use the sewerage system without charge, and that a charge may therefore be made for the use of the sewerage facility, "a benefit dis-

> tinct from that originally conferred by building it." The respondent city by heretofore maintaining its sewerage system through taxation did not impliedly or otherwise bind itself never to charge for its use. Such sewerage charges are but charges for a service rendered. . . . The 1951 Act . . . makes it the mandatory duty of a city which issues such revenue bonds "to fix and maintain rates and make and collect charges for the use and services of the (sewerage) system," etc. and it is of no consequence whatever that the city had theretofore exacted no service charge for the use of such system. This contention is without merit and must be denied. [*803 F.2d at 1416-1417*, citing *Maryville v Cushman, 363 Mo. 87; 249 S.W.2d 347 (1952)*.]

[**48] As an extension of this argument, the majority asserts that the seventy-five percent of the property owners who already benefit from a separated sewer program should not have to pay for the remainder of the construction that will serve the remaining twenty-five percent. However, this argument bifurcates the system into multiple parts, ignoring consideration of the system as a whole. In order to comply with the NPDES permit and ensure clean water in the future, the city must complete the storm water system and have it benefit all residents.

The majority also contends that "the fact that the storm water service charge may be secured by placing a lien on property is relevant." Slip op at 21. I agree with the rationale of the Court of Appeals that the observation is not persuasive:

[*185] The manner by which the city has chosen to enforce the fee does not establish that the fee is a tax merely because an unpaid fee results in a lien on property. Other Lansing ordinances provide that the city's municipally owned and operated electric and drinking water distribution systems, entrusted to the Lansing Board of Water & Light, has the benefit of a lien on property for unpaid utility charges. At [**49] common law, liens arise in many situations in which a charge or fee remains unpaid, and Michigan jurisprudence recognizes mechanics liens, artisans liens, and garage keepers liens, among others. [*221 Mich. App. 79, 87, n 6; 561 N.W.2d 423 (1997)*, citing *Nickell v Lambrecht, 29 Mich. App. 191; 185 N.W.2d 155 (1970)*.]

The majority fails to cite any authority for the proposition that a lien somehow becomes relevant to this inquiry. Indeed, *Ripperger* itself states that a lien on real property in a sewage system context, although enforced in the same manner as a tax lien, does not imply that a sewage rate is tantamount to a tax.

IV

Storm water drainage systems are the wave of the future, and many cities are implementing special assessments and user fees to cope with the projected increasing cost and demand of sanitizing storm water. As the Stormwater Utility Ad Hoc Committee noted, "the American Public Works Association (APWA) has concluded that 'The User Charge and the Utility Concept are the most dependable and equitable approaches available to local governments for financing stormwater management.'" City of Lansing [**50] Stormwater Utility Ad Hoc Committee Report, Draft Report, August, 1994, p 2. Michigan cities, from St. Clair Shores and Ann Arbor to Marquette, have implemented or plan to implement storm water service [*186] programs that employ user fees and the EHA method to fund their programs. The majority's holding subjects these cities to future legal challenges and wreaks havoc with the state's water sewage and water disposal system. [13]

> 13 Additional authority supporting the proposition that the storm water system in this case represents a true regulatory fee includes: *Long Run Baptist Ass'n, Inc v Louisville & Jefferson Co Metropolitan Sewer Dist, 775 S.W.2d 520, 523 (Ky App, 1989)* (rejecting the plaintiffs' argument that the storm water system was an "indirect" benefit to citizens and thus a tax); *Smith Chapel Baptist Church v Durham, 348 N.C. 632, 636; 502 S.E.2d 364 (1998)* (holding that the user fees, established by statute, were not based on the service to landowners, and the statute in question did not require proof of a benefit to the landowners); *Roseburg School Dist v City of Roseburg, 316 Ore. 374, 380-381; 851 P.2d 595 (1993)* (finding that the storm water system did not impose a "tax" under the Oregon Constitution because the fee was not imposed against a specific property owner, but rather on the user of the water service); *Twietmeyer v City of Hampton, 255 Va. 387, 392; 497 S.E.2d 858 (1998)* (holding that the city of Hampton's storm water management fees system was not meant "to raise general revenue" and thus the ordinance requiring payment of storm water fees was a legitimate "regulation" rather than a "tax" on residents); *Teter v Clark Co, 104 Wn.2d 227, 239; 704 P.2d 1171 (1985)* (holding the storm water control plan to be "tools of regulation" rather than a tax).

[**51] The majority ignores that the storm water treatment is intimately related to the sewage fees that the residents already pay. The storm water and the sewage travel through one pipe and are eventually separated to comply with federal law. As the Court of Appeals noted, "storm water collection, detention, and treatment (which even plaintiff concedes was properly subject to a fee and

not a tax when combined with sewage disposal), do not lose their character as a fee by virtue of being separated from sewage collection and disposal." *221 Mich. App. at 87*. The storm water service charge does not lose its status as a user fee simply because the sewage and storm water flow [*187] through one pipe, but are eventually separated into two individual sewage pipes. [14]

> 14 Notably, even the Headlee Blue Ribbon Commission Report, which the majority mentions to support its claim that "voluntariness" is a factor in this equation, classified sewage treatment as a user fee:
>
> A "fee for service" or "user fee" is a payment made for the voluntary receipt of a measured service, in which the revenue from the fees are used only for the service provided. Examples include municipal sewer charges . . . . [Report, *supra*, § 5, p 30.]
>
> I would contend that sewage and storm water runoff are closely aligned and do not lose their characteristics by being separated.

[**52] When we examined the sewage charges at issue in *Ripperger*, we noted that the act in that case established beyond all doubt the principle that the disposal of sewage into the streams of this State is a matter of importance to the public health, which concerns the health of the people of the State at large, and is so essential that, if the people of a city fail to meet their responsibility by bond issue, drastic steps may be taken. [*338 Mich. at 687*.]

The storm water system here, like the sewage system at issue in *Ripperger*, benefits both the public health of the city and each resident. Every property owner in the area receives increased property rates by being connected to a storm water and sewage treatment and disposal system. I would join the Court of Appeals and the courts of virtually every other state that have addressed similar storm water charges and classified them as "user fees" or "special assessments," thus facilitating the imperative of ensuring a clean water supply.

In sum, the storm water drainage system at issue here is a user fee because of its inherent connection to sewage treatment and disposal. Any further [*188] attempts to define taxes and user fees should [**53] be addressed to the Legislature.

For the stated reasons, I dissent, and I would affirm the decision of the Court of Appeals.

MALLETT, C.J., and CAVANAGH, J., concurred with BOYLE, J.

EXHIBIT - 2

Dekalb County v. United States

United States Court of Federal Claims

January 28, 2013, Filed

No. 11-761 C

Reporter
108 Fed. Cl. 681 *; 2013 U.S. Claims LEXIS 21 **

DEKALB COUNTY, GEORGIA, a political subdivision of the State of Georgia, Plaintiff, v. THE UNITED STATES, Defendant.

Core Terms

stormwater, charges, taxes, immunity, waive, runoff, sovereign immunity, ordinance, management system, motion to dismiss, reasonable services, properties, waiver of sovereign immunity, property owner, pollutants, accrued, clarification, benefits, argues, amici, federal government, federal facility, federal property, utility charges, water pollution, retroactively, unambiguous, developed property, unequivocally, purposes

Case Summary

Overview

A county was precluded from collecting storm-water management charges assessed against federal government properties since the charges were impermissible local taxes against the federal government, and *33 U.S.C.S. § 1323* unequivocally waived the government's sovereign immunity only with regard to storm-water fees but not taxes.

Outcome
Motion granted.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

HN1 **Clean Water Act, Water Quality Standards**

33 U.S.C.S. § 1323 requires the federal government to meet the same water pollution abatement requirements as those applicable to private entities.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

HN2 **Clean Water Act, Water Quality Standards**

See *33 U.S.C.S. § 1323(a)*.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

HN3 **Clean Water Act, Water Quality Standards**

33 U.S.C.S. § 1323(a) states that its mandate for federal compliance with water quality standards applies to any requirement, whether substantive or procedural, to the exercise of any federal, state, or local administrative authority, and to any process and sanction, whether enforced in federal, state, or local courts or in any other matter. Also, *§ 1323* states that the subsection applies notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

HN4[] Clean Water Act, Water Quality Standards

See Pub. L. No. 111-378, 124 Stat. 4128 (2011).

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

HN5[] Clean Water Act, Water Quality Standards

Pub. L. No. 111-378, 124 Stat. 4128 (2011), concerning federal compliance with water quality standards states that federal agencies shall not be obligated to pay or reimburse any fee, charge, or assessment except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Governments > Courts > Courts of Claims

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN6[] Jurisdiction, Subject Matter Jurisdiction

In rendering a decision on a motion to dismiss for lack of subject matter jurisdiction pursuant to U.S. Ct. Fed. Cl. R. 12(b)(1), a court must presume all undisputed factual allegations to be true and must construe all reasonable inferences in favor of the plaintiff. The relevant issue in a motion to dismiss under Rule 12(b)(1) is not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims. The plaintiff bears the burden of establishing subject matter jurisdiction, and must do so by a preponderance of the evidence. The court may look at evidence outside of the pleadings in order to determine its jurisdiction over a case. Indeed, the court may, and often must, find facts on its own. If jurisdiction is found to be lacking, the court must dismiss the action. Rule 12(h)(3).

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Governments > Courts > Courts of Claims

HN7[] Motions to Dismiss, Failure to State Claim

A complaint should be dismissed under U.S. Ct. Fed. Cl. R. 12(b)(6) when the facts asserted by the claimant do not entitle him to a legal remedy. When considering a motion to dismiss under this rule, the allegations of the complaint should be construed favorably to the pleader. When the allegations in the complaint, however true, could not raise a claim of entitlement to relief, dismissal is warranted under Rule 12(b)(6). To survive a motion to dismiss for failure to state a claim, the complaint must contain more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. While the complaint is not required to contain detailed factual allegations, it must provide enough facts to state a claim for relief that is plausible on its face. In order to meet the requirement of facial plausibility, the plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN8[] Motions to Dismiss, Failure to State Claim

A court is not required to convert a motion to dismiss for failure to state a claim into a motion for summary judgment unless the court relies upon evidence outside of the pleadings in resolving the motion. U.S. Ct. Fed. Cl. R. 12(d).

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Governments > Courts > Courts of Claims

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN9 **Motions to Dismiss, Failure to State Claim**

The requirement set forth in U.S. Ct. Fed. Cl. R. 12(d)--i.e., that motions to dismiss must be treated as motions for summary judgment when the court relies on evidence outside of the pleadings--is, by its own terms, limited to motions to dismiss under Rule 12(b)(6) and Rule 12(c). In resolving motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), in contrast, the court is free to make findings of fact based on evidence not contained in the pleadings.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Governments > Courts > Courts of Claims

HN10 **Motions to Dismiss, Failure to State Claim**

In deciding whether to dismiss a complaint for failure to state a claim under U.S. Ct. Fed. Cl. R. 12(b)(6), a court may consider matters of public record.

Governments > Federal Government > Claims By & Against

Governments > Courts > Courts of Claims

Governments > Legislation > Statute of Limitations > Governmental Entities

HN11 **Federal Government, Claims By & Against**

See 28 U.S.C.S. § 2501.

Governments > Federal Government > Claims By & Against

Governments > Courts > Courts of Claims

Governments > Legislation > Statute of Limitations > Governmental Entities

HN12 **Federal Government, Claims By & Against**

The six-year limitations period for claims over which the U.S. Court of Federal Claims has jurisdiction is an absolute jurisdictional bar that cannot be waived by the government. A claim first accrues for purposes of the six-year limitations period when all the events have occurred which fix the liability of the government and entitle the claimant to institute an action.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

Governments > Federal Government > Claims By & Against

Governments > Courts > Courts of Claims

HN13 **Jurisdiction Over Actions, Limited Jurisdiction**

In order to establish jurisdiction in the U.S. Court of Federal Claims, a plaintiff must demonstrate that the government has consented to suit and that there is a substantive legal basis for such claims.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

Governments > Federal Government > Claims By & Against

Governments > Courts > Courts of Claims

HN14 **Jurisdiction Over Actions, Limited Jurisdiction**

See 28 U.S.C.S. § 1491(a)(1).

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

Governments > Federal Government > Claims By &

Against

Governments > Courts > Courts of Claims

HN15[] Jurisdiction Over Actions, Limited Jurisdiction

The Tucker Act does two things: (1) it confers jurisdiction upon the U.S. Court of Federal Claims over specified categories of actions brought against the United States, and (2) it waives the government's sovereign immunity for those actions. However, the statute does not create a substantive cause of action; in order to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

HN16[] Clean Water Act, Water Quality Standards

See 33 U.S.C.S. § 1323(a).

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

Governments > Federal Government > Claims By & Against

Governments > Courts > Courts of Claims

HN17[] Clean Water Act, Water Quality Standards

33 U.S.C.S. § 1323(a) states that the government shall be subject to federal, state, and local water pollution requirements including the payment of reasonable services charges. In general, when Congress uses the mandatory term "shall" in a statute to describe the government's obligation to make a payment to a party or group, the statute is money mandating for purposes of jurisdiction in the U.S. Court of Federal Claims.

Governments > Federal Government > Claims By & Against

HN18[] Federal Government, Claims By & Against

In order to waive the government's sovereign immunity, Congress must use language that is unequivocal and unambiguous. In contrast, the "fair interpretation" rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity. Because the Tucker Act supplies a waiver of immunity for specified claims against the government, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity. It is enough, then, that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be lightly inferred, a fair inference will do.

Governments > Federal Government > Claims By & Against

Governments > Courts > Courts of Claims

HN19[] Federal Government, Claims By & Against

Assuming that the U.S. Court of Federal Claims has taken jurisdiction over a cause as a result of an initial determination that plaintiff's cause rests on a money-mandating source, the consequence of a ruling by the court on the merits, that plaintiff's case does not fit within the scope of the source, is simply this: the plaintiff loses on the merits for failing to state a claim on which relief can be granted.

Constitutional Law > Supremacy Clause > General Overview

Tax Law > State & Local Taxes > General Overview

HN20[] Constitutional Law, Supremacy Clause

It is a fundamental principle of constitutional law that the United States is immune from direct taxation by state and local governments, including counties. The federal government's immunity from state and local taxation is

based upon the *Supremacy Clause, U.S. Const. art. VI, cl. 2*, and is therefore absolute.

Constitutional Law > Supremacy Clause > General Overview

Governments > State & Territorial
Governments > Finance

HN21 **Constitutional Law, Supremacy Clause**

Notwithstanding the absolute prohibition on state taxation, the federal government may be charged for services rendered or for its use of state or local property.

Constitutional Law > Supremacy Clause > General Overview

Governments > State & Territorial
Governments > Finance

HN22 **Constitutional Law, Supremacy Clause**

There is no question that states cannot tax the federal government without its consent, but it is also clear that state governments may charge the federal government a reasonable and nondiscriminatory fee for services rendered.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Tax Law > State & Local Taxes > General Overview

HN23 **Federal & State Interrelationships, Erie Doctrine**

Where a federal right is concerned, a federal court is not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.

Constitutional Law > Supremacy Clause > General Overview

Governments > State & Territorial
Governments > Finance

Tax Law > State & Local Taxes > General Overview

HN24 **Constitutional Law, Supremacy Clause**

In seeking to draw a line between an impermissible state tax against the federal government and a permissible fee, a federal court must consider all the facts and circumstances of record in the case and assess them on the basis of the economic realities to determine the essential nature of the charge.

Constitutional Law > Supremacy Clause > General Overview

Tax Law > State & Local Taxes > General Overview

HN25 **Constitutional Law, Supremacy Clause**

The *Supremacy Clause* categorically prohibits state and local taxation of federal property.

Constitutional Law > Supremacy Clause > General Overview

Governments > State & Territorial
Governments > Finance

Tax Law > State & Local Taxes > General Overview

HN26 **Constitutional Law, Supremacy Clause**

To distinguish permissible fees from impermissible state taxes against the federal government, courts apply an analysis as a three-part inquiry that asks the following questions. First, which governmental entity imposed the charge? Next, which parties must pay the charge? And finally, for whose benefit are the revenues generated by the charge spent?

Governments > State & Territorial
Governments > Finance

Tax Law > State & Local Taxes > General Overview

HN27 **State & Territorial Governments, Finance**

When a state assessment is imposed by a legislative body, rather than an administrative agency, it is more likely to be viewed as a tax than as a fee.

Governments > State & Territorial
Governments > Finance

Tax Law > State & Local Taxes > General Overview

HN28[] **State & Territorial Governments, Finance**

If a state charge is imposed upon all citizens, or a broad class of them, then the charge is more likely to be a tax; if the charge is imposed only upon a narrow group, then the charge is more likely to be a fee.

Governments > State & Territorial
Governments > Finance

Tax Law > State & Local Taxes > General Overview

HN29[] **State & Territorial Governments, Finance**

If a local government spends revenue to provide a benefit for the general public, then the charge is more likely to be a tax, but if the revenue is spent to provide a particularized benefit for a narrow group, or to offset the cost of regulating a narrow group, then the charge is more likely to be a fee.

Governments > Local Governments > Police Power

Real Property Law > Water Rights > General Overview

HN30[] **Local Governments, Police Power**

See DeKalb County, Ga., Code § 25-372.

Governments > General Overview

HN31[] **Governments**

Fees generally fall into two broad categories: user fees, which a government may charge in exchange for services or the use of government-owned property, and regulatory fees, which are charges that are imposed by a regulatory agency to recoup its costs of regulation. In both cases, the payment of the fee is voluntary. With a user fee, one can avoid the charge by not accepting the government's services or by not using the government's property. With a regulatory fee, one can avoid the charge by not engaging in the regulated activity.

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Finance

HN32[] **Local Governments, Claims By & Against**

See DeKalb County, Ga., Code § 25-371(a).

Constitutional Law > Supremacy Clause > General Overview

Governments > Federal Government > Claims By & Against

Tax Law > State & Local Taxes > General Overview

HN33[] **Constitutional Law, Supremacy Clause**

Absent express congressional authorization, a state cannot tax the United States directly. To waive the government's sovereign immunity, Congress must express its intent to do so in terms that are unequivocal and unambiguous. For that reason, any ambiguities in the statutory language are to be construed in favor of immunity, so that the government's consent to be sued is never enlarged beyond what a fair reading of the text requires.

Governments > Federal Government > Claims By & Against

HN34[] **Federal Government, Claims By & Against**

A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text. The standards applicable to a waiver of sovereign immunity are not lowered simply because a statute purports to place the federal government on the same footing as private parties. Instead, statutes placing the United States in the same position as a private party must be read narrowly to preserve certain immunities that the United States has enjoyed historically.

Governments > Federal Government > Claims By & Against

HN35 **Federal Government, Claims By & Against**

A statute purporting to waive the government's immunity is ambiguous if there is a plausible interpretation of the statute that would not authorize money damages against the government.

Governments > Legislation > Interpretation

Governments > Legislation > Effect & Operation > Retrospective Operation

HN36 **Legislation, Interpretation**

In normal circumstances, a court can discern the meaning of ambiguous statutory language by reference to extrinsic evidence of congressional intent. However, such evidence is generally limited to legislative history that preceded the enactment of the statute. An exception to that general rule of statutory construction allows a court to treat an amendment to an ambiguous statute as a clarification of that statute, and to interpret the statute as if it had always been so clarified--essentially giving the amendment retroactive effect.

Governments > Legislation > Effect & Operation > Retrospective Operation

HN37 **Effect & Operation, Retrospective Operation**

While there is no requirement that statutes be applied only prospectively, there is a strong presumption against retroactive application. When a statute effects a substantive change in the law, it cannot be applied retroactively unless Congress has expressly indicated its intent that the statute be given retroactive effect. However, the usual concerns about retroactive application of a statutory amendment are not implicated when the amendment merely clarifies prior law rather than effecting a substantive change in the law. For that reason, an amendment that does nothing more than clarify existing law may be given retroactive effect even in the absence of a clear statement from Congress indicating that the amendment is to be applied retroactively.

Governments > Federal Government > Claims By & Against

HN38 **Federal Government, Claims By & Against**

In contrast to most statutes, a waiver of sovereign immunity must be expressed in clear and unambiguous terms, and any ambiguities contained in the statute must be resolved in favor of immunity. Further, a court may not examine legislative history or any other type of extrinsic evidence of congressional intent in interpreting the scope of the waiver. Rather, any waiver of sovereign immunity must be unequivocally expressed in statutory text and will be strictly construed, in terms of its scope, in favor of the sovereign. For that reason, it does not appear that Congress could ever clarify the scope of an earlier waiver of sovereign immunity because a statute may be clarified only if it is ambiguous, while a statute can effect a waiver of sovereign immunity only if it is unambiguous.

Headnotes/Summary

Headnotes

Money-Mandating Source of Law; Tucker Act, *28 U.S.C. § 1491(a)(1) (2006)*; Statute of Limitations, *28 U.S.C. § 2501 (2006)*; Waiver of Sovereign Immunity; State Taxation of Federal Property; *Supremacy Clause, U.S. Const. Art. VI, cl. 2*; Federal Facilities Section of the Clean Water Act, *33 U.S.C. § 1323 (2006)*; Subject Matter Jurisdiction, *RCFC 12(b)(1)*; Failure to State a Claim, *RCFC 12(b)(6)*.

Counsel: **[**1]** Sam L. Brannen, Jr., DeKalb County Law Department, with whom were Lisa E. Chang and Duane D. Pritchett, Decatur, GA, for plaintiff.

Franklin E. White, Jr., United States Department of Justice, with whom were Stuart F. Delery, Acting Assistant Attorney General, and Jeanne E. Davidson, Director, Washington, DC, for defendant. Harold Askins, Department of Veterans Affairs, Michael F. Kiely, United States Postal Service, James Misrahi, Department of Health & Human Services, Centers for Disease Control, of counsel.

Lawrence R. Liebesman, Washington, DC, for amici curiae National Association of Clean Water Agencies,

National Association of Flood and Stormwater Management Agencies, and American Public Works Association.

Judges: LYNN J. BUSH, Judge.

Opinion by: LYNN J. BUSH

Opinion

[*685] BUSH, *Judge.*

Now pending before the court is defendant's motion to dismiss and plaintiff DeKalb County's motion for summary judgment, both of which have been fully briefed and are ripe for a decision by the court. Because the court concludes that some of the claims set forth in the complaint were filed more than six years after they first accrued, defendant's motion to dismiss those claims under *Rule 12(b)(1) of the Rules of the United States Court of Federal Claims* **[**2]** (RCFC) must be granted. The court further holds that the remainder of the claims set forth in the complaint fail to state a claim upon which relief can be granted and must be dismissed under *RCFC 12(b)(6)*. Accordingly, defendant's motion to dismiss is granted, and DeKalb County's motion for summary judgment is denied.

BACKGROUND[1]

I. Factual History

A. The DeKalb County Municipal Separate Storm Sewer System

Most of the rain that falls on undeveloped land is absorbed into the ground. But when land is developed, and the property is covered with impervious surfaces such as buildings, parking lots, sidewalks, and roads, rainfall cannot be absorbed and flows onto adjacent land in higher volumes and at higher velocities than if the land had remained in an undeveloped state. This additional runoff increases the risk of flooding for nearby properties and also contributes to water pollution because the stormwater collects debris, chemicals, and other materials on the pavement and other impervious surfaces as it travels towards **[**3]** natural waterways. Stormwater runoff from impervious surfaces also impairs water quality through erosion and sedimentation.

In response to the increased stormwater runoff attributable to development, local governments have constructed and operated stormwater management systems for many years. The cost of operating such systems has increased dramatically in recent years, due to the accelerated pace of development and new requirements, especially requirements related to the abatement of water pollution, imposed by both state and federal law. While drainage and flood prevention were the primary impetus for the development of stormwater management systems, environmental protection has become an increasingly important — perhaps the primary — consideration in the design and management of such systems.

The Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, more commonly known as the Clean Water Act (CWA), created the National Pollutant Discharge Elimination System (NPDES), which requires a permit from either the Environmental Protection Agency (EPA), or an EPA-approved state agency, in order to discharge any type of pollutant from a point source into the **[**4]** waters of the United States. *See* *33 U.S.C. §§ 1311(a)*, *1342 (2006)*. In enacting the CWA, Congress declared that the statute's purpose was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." **[*686]** 86 Stat. 816. Further, "it [was] the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." *Id.*

In general, municipal separate storm sewer systems divert and collect stormwater and then discharge that water, untreated, into natural waterways. Because those systems discharge pollutants into the waters of the United States, they are treated as point sources under the CWA, as amended, and are required to obtain an NPDES permit, which imposes stringent requirements on their design and operation. [2] *See* *33 U.S.C. §*

[1] The facts recounted here are taken from the parties' submissions in this case and are undisputed. Unless otherwise noted, the court makes no findings of fact in this opinion.

[2] There was no NPDES permit requirement for stormwater discharges until Congress passed the Water Quality Act of 1987, Pub. L. No. 100-4, sec. 405, 101 Stat. 7, 69-71. The EPA promulgated the first regulations implementing the new

1342(p)(3)(B) (stating that NPDES permits for municipal storm sewers must prohibit the discharge of anything other than stormwater into the system and "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such **[**5]** other provisions as the Administrator or the state determines appropriate for the control of such pollutants").

DeKalb County, Georgia (the County), a political subdivision of the State of Georgia, owns and operates the DeKalb County Municipal Separate Storm Sewer System (the stormwater management system), which was developed over many years. [3] Code of DeKalb County (County Code) § 25-360(c). The system is operated in accordance with an NPDES permit issued by the State of Georgia and is also subject to additional requirements under state law. *See* Compl. ¶ 13; Pl.'s Resp. at 1-2.

In December 2003, the County's board of commissioners adopted a new stormwater management ordinance, which created a new stormwater utility that would be "responsible for stormwater management throughout the county's jurisdictional limits, and [would] provide for the management, protection, control, regulation, use, and enhancement of stormwater systems and facilities." County Code § 25-362(a). The board of commissioners transferred to the new stormwater utility "operational control over the existing stormwater management systems and facilities owned and heretofore operated by the county and other related assets, including but not limited to properties upon which such facilities are located, easements, rights-of-entry and access, and certain equipment." **[**7]** *Id.* § 25-362(b). Most relevant to this case, the stormwater ordinance established a new system of "stormwater service fees" to fund the operations of the new utility. *Id.* § 25-365.

Under the ordinance, the owners of all developed property located within the unincorporated portions of the county are required to pay an annual assessment that is generally based on the impervious surface area located on the property. [4] The charge assessed on developed properties is equal to $4.00 per month for each Equivalent Residential Unit (ERU). [5] *Id.* § 25-365(b). Single-family **[*687]** dwellings are assessed the rate applicable to one ERU; multiple-family dwellings are assessed the rate applicable to one ERU, multiplied by the number of dwelling units on the property, multiplied by an adjustment factor of 0.5; and all other developed properties are assessed the rate applicable to one ERU for every 3000 square feet of impervious surface area on the property, rounded up to the next highest tenth of an ERU. *Id.* § 25-365(c)-(e).

The stormwater management charges do not apply to undeveloped land, public rights of way, railroad rights of way, or "[a]ny property whereby one hundred (100) percent of the stormwater runoff is contained on the premises and no runoff enters into the stormwater management system." *Id.* § 25-368. Further, property owners may apply for credits against the stormwater assessment by implementing specified systems and facilities on their own property, but the credits may amount to no more than forty percent of the total charge. *Id.* § 25-369(a).

The ordinance provides that the revenue generated by the new assessments must be deposited into **[**9]** an "enterprise fund," which is to be used only for costs incurred in connection with the stormwater management system. County Code § 25-364. Under the ordinance, the County may appropriate additional funds for the

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requirement in 1990. ***National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990)*** (codified at 40 C.F.R. pts. 122-124).

[3] The County is authorized to establish a stormwater management system under the Home Rule section of the Georgia Constitution. *See* Ga. Const. 1983, Art. IX, sec. 2, par. III (a)(6) (stating **[**6]** that counties may provide "[s]torm water and sewage collection and disposal systems"). Under state statute, the County is authorized to "prescribe, revise, and collect rates, fees, tolls, or charges" for systems, plants, works, instrumentalities, and properties "used or useful in connection with the collection, treatment, and disposal of sewage, waste, and storm water." Ga. Code Ann. §§ 36-82-61(4)(C)(ii), 36-82-62(a)(3) (West 2012).

[4] The ordinance applies only to the unincorporated portions of DeKalb County because the County cannot exercise its authority within the boundaries of incorporated municipalities that are **[**8]** located inside of its borders. *See* Ga. Const. 1983, Art. IX, sec. 2, par. III(b)(1) ("No county may exercise any of the powers listed in subparagraph (a) of this Paragraph or provide any service listed therein inside the boundaries of any municipality or any other county except by contract with the municipality or county affected[.]").

[5] The ERU was calculated based on the county's median impervious coverage for a statistical sampling of lots improved with detached, single-family dwellings. *See* County Code § 25-361 (definition of "Equivalent Residential Unit").

system, but the revenue in the enterprise fund may not be devoted to any other purpose. While revenue that is deposited into the enterprise fund may be pledged "to the payment of principal of premium, if any, and interest on any revenue bonds or other obligations lawfully issued or otherwise contracted for by the county as may be provided in any resolution authorizing such bonds or obligations or in any trust instrument relating to such bonds or obligations[,]" *id.* § 25-364(c), the referenced bonds are limited to those related solely to the stormwater management system, *see* Tr. at 35-36.

The ordinance provides that the "stormwater service fee shall accrue beginning January 1, 2004, and shall be billed annually thereafter." *Id.* § 25-366. The charge may be billed separately or collected "with other fees for services, . . . provided that in no instance shall the service charge constitute a direct lien against the property." *Id.* § 25-371(a). The County may send the bill for the **[**10]** assessment through the mail or by other means, and that bill must indicate "the amount of the bill, the date the payment is due, and the date when past due." *Id.* § 25-371(b).

In practice, the County often includes the amount of the stormwater charge due for each property owner as a line item on the annual bill sent during the summer for fees and ad valorem taxes. Affidavit of John G. Booth (Booth Aff.) ¶ 6. The United States and other tax-exempt property owners, in contrast, are billed for the assessment on a separate "Stormwater Utility Notice." *Id.* The County assesses these charges against its own property, and also pays stormwater management charges imposed by municipalities and other counties in which it owns property. *See* Affidavit of Joel Gottlieb ¶¶ 3-5.

B. The Federal Facilities Section of the Clean Water Act

Since its original enactment in 1972, the CWA has included a provision known as the Federal Facilities Section, ***HN1***[↑] *33 U.S.C. § 1323 (2006)*, which requires the federal government to meet the same water pollution abatement requirements as those applicable to private entities. [6] In this case, the County argues that the Federal Facilities Section, which was amended in 1977 and again **[**11]** in 2011, waives the federal government's sovereign immunity from the stormwater utility charges that plaintiff seeks to recover in this case. Because the Federal Facilities Section is central to the County's case, the court will examine its history in some detail.

[*688] 1. The 1972 Version

In the Federal Water Pollution Control Act Amendments of 1972, the relevant portion of the Federal Facilities Section read as follows:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control **[**12]** and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges.

Pub. L. No. 92-500, 86 Stat. 816, 875.

The Senate Report on the 1972 CWA states that the purpose of *section 1323* was to "require[] that Federal facilities meet the same effluent limitations as private sources of pollution, unless the Federal facility is specifically exempted by the President." S. Rep. No. 92-414, at 67, *reprinted in* 1971 U.S.C.C.A.N. 3668, 3733. There is no discussion in either the text of the statute or in the Senate Report as to what types of charges the term "reasonable service charges" was intended to encompass.

2. The 1977 Version

In *EPA v. California EPA ex rel. State Water Resources Control Board, 426 U.S. 200, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976)*, the Supreme Court held that the Federal Facilities Section of the CWA did not require federal agencies to meet state permitting requirements related to the abatement of water pollution. The Supreme Court first explained that federal properties "are subject to state regulation only when and to the extent that

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[6] The various sections of the CWA are often referred to as they appeared in the law enacted by Congress, rather than as they were ultimately codified in the United States Code. The Federal Facilities Section, for example, is sometimes referred to as section 313 of the CWA, even though it is codified at *33 U.S.C. § 1323*. In this opinion, the court will refer to that section as it was codified (*i.e.*, as "*section 1323*").

congressional authorization is clear and unambiguous." *Id. at 211*. Next, the Court held that *section 1323* **[**13]** did not expressly require federal agencies to obtain an NPDES permit from the state to discharge effluents into navigable waters. Finally, according to the Court, none of the express terms of *section 1323* — including the requirement that the federal government pay reasonable service charges — could be read to contain an implied requirement to obtain such a permit.

Congress amended *section 1323* in 1977, noting in the Senate Report on the amendment that "[t]he act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws." S. Rep. No. 95-370, at 67 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4392. The report explains that "the Supreme Court, encouraged by Federal agencies, ha[d] misconstrued the original intent [of the 1972 law]." *Id.* The report further notes that because

> the substantive requirements of the act and of State and local law would be unenforceable unless procedural provisions were also met[,] section 313 is amended to specify that, as in the case of air pollution, a Federal facility is subject to any Federal, State, and local requirement respecting the control or abatement of **[**14]** water pollution, both substantive and procedural, to the same extent as any person is subject to these requirements. This includes, but is not limited to, requirements to obtain operating and construction permits, reporting and monitoring requirements, any provisions for injunctive relief and such sanctions imposed by a court to enforce such relief, and the payment of reasonable service charges.

Id. at 4392-93. *Section 1323*, as amended in 1977 and as it still reads today, states that

> ***HN2***[↑] [e]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, *and each officer, agent, or employee thereof in the performance of his official duties*, shall *be subject to*, and comply with, *all* Federal, State, interstate, and local requirements, *administrative authority, and process and sanctions* respecting *the* control and abatement of water pollution *in the same manner, and* to the same extent as *any nongovernmental entity* including the payment of reasonable service charges.

[*689] *33 U.S.C. § 1323(a)* **[**15]** (emphasis added to indicate changes made by amendment). ***HN3***[↑] The amended section also states that its mandate applies "to any requirement, whether substantive or procedural," "to the exercise of any Federal, State, or local administrative authority," and "to any process and sanction, whether enforced in Federal, state, or local courts or in any other matter." *Id.* Finally, the 1977 version of *section 1323* states that "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." *Id.*

3. The 2011 Version

Despite the 1977 amendment to the Federal Facilities Section of the CWA, the federal government routinely refused to pay the types of stormwater charges at issue in this case, arguing that such charges were taxes rather than fees, and did not fall within the waiver of immunity contained in *section 1323(a)*. In response, Senator Ben Cardin introduced a bill to add two new subsections to *section 1323*, without changing the text of *section 1323(a)*:

> (c) Federal Responsibility for Stormwater Pollution. Reasonable service charges described in subsection (a) include reasonable fees or assessments made for the purpose of stormwater **[**16]** management in the same manner and to the same extent as any nongovernmental entity.
> (d) No Treatment as Tax or Levy. A fee or assessment described in this section —
> (1) shall not be considered to be a tax or other levy subject to an assertion of sovereign immunity; and
> (2) may be paid using appropriated funds.

S. 3481, 111th Cong. (2010) (as introduced), 156 Cong. Rec. S4851, S4856.

In introducing his proposed amendment to the Federal Facilities Section, Senator Cardin noted the government's persistent refusal to pay reasonable stormwater management charges, and explained that "[a]dopting the legislation that I am introducing today will remove all ambiguity about the responsibility of the Federal Government to pay these normal and customary stormwater fees." 156 Cong. Rec. S4851, S4856 (2010) (statement of Senator Cardin).

Congress ultimately passed an amended version of Senator Cardin's bill, which the President signed into law on January 4, 2011:

> HN4[] (c) Reasonable Service Charges —
> (1) In general. For the purposes of this Act, reasonable service charges described in subsection (a) include any reasonable nondiscriminatory fee, charge, or assessment that is —
>
> > (A) based on some fair approximation **[**17]** of the proportionate contribution of the property or facility to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility); and
> > (B) used to pay or reimburse the costs associated with any stormwater management program (whether associated with a separate storm sewer system or a sewer system that manages a combination of stormwater and sanitary waste), including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge, or assessment is denominated a tax.

Pub. L. No. 111-378, 124 Stat. 4128 (2011). In addition, HN5[] the amendment stated that federal agencies "shall not be obligated to pay or reimburse any fee, charge, or assessment described in paragraph (1), except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment." *Id.* at 4128-29.

C. The Federal Properties in this Case

The United States owns a number of properties located within the county. In this case, the **[**18]** County seeks to recover unpaid stormwater management charges assessed against eighteen different properties — six owned by the United States and twelve owned by the Postal Service — for the years **[*690]** 2005 through 2010. Plaintiff asserts that the government has been inconsistent in its payment of stormwater management charges for its properties, "paying the fees in full for some properties and facilities and refusing to pay for other similar properties and facilities." Compl. ¶ 27. The County has demanded payment of the charges for many years, and notified the government of its intent to pursue its claims in court in letters dated March 9, 2010 and October 13, 2011. *Id.* ¶¶ 28-29.

The government concedes that it is now required, under section 1323, to pay all stormwater management charges accruing after January 4, 2011, the date of the most recent amendment to that section. [7] In this case, the parties do not dispute whether the government is required to pay those charges now and in the future. Rather, the parties' disagreement here centers on whether the government is liable to the County for charges that were assessed against federal properties in the years 2005 through 2010.

II. Procedural History

On November 14, 2011, the County filed its complaint in this case, in which it argues that the federal government has waived its sovereign immunity from "reasonable service charges" under section 1323 of the Clean Water Act, and that the stormwater management charges plaintiff seeks to recover in this case are within the scope of that waiver. The County requests $281,553.12 in damages, plus interest, attorneys' fees, and other related expenses. The amount requested by the County is limited to charges that accrued before section 1323 was amended on January 4, 2011.

On February 27, 2012, the government filed a motion to dismiss **[**20]** this action pursuant to RCFC 12(b)(1) and RCFC 12(b)(6). Defendant raises two arguments in its motion to dismiss. First, defendant argues that any claims that accrued before November 14, 2005 must be dismissed as untimely under 28 U.S.C. § 2501 (2006). Second, defendant asserts that each of the County's remaining claims must be dismissed for failure to state a claim because those claims seek the recovery of state taxes that were levied upon federal properties before the United States waived its immunity from such taxes.

On April 30, 2012, the County filed its response to the government's motion to dismiss, as well as a motion for

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[7] While the government **[**19]** concedes that the 2011 amendment of section 1323 created a prospective obligation to pay the County's stormwater management charges, there is some uncertainty with respect to the government's diligence in making those payments. *Compare* Pl.'s Resp. at 16 n.9 (stating that the United States has "paid the majority of such fees incurred since § 1323(c) became law on January 4, 2011") *with* Booth Aff. ¶ 9 ("No [fewer] than fifteen (15) federal facilities are now delinquent in paying stormwater utility fees due DeKalb County for calendar year 2011.").

partial summary judgment in favor of plaintiff. In response to defendant's argument that some of the County's claims were not timely, plaintiff asserts that its stormwater management charges are not due until December 31st of each year, and do not become delinquent until January 1st of the following year. For that reason, plaintiff argues that none of its claims accrued before January 1, 2006, which was less than six years before it filed its suit in this court. With respect to defendant's argument that the County's charges are impermissible taxes that were **[**21]** not covered by the pre-2011 version of section 1323, plaintiff responds that its charges are not taxes but fees, which fall squarely within the waiver of sovereign immunity contained in section 1323.

On May 7, 2012, the National Association of Clean Water Agencies, the National Association of Flood and Stormwater Management Agencies, and the American Public Works Association filed a motion for leave of the court to file an *amicus curiae* brief in support of the County. The court granted that motion on May 15, 2012. In their brief, amici argue that the 2011 amendment should not be read to contain a new waiver of the government's sovereign immunity. Instead, according to amici, the 2011 amendment must be viewed as a mere clarification of the waiver of sovereign immunity contained in the earlier version of section 1323. For that reason, amici contend that the government is **[*691]** liable for the charges that accrued before the 2011 amendment was enacted.

On July 20, 2012, defendant filed a reply in support of its motion to dismiss, as well as its response to the County's motion for summary judgment. In its reply, the government rejects the County's contention that none of the charges assessed in **[**22]** 2005 accrued until January 1, 2006. In that regard, the government notes that the County sent the government an invoice for approximately half of those charges in the summer of 2005, and that the invoice informed the government that the charges were due no later than August 15, 2005. For that reason, the government argues that any claims related to those charges accrued more than six years before the complaint was filed in this case. The government further asserts that the charges at issue in this case are taxes rather than fees, that the government had not waived its immunity from such taxes until January 2011, and that the 2011 amendment cannot be read as a clarification of an earlier waiver of immunity.

On September 25, 2012, the County filed its reply in support of its motion for summary judgment. In its reply, the County disagrees with the legal tests endorsed by the government in its motion, but further argues that its stormwater utility charges are fees irrespective of which test is applied. The County also endorses and adopts the principal argument advanced by amici in their brief, *i.e.*, that the 2011 amendment to section 1323 may be applied retroactively as a clarification **[**23]** of the earlier version of that section.

This matter was transferred to the undersigned pursuant to *RCFC 40.1* on October 17, 2012, and the court heard oral argument from counsel on the parties' dispositive motions on November 30, 2012. [8]

DISCUSSION

I. Standards of Review

A. RCFC 12(b)(1)

HN6[↑] In rendering a decision on a motion to dismiss for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), this court must presume all undisputed factual allegations to be true and must construe all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), *abrogated on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800, 814-15, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 747 (Fed. Cir. 1988). The relevant issue in a motion to dismiss under RCFC 12(b)(1) "'is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" Patton v. United States, 64 Fed. Cl. 768, 773 (2005) (quoting Scheuer, 416 U.S. at 236). The plaintiff bears the burden of establishing subject **[**24]** matter jurisdiction, Alder Terrace, Inc. v. United States, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)), and must do so by a preponderance of the evidence, Reynolds, 846 F.2d at 748 (citations omitted). The court may look at evidence outside of the pleadings in order to determine its jurisdiction over a case. Martinez v. United States, 48 Fed. Cl. 851, 857 (2001) (citing RHI Holdings, Inc. v.

[8] With the court's permission, counsel for the County yielded a portion of his time for oral argument to counsel for amici.

United States, 142 F.3d 1459, 1461-62 (Fed. Cir. 1998); Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir. 1991)), *aff'd in relevant part*, 281 F.3d 1376 (Fed. Cir. 2002). "Indeed, the court may, and often must, find facts on its own." *Id.* If jurisdiction is found to be lacking, this court must dismiss the action. RCFC 12(h)(3).

B. RCFC 12(b)(6)

HN7[] It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). When considering a motion to dismiss under this rule, "the allegations of **[*692]** the complaint should be construed favorably to the pleader." Scheuer, 416 U.S. at 236. **[**25]** "[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief," dismissal is warranted under RCFC 12(b)(6). Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). To survive a motion to dismiss for failure to state a claim, a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 555. While a complaint is not required to contain detailed factual allegations, it must provide "enough facts to state a claim for relief that is plausible on its face." Id. at 570. In order to meet the requirement of facial plausibility, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

II. Analysis

In its motion, defendant advances two separate grounds for dismissing the claims set forth in the County's complaint. First, defendant argues that any claims related to stormwater utility charges that were billed to the government more than six years before the complaint was filed are precluded by the court's statute of limitations and **[**26]** must be dismissed under RCFC 12(b)(1). Second, defendant asserts that the remaining claims must be dismissed under RCFC 12(b)(6) because (1) the County's assessments constitute taxes; (2) the government did not waive its immunity from state or local taxes used to fund stormwater management systems until January 4, 2011; and (3) that waiver may not be applied retroactively to cover stormwater utility charges that were levied before that date.

The court must first address the County's assertion that defendant's motion to dismiss must be converted into a motion for summary judgment because it relies on material outside of the pleadings. That assertion is incorrect for three reasons. First, HN8[] the court is not required to convert a motion to dismiss into a motion for summary judgment unless the court relies upon evidence outside of the pleadings in resolving the motion. *See* RCFC 12(d) (requiring conversion only when "matters outside the pleadings are presented to *and not excluded by the court*") (emphasis added). Neither of the documents attached to the government's motion to dismiss is necessary to the court's resolution of that motion.

Furthermore, to the extent that the court must rely on **[**27]** any material outside of the pleadings in this case, such reliance is limited to the government's motion to dismiss under RCFC 12(b)(1). HN9[] The requirement set forth in RCFC 12(d) — *i.e.*, that motions to dismiss must be treated as motions for summary judgment when the court relies on evidence outside of the pleadings — is, by its own terms, limited to motions to dismiss under RCFC 12(b)(6) and RCFC 12(c). In resolving motions to dismiss for lack of subject matter jurisdiction under RCFC 12(b)(1), in contrast, the court is free to make findings of fact based on evidence not contained in the pleadings. *See* Rocovich, 933 F.2d at 993; Martinez, 48 Fed. Cl. at 857.

Finally, both of the documents attached to the government's motion to dismiss are matters of public record that were printed from the County's own website. The court may consider those documents in resolving the motion to dismiss without converting that motion into one for summary judgment. *See* Sebastian v. United States, 185 F.3d 1368, 1374 (Fed. Cir. 1999) (HN10[] "In deciding whether to dismiss a complaint under Rule 12(b)(6), the court may consider matters of public record.").

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

In **[**28]** its motion to dismiss, defendant argues that this court does not have jurisdiction over any claims for the recovery of stormwater utility charges that were billed to the government more than six years before the County filed its complaint in this case. Because the

complaint was filed on November 14, 2011, defendant argues that the County's attempt to recoup unpaid stormwater charges that were billed more than six years before that **[*693]** date are untimely under 28 U.S.C. § 2501. Further, although the issue was not raised by defendant, the court must determine whether plaintiff has identified a money-mandating source of substantive law for purposes of this court's jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1) (2006). For the reasons set forth below, the court holds that plaintiff has identified a money-mandating source of law, but further concludes that the County's claims to recover stormwater utility charges that were billed to the government before November 14, 2005 are untimely and must be dismissed under RCFC 12(b)(1).

1. The Court Does Not Possess Subject Matter Jurisdiction over Claims for the Recovery of Stormwater Utility Charges Billed to Defendant before November 14, [29] 2005**

Section 2501 provides in relevant part that ***HN11***[↑] "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. The United States Supreme Court has held that ***HN12***[↑] the six-year limitations period is an absolute jurisdictional bar that cannot be waived by the government. *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133-34, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008) (holding that the statute of limitations contained in section 2501 is jurisdictional and is not subject to tolling, waiver, or estoppel). The County filed its suit on November 14, 2011. In order to be considered within the limitations period set forth in section 2501, the County's claims must have accrued no earlier than November 14, 2005. If any of its claims accrued before that date, then the court is without jurisdiction to hear them. The Federal Circuit has explained that a claim first accrues for purposes of the six-year limitations period "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." Alder Terrace, 161 F.3d at 1377.

The County **[**30]** asserts that the stormwater management charges it levied on federal properties in 2005 were not due until the end of that year and did not become delinquent until January 1, 2006. *See* Booth Aff. ¶ 5. In addition, the County contends that a claim seeking payment for services rendered accrues, and the statute of limitations begins to run, only when "'the last services are rendered.'" Pl.'s Resp. at 19 (quoting Empire Inst. of Tailoring, Inc. v. United States, 161 F. Supp. 409, 142 Ct. Cl. 165, 168 (1958)). Inasmuch as the charges for 2005 were based on services that plaintiff argues were rendered until December 31, 2005, the County contends that its claims related to the recovery of those charges were timely because they did not accrue more than six years before the complaint was filed in this case.

Defendant, in contrast, contends that under the continuing claims doctrine, "'the cause of action for pay or compensation accrues as soon as the payor fails or refuses to pay what the law (or the contract) requires; there is no other condition precedent to the accrual of the cause of action.'" Def.'s Reply at 7 (quoting Friedman v. United States, 310 F.2d 381, 385, 159 Ct. Cl. 1 (Ct. Cl. 1962)). Furthermore, according to **[**31]** defendant, "'where the payments are to be made periodically, each successive failure to make proper payment gives rise to a new claim upon which suit can be brought.'" *Id.* at 8 (citation omitted). The government received an invoice for stormwater management charges in the summer of 2005. On that invoice, the County stated that the stormwater utility charge is calculated on an annual basis, but is due in two equal installments on August 15, 2005, and November 15, 2005. *See* Booth Aff. Ex. 1. Based on that invoice, the government argues that any of the County's claims related to stormwater charges levied on federal properties in the first half of 2005 are untimely. [9]

[*694] The County does not dispute that it sent an invoice to the government for its charges in July 2005, *see* Tr. at 53, and that invoice expressly states that the charges "are due in two equal installments: August 15th and November 15th," Booth Aff. Ex. 1. The County argues, however, that the dates indicated on the invoice are not really due dates. Rather, plaintiff contends those dates allow property owners to prepay their stormwater charges as an administrative convenience, but the

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[9] In its motion, defendant asserts that the County's stormwater management charges accrue on a continuous basis beginning on January 1st of each year. Based on that assertion, defendant argues that more than ten months' worth of the charges imposed on federal properties in 2005 are time-barred under section 2501. In its reply in support of its motion, however, the government appears to have abandoned that argument, instead asserting that the County's claims are untimely with respect to half of the stormwater management charges **[**32]** levied in 2005 — *i.e.*, those included on the July 2005 invoice.

charges were not actually due until December 31, 2005. *Id.* ¶¶ 5-7.

The County's argument is not, however, supported by the record in this case. Nothing in the stormwater ordinance states that stormwater management assessments are due on December 31st, or that they are not considered delinquent until January 1st of the following year. Instead, the ordinance states that "[t]he stormwater service fee shall accrue beginning January 1, 2004, and shall be billed annually thereafter." County Code § 25-366. The ordinance also requires the County to inform property owners of the date on which the charges are due, and requires property owners to pay a one **[**33]** percent per month late fee for charges that are delinquent. [10] *Id.* § 25-371(b). The County sent the government an invoice for stormwater utility charges in July 2005, and that invoice unequivocally informed the government that half of its annual liability for those charges was due no later than August 15th of that year. Because the government did not pay the assessments for the first half of 2005 by the specified date, the County could have commenced an action to recover those charges the next day, on August 16, 2005. Thus, the deputy tax commissioner's statement that the charges were not actually delinquent until January 1st of the next year cannot override the August 15th deadline imposed by the County's invoice or suspend the accrual of the County's claims for purposes of the limitations period. For the foregoing reasons, the court holds that any claims related to stormwater charges for the first half of 2005 were untimely and must be dismissed under RCFC 12(b)(1).

2. Section 1323(a) of the Clean Water Act Is a Money-Mandating Source of Law for Purposes of this Court's Jurisdiction under the Tucker Act

With respect to the remaining claims presented by plaintiff, HN13[↑] in order to establish jurisdiction in this court, the County must demonstrate that the government has consented to suit and that there is a substantive legal basis for such claims. *See* United States v. White Mountain Apache Tribe, 537 U.S. 465, 472, 123 S. Ct. 1126, 155 L. Ed. 2d 40 (2003) (*White Mountain Apache*) ("Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver.") (citations omitted).

The County asserts that this court has jurisdiction over its claims under the Tucker Act, [11] which provides in relevant part that the

> **[*695]** HN14[↑] United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either **[**35]** upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). The Federal Circuit has explained that HN15[↑] the Tucker Act "does two things: (1) it confers jurisdiction upon the Court of Federal Claims over the specified categories of actions brought against the United States, and (2) it waives the Government's sovereign immunity for those actions." Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (*en banc* in relevant part). However, the statute

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[10] While the County describes the stormwater assessment as an annual charge, and the ordinance states that those charges shall be billed annually, *see* County Code § 25-366, the ordinance states that the charges are to be **[**34]** calculated on a *monthly*, rather than annual, basis, *see id.* § 25-365(b) ("The stormwater service charge per equivalent residential unit shall be four dollars ($4.00) per month or as amended by official action of the governing authority.").

[11] The County also asserts that this court may exercise jurisdiction over suits against the Postal Service under 39 U.S.C. § 401 (2006). With respect to federal jurisdiction, however, that section simply provides that the Postal Service may "sue and be sued in its official name." *Id.* § 401(1). Another section of the **[**36]** same title addresses suits by and against the Postal Service, but that section states only that "the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service." 39 U.S.C. § 409(a) (2006). Defendant does not contest this court's jurisdiction over the Postal Service under the Tucker Act, and this court routinely exercises such jurisdiction. *See generally* Emery Worldwide Airlines, Inc. v. United States, 49 Fed. Cl. 211, 220 (noting that the Postal Service is an "agency" under 28 U.S.C. § 451 (2006) and is therefore subject to this court's jurisdiction under the Tucker Act), *aff'd*, 264 F.3d 1071, 1080 (Fed. Cir. 2001). The County is incorrect, however, in its assertion that the Postal Service may be named as a separate defendant in this case, distinct from the United States. Under the Tucker Act, the United States is the only defendant over which this court may properly exercise subject matter jurisdiction. 28 U.S.C. § 1491(a)(1); *see also* RCFC 10(a) (noting that the United States must be designated as the defendant in this court).

"does not create a substantive cause of action; in order to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages." *Id.*

The substantive source of law upon which the County relies to establish this **[**37]** court's subject matter jurisdiction under the Tucker Act is section 1323(a), which states that

> HN16[] [e]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, *shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.*

33 U.S.C. § 1323(a) (emphasis added).

Importantly, HN17[] section 1323(a) states that the government "shall" be subject to federal, state, and local water pollution requirements "including the payment of reasonable services charges." In general, the Federal Circuit has held that when Congress uses the mandatory term "shall" in a statute to describe the government's obligation to make a payment to a party or group, **[**38]** the statute is money mandating. *See* Greenlee Cnty., Ariz. v. United States, 487 F.3d 871, 877 (Fed. Cir. 2007) (noting that "use of the word 'shall' generally makes a statute money-mandating"); Agwiak v. United States, 347 F.3d 1375, 1380 (Fed. Cir. 2003) ("We have repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating."). Defendant does not contend that the government has any discretion to choose whether to comply with the requirements of section 1323; rather, the dispute between the parties is over the precise scope of that provision — *i.e.*, whether the term "reasonable service charges" includes the type of charges at issue in this case.

HN18[] In order to waive the government's sovereign immunity, Congress must use language that is unequivocal and unambiguous. *See* United States v. Mitchell, 445 U.S. 535, 538, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) (noting that a waiver of sovereign immunity must be "unequivocally expressed"). In contrast, the

> "fair interpretation" rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity. "Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations **[**39]** need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity." It is enough, then, that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be "lightly inferred," a fair inference will do.

White Mountain Apache, 537 U.S. at 472-73 (citations omitted).

[*696] As the court will discuss below, Congress did not waive the government's immunity from the type of charges at issue in this case until January 4, 2011. [12] However, that conclusion — that the County's stormwater management charges are not covered by the pre-2011 version of section 1323 — does not require the court to dismiss the County's claims under RCFC 12(b)(1). Rather, as the Federal Circuit has explained,

> HN19[] [a]ssuming that the Court of Federal Claims has taken jurisdiction over the cause as a result of the initial determination that plaintiff's cause rests on a money-mandating source, the consequence of a ruling by the court on the merits, that plaintiff's case does not fit within the scope of the source, is simply this: plaintiff loses **[**40]** on the merits for failing to state a claim on which relief can be granted.

Fisher, 402 F.3d at 1175-76. The same is true here. The court may exercise jurisdiction over the County's claims in this case, at least those that are timely, because

[12] There are two types of sovereign immunity implicated in this case. First, there is the government's immunity from suit, which was waived by the Tucker Act. In addition, there is the government's immunity from state and local taxation to fund stormwater management systems, which, as discussed in detail below, was not waived until January 4, 2011.

section 1323 may fairly be interpreted to mandate the payment of money by the government. Notwithstanding that jurisdictional basis, the County has failed to state a claim upon which relief can be granted because it has failed to demonstrate that its stormwater management charges fall within the scope of section 1323.

B. Motion to Dismiss for Failure to State a Claim

In its motion to dismiss under RCFC 12(b)(6), defendant argues that the charges the County seeks to recover in this case are taxes that may not be imposed on federal properties or facilities without the prior consent of the United States. Defendant **[**41]** concedes that Congress waived the government's immunity from such taxes when it amended section 1323 on January 4, 2011, but argues that the waiver contained in the 2011 amendment cannot be applied retroactively, nor may it be viewed as an attempt by Congress to clarify an earlier waiver of immunity. In order to resolve the government's motion, the court must address three separate questions.

First, are the stormwater management charges at issue in this case properly viewed as taxes or fees? Second, if the charges are taxes rather than fees, did the government unequivocally and unambiguously waive its immunity from such taxes in the 1977 amendments to the Clean Water Act? Finally, if the government did not clearly waive its sovereign immunity in 1977, may the 2011 amendment be given retroactive effect as a mere clarification of the 1977 waiver, rather than as a new and separate waiver of sovereign immunity?

The court concludes that the County's stormwater management charge is a tax that cannot be imposed upon federal properties without the consent of the United States. The court further holds that Congress did not unequivocally waive the federal government's sovereign immunity from state **[**42]** taxation in 1977, and that the 2011 amendment cannot be applied retroactively as a clarification of the initial waiver of sovereign immunity. For those reasons, the court must grant defendant's motion to dismiss under RCFC 12(b)(6).

1. DeKalb County's Stormwater Utility Charge Is a Tax

HN20[] It is a fundamental principle of constitutional law that the United States is immune from direct taxation by state and local governments, including counties. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819); *see also* Lee v. Osceola & Little River Rd. Improvement Dist. No. 1 of Mississippi Cnty., Mo., 268 U.S. 643, 45 S. Ct. 620, 69 L. Ed. 1133 (1925) ("It was settled many years ago that the property of the United States is exempt by the Constitution from taxation under the authority of a State as long as title remains in the United States.").

The federal government's immunity from state and local taxation is based upon the Supremacy Clause, U.S. Const. Art. VI, cl. 2, **[*697]** and is therefore absolute. *See* United States v. Delaware, 958 F.2d 555, 558 (3d Cir. 1992) (noting that the Supreme Court has adopted a broad reading of "the Supremacy Clause, viewing all state taxes on federal entities as insults to national sovereignty and impermissible **[**43]** burdens on federal operations"); *see also* United States v. New Mexico, 455 U.S. 720, 733, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982) (noting that "the Court has never questioned the propriety of absolute federal immunity from state taxation"); United States v. City of Columbia, 914 F.2d 151, 153 (8th Cir. 1990) ("Unlike the states' immunity from federal taxation, which is somewhat limited, the United States' immunity from state taxation is a 'blanket immunity.'") (citation omitted).

HN21[] Notwithstanding the absolute prohibition on state taxation, the government may be charged for services rendered or for its use of state or local property. *See, e.g.*, Packet Co. v. Keokuk, 95 U.S. 80, 85-86, 24 L. Ed. 377 (1877) (holding that a charge for the use of a public wharf was a user fee rather than a tax for constitutional purposes); Cincinnati v. United States, 153 F.3d 1375, 1376 (Fed. Cir. 1998) ("One issue courts have had to decide is whether the assessment in question should be characterized as a tax, and thus impermissible when imposed on a federal entity, or whether the assessment should be considered a fee for services provided to the federal entity, and therefore permissible.").

In short, HN22[] there is no question that states cannot tax the federal **[**44]** government without its consent, but it is also clear that state governments may charge the federal government a reasonable and nondiscriminatory fee for services rendered. Here, the court must determine whether the charges at issue in this case are most appropriately characterized as taxes or fees. The parties disagree on the answer to that question, and they cite different legal standards in reaching their divergent conclusions.

Before addressing the standards proposed by the parties, the court notes that it matters little that the Georgia Supreme Court has determined that the type of stormwater utility assessments at issue in this case are fees rather than taxes. *See* McLeod v. Columbia Cnty., 278 Ga. 242, 599 S.E.2d 152, 154-55 (Ga. 2004). That decision does not affect the outcome here: ***HN23***[⬆] "Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." Carpenter v. Shaw, 280 U.S. 363, 367-68, 50 S. Ct. 121, 74 L. Ed. 478 (1930). Indeed, the state court addressed the issue only because a federal district court had remanded the case after determining **[**45]** that the charges were taxes under federal law. *See* McLeod v. Columbia Cnty., 254 F. Supp. 2d 1340, 1344-49 (S.D. Ga. 2003) (holding that a county's stormwater management charges were taxes for purposes of the Tax Injunction Act, 28 U.S.C. § 1341 (2006)).

For the same reason, the court is not bound by the County's characterization of its charges as "stormwater service fees" in the stormwater ordinance. *See* Collins Holding Corp. v. Jasper Cnty., S.C., 123 F.3d 797, 800 n.3 (4th Cir. 1997) ("Whether the body imposing the assessment labels it as a tax or a fee is not dispositive because the label is not always consistent with the true character of the assessment.") (citation omitted). Instead, ***HN24***[⬆] in seeking to draw a line between an impermissible tax and a permissible fee, the court must "consider all the facts and circumstances of record in the case and assess them on the basis of the economic realities to determine the essential nature of the [charge]." City of Columbia, 914 F.2d at 154 (citation omitted).

a. The *Massachusetts* Test

The County argues that the test set forth in Massachusetts v. United States, 435 U.S. 444, 98 S. Ct. 1153, 55 L. Ed. 2d 403 (1978), presents the most appropriate means of determining whether the **[**46]** stormwater charges in this case are permissible fees or impermissible taxes. While the decisions of the Supreme Court are, of course, binding on this court, the issues addressed in that case are not the issues now before this court, and the holding in that case does not apply here. **[*698]** First, the issue before the court in this case is whether the County's stormwater management charges are fees or taxes, while the issue before the Supreme Court in *Massachusetts* was whether a federal tax imposed upon state property was reasonable. Further, this case requires the court to determine whether the County's stormwater charges are barred under the Supremacy Clause, while the Supreme Court's decision in *Massachusetts* was based not on that clause, but on the states' implied immunity from federal taxes.

i. *Massachusetts* Did Not Draw a Line between Permissible Fees and Impermissible Taxes

In *Massachusetts*, the state argued that its implied immunity from federal taxation prohibited the assessment of an annual registration tax on a state-owned helicopter that was used exclusively for essential police functions. In reviewing the constitutional validity of that tax, the Supreme Court created a three-part **[**47]** test, which provides that federal taxes imposed on a state or its property do not violate that state's implied immunity from federal taxation when: (1) the tax is imposed in a nondiscriminatory manner; (2) the tax is a fair approximation of the benefits received by the taxed entity; and (3) the tax does not produce revenues that exceed the cost of the benefits provided. *Massachusetts*, 435 U.S. at 467. While the tax at issue in *Massachusetts* was designed to resemble a user fee in some respects, there was no dispute that the tax was in fact a tax.

Thus, the court is not faced with a choice between two competing tests for determining whether a particular charge is a fee or a tax. The *Massachusetts* test does not address that issue; instead, that test answers an entirely different question: when do federal taxes imposed on a state or its property unduly interfere with the traditional and essential functions of the state, thereby violating that state's implied immunity from federal taxation? In other words, the *Massachusetts* test does not attempt to draw a line between fees and taxes, but instead determines whether a tax is reasonable.

The *Massachusetts* test might be useful for evaluating **[**48]** whether the County's stormwater management charges are *reasonable*, but it cannot determine whether they are fees. [13] In fact, Congress adopted the

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[13] Indeed, in the case of United States v. Renton, No. C11-1156, 2012 U.S. Dist. LEXIS 73261, 2012 WL 1903429 (W.D. Wash. May 25, 2012), upon which the County and amici rely in this case, the court there noted that the *Massachusetts* test is used to evaluate the reasonableness of a particular charge,

basic framework of that test in the 2011 amendment to section 1323. Because the waiver contained in section 1323 is limited to "reasonable service charges," the new language in the statute ensures that the government's liability under that section is in fact limited to charges that are reasonable. In this case, however, the government does not contest or dispute the reasonableness of the County's stormwater charges. *See* Tr. at 22-23. Rather, the government argues only that the charges are taxes, and that Congress did not waive the government's immunity from such taxes until January 4, 2011.

ii. The Supreme Court's Holding in *Massachusetts* Was Not Based on the *Supremacy Clause*

The Supreme Court's analysis in *Massachusetts* is also inapposite because it was not based upon the Supremacy Clause. In contrast to the federal government's immunity from state and local taxation, which is based on the Supremacy Clause, the states' immunity from federal taxation "was judicially implied from the States' role in the constitutional scheme." Massachusetts, 435 U.S. at 455. For that reason, state immunity from federal taxation is not absolute, in sharp contrast to the federal government's categorical immunity from state taxation. *See* City of Columbia, 914 F.2d at 153 ("Generally, the states are immune from federal taxation that would unduly burden essential state functions. Federal immunity from state taxation, however, is a blanket immunity and is not subject to the same limits.").

[*699] *HN25*[↑] The Supremacy Clause **[**50]** categorically prohibits state and local taxation of federal property. For that reason, the test described in Massachusetts — which is used to determine whether federal taxes on state-owned property violate that state's implied immunity from federal taxation — cannot be applied in this case. *See, e.g.,* Oneida Tribe of Indians of Wisconsin v. Village of Hobart, No. 10-C-137, 891 F. Supp. 2d 1058, 2012 U.S. Dist. LEXIS 125564, 2012 WL 3839570, at *6 n.5 (E.D. Wis. Sept. 5, 2012) ("Federal immunity from state taxation is predicated on the Supremacy Clause whereas state immunity from Federal taxation is implied from the states' relationship to the national government within the constitutional scheme. The difference is significant and makes the two analytically distinct. *Massachusetts* is accordingly inapplicable here.") (emphasis and citation omitted). In sum, the *Massachusetts* test does not apply here because it addresses a different question than the one now before this court, and it is based upon a different constitutional provision than the one this court must now apply. [14]

b. The *San Juan Cellular* Test

Defendant urges this court to adopt the legal framework first established in San Juan Cellular Telephone Co. v. Public Service Commission, 967 F.2d 683 (1st Cir. 1992). **[**52]** There, the United States Court of Appeals for the First Circuit explained that a number of courts have been required to draw a line between permissible fees and impermissible taxes, and noted that those courts

> have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other. The classic "tax" is imposed by a legislature upon many, or all citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. It

not to determine whether that charge is a tax or a fee. *See* 2012 U.S. Dist. LEXIS 73261 at [WL]*7 ("[T]he factors in the *Massachusetts* **[**49]** test have been recognized as a test of the reasonableness of regulatory charges."), n.5 ("The issue here . . . is not whether reasonable service charges for stormwater programs are taxes, but the use of the *Massachusetts* factors in determining the reasonableness of regulatory charges.").

[14] The County and amici note that the United States Court of Appeals for the First Circuit used the three-part *Massachusetts* test to evaluate the validity of a state **[**51]** charge imposed on the federal government in Maine v. Department of Navy, 973 F.2d 1007 (1st Cir. 1992), and thus argue that the application of the test is not limited to those situations in which the federal government has imposed a tax on a state government. In that case, however, the First Circuit did not apply the test set forth in *Massachusetts* to determine whether the charge at issue was a fee or a tax. Instead, the question before that court was whether the charges at issue — which the parties agreed were fees — were unreasonable. The First Circuit noted that the government had waived its immunity only with respect to *reasonable* service charges, and then applied the *Massachusetts* test for the purpose of evaluating the government's contention that the licensing fees imposed by the state were unreasonably high. The statute at issue in *Maine* was the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (2006), which contains a provision that is substantially similar to the Federal Facilities Section of the Clean Water Act.

> may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.

Id. at 685 (citations omitted).

Many courts have borrowed the analysis in *San Juan Cellular* to distinguish permissible fees from impermissible taxes. *See, e.g.,* *Valero Terrestrial Corp. v. Caffrey, 205 F.3d 130, 134-36 (4th Cir. 2000)*; *Collins Holding, 123 F.3d at 800-01*; *McLeod, 254 F. Supp. 2d at 1345-48*; *Oneida Tribe, 2012 U.S. Dist. LEXIS 125564, 2012 WL 3839570, at *6-*8*. **[**53]** Those ***HN26***[⬆] courts have applied that analysis as a three-part inquiry that asks the following questions. First, which governmental entity imposed the charge? Next, which parties must pay the charge? And finally, for whose benefit are the revenues generated by the charge spent?

The County and amici argue that *San Juan Cellular*, and many of the other cases that applied its analysis, are simply inapplicable here because the question in those cases was whether the charge at issue was a fee or a tax for purposes of the Tax Injunction Act (TIA), *28 U.S.C. § 1341*, and not whether a state charge could be assessed against federal property without violating the *Supremacy Clause*. [15] While that observation **[*700]** is correct, the court does not find it to be particularly relevant. Unlike the test in *Massachusetts*, which the County and amici contend is applicable here, the analysis in *San Juan Cellular* actually addresses the issue that is now before the court. The court finds the analysis in *San Juan Cellular* to be persuasive and holds that the use of a three-part test based on that analysis represents an appropriate approach to drawing the line between fees and taxes. Finally, as discussed in more detail below, **[**54]** the third — and most important — factor of the *San Juan Cellular* inquiry is fully consistent with the Supreme Court's observation that a government agency that provides a service "may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society." *Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 340-41, 94 S. Ct. 1146, 39 L. Ed. 2d 370 (1974)*. The court notes the legal context in which the *San Juan Cellular* analysis was first developed, but nonetheless holds that it is the more appropriate analytical framework for the question now before the court.

i. Which Entity Imposed the Charge?

First, the court must examine which governmental entity imposed the charge in this case. ***HN27***[⬆] When an assessment is imposed by a legislative body, rather than an administrative agency, it is more likely to be **[**55]** viewed as a tax than as a fee. *See* *San Juan Cellular, 967 F.2d at 686*. Here, the stormwater charges were adopted, and their precise amounts were set, by the County's board of commissioners. The stormwater utility does not have the authority to revise the rates set forth in the ordinance; instead, the specified rates may be amended only by action of the "governing authority" — *i.e.*, the County's board of commissioners and chief executive. *See* County Code § 25-365(b) ("The stormwater service charge per equivalent residential unit shall be four dollars ($4.00) per month *or as amended by official action of the governing authority.*") (emphasis added).

Some courts have noted that "[i]f the responsibility for administering and collecting the assessment lies with the general tax assessor, it is more likely to be a tax; if this responsibility lies with a regulatory agency, it is more likely to be a fee." *Collins Holding, 123 F.3d at 800*. Here, the County's stormwater charges are billed to the government on an invoice from the County's tax commissioner. *See* Booth Aff. Ex. 1. The County's deputy tax commissioner, who is also its director for delinquent collections, "oversee[s] collection of delinquent **[**56]** stormwater utility fees on behalf of DeKalb County, Georgia." *Id.* ¶ 3. The stormwater utility does not collect the assessments that are ultimately deposited into the enterprise fund. The stormwater charges in this case were adopted and set by the County's legislative body, and they are collected by the County's tax collector. Those facts, under the first prong of the *San Juan Cellular* test, suggest that the stormwater assessments in this case are taxes rather than fees.

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[15] In *San Juan Cellular*, the First Circuit determined whether a regulatory charge was a fee or a tax under the Butler Act, *48 U.S.C. § 872 (2006)*, a statute designed to minimize the interference of federal courts with the collection of taxes imposed under the laws of Puerto Rico, in the same way that the TIA minimizes such interference with respect to state and local taxes.

ii. Which Parties Must Pay the Charge?

Next, the court must examine which parties are subject to the assessments. *HN28*[↑] If the charge is imposed upon all citizens, or a broad class of them, then the charge is more likely to be a tax; if the charge is imposed only upon a narrow group, then the charge is more likely to be a fee. *San Juan Cellular, 967 F.2d 683, 685*. Here, the County's stormwater management charge is not assessed against a narrow group of residents or businesses; instead, the assessment is levied against every single owner of developed property in the unincorporated portions of the county. [16]

[*701] The stormwater charge is assessed against every dwelling in the county, as well as "commercial and office buildings, industrial and manufacturing buildings, storage buildings and storage areas covered with impervious surfaces, parking lots, parks, recreation properties, public and private schools and universities, research stations, hospitals and convalescent centers, airports, and agricultural uses covered by impervious surfaces." County Code § 25-361 (providing definitions of "single dwelling lot," "multiple dwelling lot," and "other developed land"); *id.* § 25-365 (setting the charges applicable to single dwelling lots, multiple dwelling lots, and other **[**58]** developed land). The ordinance further notes that the majority of the land within the unincorporated portion of the county is in fact developed. *Id.* § 25-360(d).

In sum, the stormwater charges that the County seeks to recover in this case are imposed upon every homeowner who lives in the unincorporated portion of the county and every business that is located there, as well as every other lot that is covered with any impervious surface, ranging from the smallest doghouse to the largest church, airport, or sports stadium. Because the County's stormwater charge is not assessed against a narrow group, but is instead imposed on the majority of property in the unincorporated portions of the county, *see id.* § 25-360(d), the second factor of the *San Juan Cellular* inquiry also suggests that the charge is a tax.

iii. For Whose Benefit Are the Revenues Spent?

Finally, the court must examine for whose benefit the revenues generated by the charge are spent. *HN29*[↑] If the County spends the revenue to provide a benefit for the general public, then the charge is more likely to be a tax, but if the revenue is spent to provide a particularized benefit for a narrow group, or to offset the cost of regulating a **[**59]** narrow group, then the charge is more likely to be a fee. Here, the court concludes that the stormwater management charges are used to finance benefits that inure primarily to the benefit of the general public.

The First Circuit has explained that the third part of the *San Juan Cellular* inquiry is often the most important: "[c]ourts facing cases that lie near the middle of this spectrum have tended . . . to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation." *San Juan Cellular, 967 F.2d at 685*.

The stormwater ordinance describes the purpose of the utility, noting that the "provision of stormwater management services and facilities in DeKalb County promotes an essential regulatory purpose by controlling where stormwater runoff flows and how it is disposed, and thereby reducing flooding, erosion and water pollution caused by stormwater runoff." County Code § 25-360(e). Further, the ordinance explains that

> [t]he board of commissioners is responsible for the protection and preservation of the **[**60]** public health, safety, and welfare of the community, and finds that it is in the best interest of the health, safety, and welfare of the citizens of the county and the community at large to proceed with the development, implementation, and operation of a utility for stormwater management accounted for in the county budget as a separate enterprise fund dedicated solely to stormwater management and to institute funding methods associated therewith.

Id. § 360(g); *see also* Tr. at 36 (noting that revenue deposited in the enterprise fund is spent to further the purposes of drainage control and flood control), 38 (explaining that the stormwater utility promotes the

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[16] The term "developed land" is defined as all property that is not "undeveloped land," which is in turn defined as "a lot in **[**57]** its unaltered natural state and which has no pavement, asphalt, or compacted gravel surfaces or structures which create an impervious surface that would prevent infiltration of stormwater or cause stormwater to collect, concentrate, or flow in a manner materially different than that which would occur if the land was in an unaltered natural state." County Code § 25-361. In other words, with the exception of rights of way — both public and railroad — developed land includes any property covered with any amount of impervious surface.

essential regulatory purposes of preventing floods, erosion, and water pollution).

The purposes of the stormwater ordinance, and of the stormwater system — *i.e.*, flood prevention and the abatement of water pollution — are benefits that are enjoyed by the general public. For that reason, the charge is more properly viewed as a tax than as a fee. *See* San Juan Cellular, 967 F.2d at 685 (noting that the revenue from a tax "is spent for the benefit of the entire community"). Those benefits are public; they are not individualized services **[**61]** provided to particular customers.

[*702] The presence of a stormwater management system, and the imposition of charges to fund that system, create reciprocal benefits and burdens for nearly all owners of developed property within the unincorporated areas of DeKalb County. While each property owner is burdened by payment of the charge, and enjoys no special benefit by virtue of the connection of its own property to that system, the property owner does derive a benefit from the fact that stormwater runoff from other properties is collected and diverted by the system. That benefit, however, is one that is shared with nearly every other member of the community. In short, flood control is a public benefit, and charges to pay for that benefit are typically viewed as taxes. *See, e.g.*, United States v. City of Huntington, W.V., 999 F.2d 71, 73 (4th Cir. 1993) (explaining that because flood control and fire prevention are both "core government services," assessments to pay for those services are taxes).

The abatement of water pollution is also an important benefit of the system, and it is likewise a public benefit that is shared with the rest of the community. The owners of developed property, who pay **[**62]** the stormwater management charges, receive no special benefit from clean rivers, streams, and lakes that is not also enjoyed by the general public. *Cf.* Mildenberger v. United States, 91 Fed. Cl. 217, 245-47 (2010) (noting that water pollution is a harm that is experienced not only by riparian landowners, but by the public as a whole), *aff'd*, 643 F.3d 938 (Fed. Cir. 2011).

The stormwater system is a local infrastructure improvement that provides benefits — *i.e.*, drainage, flood protection, and water pollution abatement — not only to the owners of developed property who pay stormwater utility charges, but also to the owners of undeveloped property, who do not pay the charge, and to other members of the general public who may not own any property in the county at all. The Supreme Court has noted that "[a]ssessments upon property for local improvements are involuntary exactions, and in that respect stand on the same footing with ordinary taxes." Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 707, 4 S. Ct. 663, 28 L. Ed. 569 (1884).

In addition to listing the generalized public benefits discussed above, the ordinance also states that the stormwater management system provides

> a specific service to property owners by **[**63]** assisting in the property owner's legal obligation to control stormwater runoff from their property and ensure that runoff does not flow upon their neighbors in greater quantities than it would if the property were in an undeveloped state. By mitigating the impact of stormwater runoff from developed property, the stormwater management system helps prevent damage that would subject a property owner to civil liability.

County Code § 25-360(f). The County argues that it is this service — the reduction in the risk of legal liability due to damage from stormwater runoff — that transforms the assessment here into a fee rather than a tax.

The court first notes that it is not clear whether defendant would in fact be subject to any liability for damage to neighboring properties due to stormwater runoff from federal facilities. During oral argument, counsel for amici suggested that the government might be subject to an action under the citizen-suit provision of the CWA, 33 U.S.C. § 1365 (2006), but both he and counsel for the County were uncertain as to whether the government might be subject to liability for either trespass or nuisance under the common law of Georgia. [17] However, the court need **[**64]** not determine the extent of the government's liability for such damage because the so-called "benefit" cited by the County is problematic in a number of respects.

First, the stormwater ordinance expressly provides that

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[17] The court notes that the government might be subject to suit in certain circumstances under the Takings Clause of the Fifth Amendment. *See, e.g.*, Ridge Line, Inc. v. United States, 346 F.3d 1346 (Fed. Cir. 2003) (evaluating whether the construction of a Postal Service facility, which dramatically increased the flow of stormwater onto a downhill property, could effect a taking of a flowage easement requiring the payment of just compensation to the owner of the affected property).

every property owner is responsible for managing the flow of stormwater **[*703]** runoff on its own property, regardless of whether those owners have remitted the stormwater charges imposed by the County:

> HN30[] [e]very owner of real property located in the unincorporated area of the county, and every person who serves as a contractor or developer for the purpose of developing real property located in the unincorporated area of DeKalb County shall provide, manage, maintain, and operate on-site stormwater management **[**65]** systems and facilities sufficient to collect, convey, detain, control and discharge stormwater in a safe manner consistent with all DeKalb County ordinances and development regulations, and the laws of the State of Georgia and the United States of America.

County Code § 25-372. The ordinance further states that "[a]ny failure to meet this obligation shall constitute a nuisance and be subject to an abatement action filed by any damaged party or DeKalb County in any court of competent jurisdiction." *Id.* In short, payment of the charge does not appear to relieve any property owner of its liability for damage to neighboring properties caused by stormwater runoff.

In addition, even if payment of the stormwater charges effectively protected property owners from such liability, there is no apparent relationship between the value of the benefit and the amount of the charge. The stormwater assessment is generally based on the amount of impervious surface on the charged property. While that measurement may provide a rough approximation of the quantity of stormwater runoff generated by that property, it does not have any clear connection to the amount of damage such runoff might cause to neighboring **[**66]** properties and, consequently, the property owner's potential liability for such damage. Instead, the damage due to stormwater runoff from a particular property will depend upon a number of other factors, such as topography, whether the surrounding properties are developed, and the types of improvements located on those properties. [18]

While user fees are generally based on the quantum of services that are provided, the assessments in this case are not necessarily based on the benefits provided to each owner of developed property. First, the stormwater charges in this case are based not on the *benefits* derived by the payor, but by the anticipated *burden* that its property imposes on the stormwater system. However, the burden imposed on the system by the runoff from the property, and the benefits conferred upon that property **[**67]** by the system are not the same thing. There may be properties, for example, that impose significant burdens on the stormwater system while deriving no substantial benefit from that system (*e.g.*, a property with extensive impervious coverage that is located on the top of a hill). Similarly, there may be properties that have little impact on the stormwater system that receive substantial benefits from that system (*e.g.*, a small home on a large, otherwise undeveloped lot that is located downhill from extensive development). Second, even if the benefits conferred on specific properties and the burdens those properties impose on the system were treated as if they were the same, the amount of the charge does not depend upon the burden actually imposed on the system by a particular property. Regardless of how much rain falls on a property, and how much of that rain actually leaves the property and flows into the system, the charge remains the same. *See* Cincinnati v. United States, 39 Fed. Cl. 271, 276 (1997) ("Under the system enacted by the City of Cincinnati, during a month of drought or a month of flooding, the federal government would be assessed the same amount of storm drainage charges.").

In **[**68]** further support of its position, the County argues that its charges should be viewed as fees because they are deposited into a separate enterprise fund that may be used only for costs related to the stormwater management system, rather than being directed into the County's general revenue account. *See* Pl.'s Resp. at 18. The fact that the revenue generated by the stormwater **[*704]** management charge is segregated from other revenue, and is ultimately deposited into a separate enterprise fund, is not a sufficient basis for determining that the charge is a fee. *See* Valero, 205 F.3d at 135 (explaining that "[i]f the revenue of the special fund is used to benefit the population at large then the segregation of the revenue to a special fund is immaterial") (citation omitted). Here, the revenue from the charge is used to fund a stormwater management system that benefits the public at large, so the fact that the revenue is segregated into

[18] This absence of proportionality might be more relevant to the reasonableness of the charge, rather than whether the charge is a fee or a tax, but the court believes that the apparent lack of proportionality also undermines the County's argument that "liability protection" is an individualized service provided to property owners in exchange for payment of the charge.

a separate account is not especially relevant. [19]

The court does not doubt the precarious financial situation of the County and other similarly situated counties and municipalities all over the country. The cost of operating stormwater management facilities has increased dramatically in recent years, and much of that increase is attributable to new requirements imposed by the federal government. Further, the tax-exempt status of federal facilities and other properties that impose significant burdens on the stormwater management system has severely limited the ability of local governments to fully recoup those costs. In light of the difficulties — both legal and political — of raising **[**70]** taxes, many counties and municipalities have attempted to structure their taxes as user fees to avoid the legal restrictions that apply to the former but not to the latter.

Unfortunately, the nature of a stormwater management system, which benefits the public without providing any individualized, measurable benefit to individual property owners, does not lend itself to a system of funding based on user fees. The United States Court of Appeals for the Ninth Circuit has noted that "[w]hen a fee is imposed on the United States for the purpose of extracting by fee that which cannot be extracted by taxation, the imposition of that fee may violate the Supremacy Clause." *Novato Fire Prot. Dist. v. United States, 181 F.3d 1135, 1139 (9th Cir. 1999)* (citations omitted). The stormwater management charges at issue are a mechanism designed to raise revenue from the federal government and, of course, other property owners to cover the rapidly increasing costs of a local improvement that benefits the public as a whole. *See* Amicus Br. at 8-9 (explaining that "municipalities began to enact and enforce stormwater ordinances starting in the 1990s, such as [impervious area charges] to cover the increasingly **[**71]** stringent costs of stormwater controls").

In summary, the court concludes that under the *San Juan Cellular* test, the stormwater management charges assessed by the County are impermissible taxes that may not be imposed on federal properties without the government's consent. The charges are set by the County's legislative body, they are imposed on every owner of developed property in the unincorporated portion of the county, and they are used to provide benefits that are enjoyed by the public as a whole.

c. The Involuntary Nature of the Charge

The government argues that the charges in this case should be viewed as taxes because they are involuntary, while the County asserts that its assessments are a fee for services rather than "an inescapable charge based solely upon the mere fact of property ownership." Pl.'s Resp. at 17 n.10. In addition to finding that the County's stormwater charges are taxes under the *San Juan Cellular* test, the court further concludes that the charges more closely resemble taxes due to their involuntary nature.

In *National Cable, 415 U.S. at 340*, the Supreme Court explained that "[a] fee is incident to a voluntary act." [20]

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[19] In *San Juan Cellular*, the First Circuit also noted that a particular charge may be an impermissible tax if it is used to pay for a public benefit that is often financed with taxes. *967 F.2d at 685*. In holding that **[**69]** the stormwater charges assessed by another Georgia county were taxes rather than fees, the United States District Court for the Northern District of Georgia noted that "[s]torm water management was and is the type of service that is often funded through general tax revenue." *McLeod, 254 F. Supp. 2d at 1348*; *see also Financing Stormwater Facilities: a Utility Approach* (1991), at 1 ("Stormwater management historically has been financed with general revenues from property taxes."), *available at http://stormwaterfinance.urbancenter.iupui.edu/PDFs/APWAmanual.pdf*.

[20] The County argues that the standard set forth in *National Cable* should not be applied here because that standard was based on the specific statute at issue in that case. There, the petitioner had challenged licensing charges imposed upon cable television companies by the Federal Communications Commission (FCC) pursuant to the Independent Offices Appropriation Act of 1952, *31 U.S.C. § 9701 (2006)*, which authorized certain agencies to impose service charges based on, *inter alia*, the value of the services provided to the recipient. The Court held that Congress had not delegated the power of taxation to the FCC, and that the power granted to the agency under the statute must therefore be limited to the authority to impose fees rather than taxes. The Supreme Court reversed **[**73]** the lower appellate court with instructions to remand the case to the FCC so the agency could determine whether its proposed service charges were proportionate to the cost of the services that were actually provided to the regulated companies. The language from *National Cable* upon which the court now relies, however, is contained within a general discussion of the essential differences between fees and taxes, and its applicability is not limited to the facts of that case. In any event, *National Cable* is not the only case in which the Supreme Court has described fees as voluntary and taxes as compulsory.

In **[*705]** a number of other cases, the Court has **[**72]** contrasted the voluntary nature of a fee with the mandatory nature of a tax. *See, e.g.,* United States v. LaFranca, 282 U.S. 568, 572, 51 S. Ct. 278, 75 L. Ed. 551 (1931) (explaining that taxes are "enforced contribution[s] to provide for the support of government"); Hagar, 111 U.S. at 707 (explaining that "[a]ssessments upon property for local improvements are involuntary exactions, and in that respect stand on the same footing with ordinary taxes").

HN31[] Fees generally fall into two broad categories: user fees, which a government may charge in exchange for services or the use of government-owned property, and regulatory fees, which are charges that are imposed by a regulatory agency to recoup its costs of regulation. In both cases, the payment of the fee is voluntary. With a user fee, one can avoid the charge by not accepting the government's services or by not using the government's property. With a regulatory fee, one can avoid the charge by not engaging in the regulated activity. *See* City of Columbia, 914 F.2d at 156 ("When the United **[**74]** States purchases water, electricity, and related services, and then pays the utility bill, it does so as a vendee pursuant to its voluntary, contractual relationship with the City. The City imposes the charge not in its capacity as a sovereign, but as a vendor of goods and services.").

Here, those subject to the stormwater utility charge have no choice but to pay that charge. The government never requested stormwater management services from the County, and it cannot simply decline to use those services. Instead, the government's liability arises solely from its status as the owner of developed property located within the unincorporated part of the county. *See* id. at 155 (noting that "[t]he United States' obligation to pay [a user fee] arises only from its consensual purchase of the City's property; it does not arise automatically, as does tax liability, from the United States' status as a property owner"). The Federal Circuit has held that a stormwater management charge that is based solely on the mere ownership of property is involuntary. *See* Cincinnati, 153 F.3d at 1377-78. There, the court explained that a charge applicable to all owners of developed property and based on the amount **[**75]** of runoff the property was expected to generate was not a voluntary purchase of services:

> The storm drainage service charge was not imposed as a result of a consensual arrangement between the city and the United States, as would be true in the case of a voluntary purchase of utilities or other services. Instead, the stormwater drainage service charge was an assessment imposed on the United States involuntarily, by virtue of its status as a property owner. While the United States may be said to be a beneficiary of the storm drainage services provided by the city, it was not offered the opportunity to choose whether to accept those benefits, and it cannot be said to have taken any action (other than not moving out of Cincinnati when the charges were assessed) to indicate its willingness to pay the charges.

Id. The Federal Circuit concluded that the involuntary nature of the stormwater charge defeated the city's assertion of an implied-in-fact contract for services. [21]

[*706] In addition, the County cannot realistically terminate service to any property due to the nonpayment of stormwater charges. During oral argument, when the court asked counsel for the County whether it was physically possible to deny any particular property owner the benefits of the stormwater management system, he responded that the County could "plug up the drainage system with concrete." [22]

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[21] The Federal Circuit expressly declined to address whether the stormwater charge in that case was a fee or a tax, Cincinnati, 153 F.3d at 1378, and noted that the involuntary nature of a charge, without more, is not necessarily **[**76]** sufficient to transform the charge into a tax:

> The involuntary nature of the charge, however, is not dispositive. There may be some instances in which a municipal assessment is involuntarily imposed but would nonetheless be considered a permissible fee for services rather than an impermissible tax.

Id. Here, the court's determination that the County's stormwater management charges are taxes is not based solely on the involuntary nature of those charges. Rather, the compulsory nature of the charge is just one consideration in addition to the court's determination that the assessment is a tax under the *San Juan Cellular* test.

[22] The court did not understand counsel's response to be a serious answer to the court's question. If the County were to physically obstruct the storm drains closest to the government's facilities, runoff from those facilities would almost certainly find its way into the stormwater management system somewhere else, while possibly causing damage to other nearby properties. With the exception of some fanciful approaches, such as acquiring land around the perimeter of the federal properties to construct levies that completely prevent stormwater runoff from leaving those properties, there does not appear to be any physical means of denying any particular property owner the benefits of the stormwater management system.

Tr. at 94. However, the County has a legal obligation to operate its stormwater management system in accordance with the requirements set forth in its NPDES permit, and disabling **[**77]** portions of that system would be an abdication of its legal responsibility to manage the stormwater within its service area, including runoff that originates on federal properties.

If it were possible to deny any particular property owner the benefits of the stormwater management system, one would expect the ordinance to provide for the termination of services due to nonpayment. Instead, the ordinance provides that ***HN32***[] "[u]npaid stormwater service fees shall be collected by filing **[**78]** suit to collect on an unpaid account and by using all methods allowed by Georgia law to collect on any judgment obtained thereby." County Code § 25-371(a). Because the default method of addressing nonpayment is litigation, rather than termination of service, the stormwater management charges at issue in this case yet again appear to be taxes rather than fees. *See* *City of Columbia, 914 F.2d at 155* (noting that "while failure to pay a tax results in civil and sometimes criminal penalties, the failure to pay a portion of a utility rate results in termination of services").

Finally, the County argues that its stormwater management charges are voluntary because property owners may receive credits against the charges for adopting specified stormwater management systems on their own property, and may even receive a complete exemption from the charges if they manage 100 percent of the rainfall on their property on their own land. The court does not believe that the availability of such credits and exemptions alters the nature of the charge — it is still a tax, regardless of whether some of those subject to the tax may receive a partial or even total exemption by constructing and operating costly **[**79]** stormwater management facilities on their own property. In addition, the credits — in contrast to the full exemption — may amount to no more forty percent of the assessed charge, so that property owners who manage ninety-nine percent of their stormwater on-site will still be subject to sixty percent of the normal assessment. *See* County Code § 25-369(a). Finally, as the government has noted, the Internal Revenue Code, Title 26 of the United States Code (2006), provides a number of credits and exemptions from tax liability, but those credits and exemptions do not transform federal taxes into fees.

2. *Section 1323(a)*, prior to the 2011 Amendment, Did Not Waive the Federal Government's Sovereign Immunity from State or Local Taxation

The County and amici argue that the language of *section 1323* — even before it was amended in 2011 — represents all unequivocal waiver of the government's immunity from the type of stormwater management charges at issue in this case. The government concedes **[*707]** that *section 1323*, as amended in 2011, subjects it to prospective liability for stormwater management charges, whether characterized as fees or taxes, but argues that the 1977 version of that section did not **[**80]** contain an unambiguous waiver of the government's sovereign immunity from state or local taxes. The court agrees with the government.

For the reasons discussed by the court above, "it is well settled that, ***HN33***[] absent express congressional authorization, a State cannot tax the United States directly." *Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989)*. To waive the government's sovereign immunity, Congress must express its intent to do so in terms that are unequivocal and unambiguous. *See* *F.A.A. v. Cooper, 132 S. Ct. 1441, 1448, 182 L. Ed. 2d 497 (2012)* ("We have said on many occasions that a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text.") (citation omitted). For that reason, "[a]ny ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *Id.* (citations omitted).

In addition, ***HN34***[] "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." *Lane v. Pena, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996)*; *see also* *Cooper, 132 S. Ct. at 1448* ("Legislative history cannot supply a waiver that is not clearly evident **[**81]** from the language of the statute.") (citation omitted). The standards applicable to a waiver of sovereign immunity are not lowered simply because *section 1323* purports to place the federal government on the same footing as private parties. Instead, "statutes placing the United States in the same position as a private party [must be] read narrowly to preserve certain immunities that the United States has enjoyed historically." *Library of Congress v. Shaw, 478 U.S. 310, 320, 106 S. Ct. 2957, 92 L. Ed. 2d 250 (1986)*.

There is no question that *section 1323(a)* waives the federal government's immunity from "reasonable service

charges," but the scope of that waiver is far from clear. First, the term is not defined in the statute, and dictionary definitions do not support the County's arguments here. *See* Black's Law Dictionary 1491 (9th ed. 2009) (defining a "service charge" as "[a] charge assessed for performing a service, such as the charge assessed by a bank against the expenses of maintaining or servicing a customer's checking account"). The definition of "service charge" more closely corresponds with the definition of a fee, *see id.* at 690 (a "charge for labor or services"), than with the definition of a tax, *see id.* at 1594 **[**82]** (a "charge, usu. monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue").

Second, the more circumscribed reading of the 1977 version of section 1323 — *i.e.*, that the term "reasonable service charges" includes fees but not taxes — is also supported by the term that Congress actually used: reasonable *service* charges. The Federal Facilities Section does not waive the government's immunity from all "reasonable charges," which might provide a somewhat more plausible basis for concluding that the term includes taxes in addition to fees. Instead, the term is qualified, and suggests that Congress intended to limit its waiver to fees that were imposed in connection with the provision of a service. *See id.* at 1491 (defining the term "service" as "[t]he act of doing something useful for a person or a company, *usu. for a fee*") (emphasis added).

The Supreme Court has explained that HN35[↑] a statute purporting to waive the government's immunity is ambiguous "if there is a plausible interpretation of the statute that would not authorize money damages against the Government." Cooper, 132 S. Ct. at 1448. Here, there is at least one plausible interpretation **[**83]** of section 1323 that would not authorize the damages the County seeks in this case: that section 1323 waives the government's immunity from fees but not from taxes. Section 1323, as it existed before January 2011, could be interpreted to waive the government's immunity from both regulatory fees, such as the fees charged to process a permit application, and user fees, such as fees charged for the provision of water or the **[*708]** disposal and treatment of sanitary sewage. On the other hand, section 1323 need not be read to waive the government's sovereign immunity from state or local taxes, such as the stormwater management charges at issue in this case. When faced with two plausible readings of a waiver of sovereign immunity, one broad in scope and one narrow, the court must interpret the statute narrowly. Lumbermens Mut. Cas. Co. v. United States, 654 F.3d 1305, 1311 (Fed. Cir. 2011) (noting that any waiver of sovereign immunity must be "unequivocally expressed in statutory text and will be strictly construed, in terms of its scope, in favor of the sovereign") (citation and internal quotations omitted).

In sum, the version of section 1323 that existed prior to January 4, 2011 did not contain **[**84]** an unambiguous waiver of the government's sovereign immunity from state or local taxes. In fact, amici appear to concede that the 1977 version of the statute is not amenable to a broader construction. *See* Tr. at 65-66 ("I don't think you can read [the 1977 version of section 1323] to say that Congress waived [sovereign immunity] for something that would meet the test of a tax."). In any case, the County and amici argue that Congress passed the 2011 amendment to clarify the intended meaning of section 1323. For that reason, the County and amici contend that section 1323 must be read as if it had always been so clarified.

3. Section 1323(c) Cannot Be Treated as a Clarification of an Earlier Waiver of the Government's Sovereign Immunity if Doing So Would Expand the Scope of the Original Waiver

In their brief to the court, amici assert that the 2011 amendment was nothing more than a clarification of an earlier waiver of sovereign immunity contained in the 1977 amendments to the Clean Water Act. In support of that argument, amici cite the decision of the United States Court of Appeals for the Eleventh Circuit in Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272 (11th Cir. 1999). There, **[**85]** the court held that an amendment will be viewed as a clarification of an earlier statute when: (1) the language of the earlier statute was ambiguous and in need of clarification; and (2) Congress has declared its intent to clarify the earlier statute. Id. at 1283-84. In their brief, amici also reference the Ninth Circuit's decision in United States v. Sanders, 67 F.3d 855, 856 (9th Cir. 1995), which explained that "when an amendment is a clarification, rather than an alteration, of existing law, then it should be used in interpreting the provision in question retroactively." In its reply in support of its motion for summary judgment, the County adopts the clarification argument advanced by amici. Unfortunately for the County, the standard set forth in *Piamba Cortes* is fundamentally inconsistent with the standards for a waiver of sovereign immunity.

HN36[↑] In normal circumstances, when a waiver of sovereign immunity is not involved, a court can discern the meaning of ambiguous statutory language by reference to extrinsic evidence of congressional intent. However, such evidence is generally limited to legislative history that preceded the enactment of the statute. *See, e.g.,* Ogilvie v. United States, 519 U.S. 79, 90, 117 S. Ct. 452, 136 L. Ed. 2d 454 (1996) **[**86]** (noting that "the view of a later Congress cannot control the interpretation of an earlier enacted statute"); United States v. Prince, 361 U.S. 304, 313, 80 S. Ct. 326, 4 L. Ed. 2d 334, 1960-1 C.B. 701 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."). Piamba Cortes provides an exception to that general rule of statutory construction, allowing a court to treat an amendment to an ambiguous statute as a "clarification" of that statute, and to interpret the statute as if it had always been so clarified — essentially giving the amendment retroactive effect.

HN37[↑] While there is no requirement that statutes be applied only prospectively, there is a strong presumption against retroactive application: "The presumption against retroactive application is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic." Landgraf v. USI Film Prods., 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). When a statute effects a substantive change in the law, it cannot be applied retroactively unless Congress has expressly indicated its intent that the statute be given retroactive effect. *See* Travenol Labs. v. United States, ***[*709]*** 118 F.3d 749, 752 (Fed. Cir. 1997) (noting that "retroactivity **[**87]** in general is not favored in the law and, accordingly, legislation will be applied only prospectively unless Congress has clearly expressed a contrary intention"). In *Piamba Cortes*, however, the Eleventh Circuit explained that the usual concerns about retroactive application of a statutory amendment are not implicated when the amendment merely clarifies prior law rather than effecting a substantive change in the law. 177 F.3d at 1283. For that reason, an amendment that does nothing more than clarify existing law may be given retroactive effect even in the absence of a clear statement from Congress indicating that the amendment is to be applied retroactively.

HN38[↑] In contrast to most statutes, however, a waiver of sovereign immunity must be expressed in clear and unambiguous terms, and any ambiguities contained in the statute must be resolved in favor of immunity. *See* Cooper, 132 S. Ct. at 1448. Further, a court may not examine legislative history or any other type of extrinsic evidence of congressional intent in interpreting the scope of the waiver. *See id.* Rather, any waiver of sovereign immunity must be "unequivocally expressed in statutory text and will be strictly construed, *in terms* ***[**88]*** *of its scope*, in favor of the sovereign." Lumbermens, 654 F.3d at 1311 (emphasis added). For that reason, it does not appear that Congress could ever clarify the scope of an earlier waiver of sovereign immunity under Piamba Cortes because a statute may be clarified only if it is *ambiguous*, while a statute can effect a waiver of sovereign immunity only if it is *unambiguous.* Here, the court has already determined that the 1977 version of section 1323 did not contain a clear, unambiguous waiver of the government's sovereign immunity from taxes. Because the earlier version of section 1323 was ambiguous with respect to whether it waived the government's immunity from taxes, there was no effective waiver from taxes in 1977 that could have been later clarified in 2011. [23]

The court disagrees with the contrary conclusion of the United States District Court for the Western District of Washington in United States v. Renton, No. C11-1156, 2012 U.S. Dist. LEXIS 73261, 2012 WL 1903429 (W.D. Wash. May 25, 2012). In that case, the district court concluded that the government was liable to two municipalities for stormwater charges assessed against federal property in years prior to the adoption of the 2011 amendment to section 1323. The district court first held that the 1977 version of that section contained an unambiguous waiver of the government's immunity from "reasonable service charges." Next, the court determined, based largely on legislative history, that the 2011 amendment was not a new waiver of sovereign immunity, but was instead a mere clarification of the earlier version of section 1323. Finally, because it held that the 2011 amendment clarified the earlier version of the statute, the court concluded that traditional canons of statutory construction required the amendment to be given retroactive **[**90]** effect. There are at least two

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[23] In effect, the County is caught in a catch-22 of sorts, caused by the incompatibility of the *Piamba Cortes* test with the exceedingly high and rigid standards that are applied to any waiver of sovereign immunity. The court cannot view the 2011 amendment as a clarification with retroactive effect unless the 1977 version of section 1323 was ambiguous in its scope. However, if the earlier version of section 1323 was in fact **[**89]** ambiguous, then the 2011 amendment cannot have retroactive effect because Congress did not waive the government's immunity from taxes by using clear and unambiguous language in 1977.

problems with the district court's analysis.

First, while the district court properly held that the 1977 version of section 1323 contained an unambiguous waiver of the government's sovereign immunity from "reasonable service charges," it failed to appreciate that the scope of the disputed term was, in fact, ambiguous. As discussed above, there are at least two plausible interpretations of the term "reasonable service charges": first, that the term encompasses both fees and taxes, and, in the alternative, that the term is limited to fees alone. Because ambiguities must be resolved in favor of immunity, the district court should have concluded that the 1977 version of section 1323, prior to its amendment in 2011, did not waive the government's sovereign immunity from state and local taxation. Instead, the district court adopted the **[*710]** more expansive interpretation of section 1323 and, based on that faulty premise, held that the 2011 amendment was nothing more than a clarification of a pre-existing waiver of immunity from taxes. *See* Lumbermens, 654 F.3d at 1311 (explaining that a waiver of sovereign immunity must be "unequivocally expressed in statutory text **[**91]** and will be strictly construed, *in terms of its scope*, in favor of the sovereign") (citation and quotations omitted).

Finally, because it determined that the 2011 amendment was a clarification of an existing waiver, rather than a new waiver of immunity, the district court placed extensive weight on the legislative history of that amendment. However, as noted above, the 1977 version of section 1323 did not contain an unambiguous waiver of immunity from state and local taxes, so the 2011 amendment must be interpreted as a new waiver of sovereign immunity, the limitations of which were to be determined solely with reference to its express language. For that reason, the district court was not permitted to turn to the legislative history of the 2011 amendment in discerning its meaning. *See* Cooper, 132 S. Ct. at 1448 ("Legislative history cannot supply a waiver that is not clearly evident from the language of the statute."); Lane, 518 U.S. at 192 ("A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text.").

In summary, because the 1977 version of section 1323 did not clearly waive the government's immunity from state or local taxes, the 2011 **[**92]** amendment to that section must be treated as a new waiver of the government's sovereign immunity. The amendment cannot be treated as a clarification of an earlier waiver because such treatment would expand the waiver beyond the unambiguous language of section 1323 as it existed before the date of the amendment. This court cannot apply the new waiver contained in the 2011 amendment retroactively unless Congress expressly stated its intent to give the amendment retroactive effect. Neither the County nor amici argue that the amendment contains a new waiver of immunity that Congress intended to have retroactive effect, and the court does not discern any such intent in either the text or the history of the 2011 amendment. [24] Because the 2011 amendment cannot be applied retroactively, the County may not recover the stormwater charges it seeks to collect in this case.

CONCLUSION

The County's claims related to stormwater management charges assessed in the first half of 2005 accrued more than six years before this suit was filed and must be dismissed as untimely. The remaining claims seek to recover local taxes that were assessed against **[**94]** the federal government before Congress waived the government's immunity from such taxes; those claims must be dismissed for failure to state a claim upon which relief can be granted. Because the County's claims must be dismissed, the court cannot grant its motion for summary judgment on those claims. In accordance with the foregoing, it is hereby **ORDERED** that:

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[24] The County and amici do not argue that the amendment contained a new waiver of sovereign immunity that Congress intended to have retroactive effect. *See* Pl.'s Resp. at 19 n.11 (stating that "[t]his Court need not apply the Stormwater Amendment retroactively in order to find in favor of DeKalb County"); Amicus Br. at 14 n.21 **[**93]** (noting that "this is not a case involving the retroactivity of [the 2011 amendment]"). Unless Congress uses clear terms to express its intent that a statute be applied retroactively, the statute will not be given such effect. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 237, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) (noting that "statutes do *not* apply retroactively *unless* Congress expressly states that they do") (emphasis in original). There is no language in the 2011 amendment expressly indicating that Congress had intended it to apply retroactively, nor is such an intent visible in the legislative history of the amendment. Instead, the amendment simply states that federal agencies are responsible for stormwater charges under section 1323, without regard to whether they are called fees or taxes. For that reason, the court may not apply the 2011 amendment retroactively to permit the County to recover the charges it seeks to collect in this case.

(1) Defendant's Motion to Dismiss, filed February 27, 2012, is **GRANTED**;

(2) Plaintiff's Motion for Partial Summary Judgment, filed April 30, 2012, is **DENIED**;

[*711] (3) The Clerk's Office is directed to **ENTER** final judgment in favor of defendant, **DISMISSING** the complaint as follows:

(a) The claims related to stormwater utility charges billed to defendant before November 14, 2005, shall be dismissed under *RCFC 12(b)(1)*, without prejudice; and

(b) The remaining claims in the complaint shall be dismissed under *RCFC 12(b)(6)*, with prejudice.

(4) No costs.

/s/ Lynn J. Bush

LYNN J. BUSH

Judge

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EXHIBIT - 3

COUNTY OF JACKSON, Plaintiff, v CITY OF JACKSON, Defendant. JACKSON COFFEE COMPANY and KLEIN BROTHERS, LLC, Plaintiffs, v CITY OF JACKSON, Defendant.

No. 307685, No. 307843

COURT OF APPEALS OF MICHIGAN

302 Mich. App. 90; 836 N.W.2d 903; 2013 Mich. App. LEXIS 1786

August 1, 2013, Decided

PRIOR HISTORY: *County of Jackson v. City of Jackson, 2013 Mich. App. LEXIS 1345 (Mich. Ct. App., Aug. 1, 2013)*

JUDGES: [***1] Before: MURPHY, C.J., and HOEKSTRA and OWENS, JJ.

OPINION

[**905] [*93] PER CURIAM.

Plaintiffs commence these original actions in the Court of Appeals under *Const 1963, art 9, §§ 25-34*, popularly known as the Headlee Amendment. The actions were consolidated by the Court of Appeals. The Jackson City Council adopted Ordinance No. 2011.02, pursuant to which the city created a storm water utility and imposed a storm water management charge on all property owners within the city to generate revenue to pay for the services provided by the utility, which include, among others, street sweeping, catch basin cleaning, and leaf pickup and mulching. The question posed by these actions is whether the city, by shifting the method of funding certain preexisting government activities from tax revenues to a utility charge, ran afoul of § 31 of the Headlee Amendment, *Const 1963, art 9, § 31*,[1] as construed and applied in *Bolt v City of Lansing, 459 Mich 152; 587 NW2d 264 (1998)*. We answer this question in the affirmative and hold that the city's storm water management charge is a tax, the imposition of which violates the Headlee Amendment because the city did not submit Ordinance 2011.02 to a vote of the qualified electors [***2] of the city. The charge is null and void.

1 Although plaintiffs allege a violation of § 25, *Const 1963, art 9, § 25*, their enforcement actions implicate only *§ 31*. See, e.g., *Bolt v City of Lansing, 459 Mich 152; 587 NW2d 264 (1998)*. *Section 25 of the Headlee Amendment* summarizes the "fairly complex system of revenue and tax limits" imposed by the amendment, *Durant v Michigan, 456 Mich 175, 182; 566 NW2d 272 (1997)*, and is implemented through the other sections of the amendment, *Const 1963, art 9, § 25*. Additionally, we decline to address plaintiffs' claims that the imposition of the management charge violates *Const 1963, art 4, § 32* and *Const 1963, art 9, § 6* because these claims are outside the scope of our original jurisdiction conferred by § 32 of the Headlee Amendment, *Const 1963, art 9, § 32*.

[*94] I

The city maintains and operates separate storm water and waste water management systems. Various state permits authorize the city to discharge storm water [**906] through its separate storm water drainage system to the Grand River, as well as other waters of the state.

Historically, the city has funded the operation and maintenance of its storm water management system with money from the city's general [***3] and street funds. The money in these funds is generated through the collection of ad valorem property taxes, gasoline taxes, and vehicle registration fees. With revenue from these taxes and fees in decline, the city retained an engineering and consulting firm to study the feasibility of establishing a storm water utility for the purpose of funding storm water management through dedicated "user fees." As acknowledged by the city in its Stormwater Management Manual,

> [w]hen subdivisions, roads and commercial developments are built or improved in the City of Jackson the City must pay for managing the resulting storm runoff. The City must install catch basins to capture storm water and storm sewers to convey the storm water to streams or rivers, ensuring it does not drain into the sanitary wastewater system and create sewer overflows. Furthermore the City must maintain the entire storm water collection system. In the past the City performed this work without a dedicated revenue source. The City used money from the general fund or the road budget, thus taking funds away from other critical programs. The storm water system is an expensive piece of the City's municipal infrastructure. The City's [***4] water and sanitary wastewater systems each have their own dedicated revenue sources derived from water and sanitary wastewater user fees. Water and sanitary wastewater users pay user fees that are partially calculated based on water consumption. However, this has not been the case with storm water management, which has had no [*95] user fees attached to it. Municipalities across the country are changing this. They now view their storm water systems as utilities similar to their water and sanitary wastewater systems. They are developing storm water user fee structures to pay for storm water planning, administration, construction and operation and maintenance.

Following the completion of the feasibility study, the city's Department of Public Works requested that the city create a storm water utility "to fund the activities currently included in the General Fund Drains at Large, Leaf Pickup, Mulching, Street Cleaning and Catch Basin Maintenance in the Major and Local Street accounts." The Jackson City Council adopted Ordinance 2011.02, known as the "Storm Water Utility Ordinance," at its January 11, 2011, meeting.

Ordinance 2011.02 establishes a storm water utility to operate and maintain the [***5] city's storm water management program. The ordinance funds this program through an annual storm water system management charge imposed on each parcel of real property, including undeveloped parcels, located within the city. All revenues generated by the storm water management charge are deposited in a storm water enterprise fund and "[n]o part of the funds . . . may be transferred to the general operating fund or used for any purpose other than undertaking the storm water management program, and operating and maintaining a storm water system." More specifically, the money in the enterprise fund may be used only to pay the "costs to acquire, construct, finance, operate and maintain a storm water system."

The management charge is computed using a formula developed by the engineering consultant that roughly estimates [**907] the amount of storm water runoff of each parcel. Anticipated storm water runoff is computed in terms of equivalent hydraulic area (EHA). This [*96] method of computation involves an estimation of the amount of storm water leaving each parcel of property based on the impervious and pervious surface areas of each parcel. The ordinance defines the phrase "impervious area or surface" [***6] as "a surface area which is compacted or covered with material that is resistant to or impedes permeation by water, including but not limited to, most conventionally surfaced streets, roofs, sidewalks, patios, driveways, parking lots, and any other oiled, graveled, graded, or compacted surfaces." "[P]ervious area or surface" is "all land area that is not impervious."

The EHA base unit used to compute the amount of a management charge is the square footage for the average single family residential parcel. One EHA base unit is 2,125 sq. ft. The pervious and impervious areas of residential parcels with two acres or less of surface area

are not measured individually. Instead, such parcels are assigned one EHA unit and charged a flat rate established by resolution of the city council, which is billed quarterly. For all other parcels, the management charge is based on the actual measurements of the pervious and impervious areas of each individual parcel. The number of EHA units for these latter parcels is calculated by multiplying a parcel's impervious area in square feet by a runoff factor[2] of 0.95 and the pervious area in square feet by a runoff factor of 0.15, adding these two areas and [***7] then dividing that total by 2,125 sq. ft. The number of EHA units is then multiplied by $2.70[3] to arrive at the monthly management charge.

2 The runoff factors are defined as the approximate fraction of rainfall that runs off the property to the storm drainage system.

3 The city has reduced this figure to $2.50 since the filing of these suits. The city also has reduced the flat rate charged to the owners of residential property of two acres or less from $8 to $7.50.

[*97] The ordinance allows property owners to receive credits against the management charge for actions taken to reduce storm water runoff from their respective properties. At the time plaintiffs commenced these original actions, the ordinance allowed a residential property owner to receive a 50 percent credit against the charge by implementing city-approved "storm water best management practices" to capture and filter or store storm water. Such best practices include the creation of rain gardens or vegetated filter strips or the use of rain barrels or a cistern. The ordinance also allowed an owner of a nonresidential property to receive a credit against the service charge of between 37.5 and 75 percent for implementing best management [***8] practices designed to control storm water peak flows through the construction and use of detention or retention ponds. Schools could receive a 25 percent "education credit" for providing students with a regular and continuing program of education concentrating on the stewardship of the state's water resources. Finally, an owner of a parcel of real property that is contiguous to the Grand River could receive a credit of up to 75 percent for directly discharging storm water into the river. After the filing of these actions, and through amendments to the ordinance adopted by the city, the city increased the amount of credit allowed for certain property owners who engage in best management practices identified by the city.

Ordinance 2011.02 creates a right to an administrative appeal, but limits the scope of that appeal to "the grounds that the [**908] impervious and/or pervious area of the property is less than estimated by the Administrator or that the credit allowable to the property is greater than that estimated by the Administrator." Additionally, the ordinance authorizes the administrator of the utility to enforce payment of the management charge by discontinuing [*98] water service to the property [***9] of a delinquent property owner, by instituting a civil action to collect any unpaid management charges, and by placing a lien against property for the unpaid charges and enforcing the lien "in the same manner as provided for the collection of taxes assessed upon such roll and the enforcement of the lien for the taxes."

The city began billing property owners for the management charge in May, 2011. Plaintiffs, who are property owners within the city, received invoices from the city for the management charges assessed against their respective properties, with their respective invoices for water service to their properties.

On December 16, 2011, plaintiff Jackson County commenced its instant Headlee Amendment enforcement action. Plaintiffs Jackson Coffee Company and Klein Brothers, LLC, commenced their enforcement action on December 28, 2011. Plaintiffs' claims for declaratory, injunctive, and monetary relief are predicated on the belief that the storm water management charge constitutes a disguised tax and, therefore, the imposition of the charge by the city violates *§ 31 of the Headlee Amendment* because the city imposed the tax without a vote of the city's electorate.

II

Plaintiffs bear [***10] the burden of establishing the unconstitutionality of the city's storm water management charge. *Adair v Michigan, 470 Mich 105, 111; 680 NW2d 386 (2004)*; *Kenefick v Battle Creek, 284 Mich App 653, 655; 774 NW2d 925 (2009)*.

Plaintiffs' enforcement actions implicate § 31 of the Headlee Amendment, *1963 Const, art 9, § 31*. An application of *§ 31* is triggered by the levying of a tax. *Bolt, 459 Mich at 158-159*. "*Section 31* prohibits units of local [*99] government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." *Durant v*

Michigan, 456 Mich 175, 183; 566 NW2d 272 (1997). Thus, a tax imposed without voter approval "unquestionably violates" *§ 31*. *Bolt, 459 Mich at 158*. However, a charge that is a user fee "is not affected by the Headlee Amendment." *Id. at 159*. "There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Id. at 160*. "Generally, a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise [***11] revenue." *Id. at 161* (quotation marks and citations omitted).

The seminal--and only--case addressing the distinction between a fee and a tax, in the context of storm water management, is our Supreme Court's decision in *Bolt*. In *Bolt*, the city of Lansing sought to limit the polluting of local rivers that resulted when heavy precipitation caused the city's combined storm water and sanitary sewer systems to overflow and discharge into those rivers combined storm water and untreated or partially treated sewage. *Id. at 154-155*. To this end, the city decided to separate the remaining combined storm and sanitary sewer system, at a cost of $176 million. *Id. at 155*. [**909] As a means to fund the costs of the sewer system separation,

> the Lansing City Council adopted Ordinance 925, which provides for the creation of a storm water enterprise fund "to help defray the cost of the administration, operation, maintenance, and construction of the stormwater system . . . ." The ordinance provides that costs for the storm water share of the CSO [combined sewer overflow] program (fifty percent of total CSO costs, including administration, [*100] construction, and engineering costs) will be financed through an annual storm [***12] water service charge. This charge is imposed on each parcel of real property located in the city using a formula that attempts to roughly estimate each parcel's storm water runoff.
>
> Estimated storm water runoff is calculated in terms of equivalent hydraulic area (EHA). As defined by the ordinance, EHA is "based upon the amount of pervious and impervious areas within the parcel multiplied by the runoff factors applicable to each." Impervious land area, which impedes water adsorption, thus increasing storm water runoff, is defined as
>
> > [t]he surface area within a parcel that is covered by any material which retards or prevents the entry of water into the soil. Impervious land area includes, but is not limited to, surface areas covered by buildings, porches, patios, parking lots, driveways, walkways and other structures. Generally, all non-vegetative land areas shall be considered impervious.
>
> Pervious land area is defined as "[a]ll surface area within a parcel which is not impervious[.]"
>
> Residential parcels measuring two acres or less are not assessed charges on the basis of individual measurements, but, rather, are charged pursuant to flat rates set forth in the ordinance. These rates are based [***13] on a predetermined number of EHA units per one thousand square feet. For residential parcels over two acres, commercial parcels, and industrial parcels, the EHA for an individual parcel is calculated by multiplying the parcel's impervious area by a runoff factor of 0.95 and pervious area by a runoff factor of 0.15 and adding the two areas.
>
> Charges not paid by the deadline are considered delinquent and subject to delayed payment charges, rebilling charges, property liens (if the charge remains unpaid for six months or more), and attorney fees if a civil suit is filed to collect delinquent charges. The ordinance

> further provides for a system of administrative appeals by property owners contending that their properties have been unfairly assessed. *Id. at 155-157* (footnotes omitted).]

[*101] A taxpayer within the city of Lansing brought suit against the city on the ground that the storm water service charge constituted a tax disguised as a user fee that violated *§§ 25* and *31* of the Headlee Amendment because the tax had not been submitted to or approved by a vote of the people. *Bolt, 459 Mich at 154, 158*. Our Supreme Court agreed, concluding that the storm water service charge was not a valid user [***14] fee, but, instead, was "a tax, for which approval is required by a vote of the people." *Id. at 154*. The Court reached this conclusion after considering a multiplicity of factors pertaining to the characteristics of fees and taxes, including the three primary criteria of a fee, which are: (1) a fee serves a regulatory purpose, (2) a fee is proportionate to the necessary costs of the service, and (3) a fee is voluntary. *Id. at 161-162*.

[**910] With regard to the first two criteria, the Court concluded that the storm water service charge neither served a regulatory purpose nor was proportionate to the necessary costs of the service. Rather, the Court concluded that the service charge served a revenue-raising purpose. *Id. at 163-167*. According to the Court, "'the "fee" is not structured to simply defray the costs of a "regulatory" activity, but rather to fund a public improvement designed to provide a long-term benefit to the city and all its citizens.'" *Id. at 164*, quoting *Bolt v City of Lansing, 221 Mich. App. 79, 91; 561 N.W.2d 423 (1997)* (MARKMAN, J., dissenting). The Court reached this conclusion, in part, because,

> [i]n instituting the storm water service charge, the city of Lansing has sought [***15] 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 this cost (approximately sixty-three percent) constitutes capital expenditures. This constitutes an investment in infrastructure as [*102] opposed to a fee designed simply to defray the costs of a regulatory activity. [*Bolt, 459 Mich at 163*.]

For this same reason, the Court concluded that the "'revenue to be derived from the charge is clearly in excess of the direct and indirect costs of actually using the storm water system over the next thirty years and, being thus disproportionate to the costs of the services provided and the benefits rendered, constitutes a tax.'" *Id. at 164*, quoting *Bolt, 221 Mich App at 91* (MARKMAN, J., dissenting).

The Court further concluded that the storm water service charge neither served a regulatory purpose nor was proportionate to the necessary costs of the service on the basis of the following two related failings of the ordinance:

> First, the charges imposed do not correspond to the benefits conferred. Approximately seventy-five percent of the property owners in the city are already served by a separated storm and sanitary [***16] sewer system. In fact, many of them have paid for such separation through special assessments. Under the ordinance, these property owners are charged the same amount for storm water service as the twenty-five percent of the property owners who will enjoy the full benefits of the new construction. Moreover, the charge applies to all property owners, rather than only to those who actually benefit. A true "fee," however, is not designed to confer benefits to the general public, but rather to benefit the particular person on whom it is imposed. *Bray [v Dep't of State, 418 Mich. 149, 162; 341 N.W.2d 92 (1983)*; *Nat'l Cable Television Ass'n v United States & Federal Communications Comm, 415 U.S. 336, 340-342; 94 S Ct 1146; 39 L Ed 2d 370 (1974)]*.
>
> > The distinction between a fee and a tax is one that is not always observed with nicety in judicial decisions, but according to some authorities, any payment exacted by the state or its municipal subdivisions as a

> contribution toward the cost of [*103] maintaining governmental functions, where the special benefits derived from their performance is merged in the general benefit, is a tax. [*71 Am Jur 2d, State and Local Taxation, § 15*, p 352.]

In this case, the [***17] lack of correspondence between the charges and the benefits conferred demonstrates that the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public.

[**911] This conclusion is buttressed by the fact that the acknowledged goal of the ordinance is to address environmental concerns regarding water quality. Improved 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. As stated by the Court of Appeals dissent[:]

> The extent of any particularized benefit to property owners is considerably outweighed by the general benefit to the citizenry of Lansing as a whole in the form of enhanced environmental quality. . . . When virtually every person in a community is a "user" of a public improvement, a municipal government's tactic of augmenting its budget by purporting to charge a "fee" for the "service" rendered should be seen for what it is: a subterfuge to evade constitutional limitations on its power to raise taxes. [*Bolt, 221 Mich App at 96* (MARKMAN, J., dissenting).]

> The second failing that supports the [***18] conclusion that the ordinance fails to satisfy the first two criteria is the lack of a significant element of regulation. See *Bray, supra at 161-162*; *Vernor [v Secretary of State, 179 Mich 157, 167-169; 146 NW 338 (1914)]*. The ordinance only regulates the amount of rainfall shed from a parcel of property as surface runoff; it does not consider the presence of pollutants on each parcel that contaminate such runoff and contribute to the need for treatment before discharge into navigable waters. Additionally, the ordinance fails to distinguish between those responsible for greater and lesser levels of runoff and excludes street rights of way from the [*104] properties covered by the ordinance. Moreover, there is no end-of-pipe treatment for the storm water runoff. Rather, the storm water is discharged into the river untreated. [*Bolt, 459 Mich at 165-167*.]

Next, the Court found that the charge lacked any element of voluntariness, which the Court found to be further evidence that the charge was a tax and not a user fee. The Court opined:

> One of the distinguishing factors of a tax is that it is compulsory by law, "whereas payments of user fees are only compulsory for those who use the service, have [***19] the ability to choose how much of the service to use, and whether to use it at all." Headlee Blue Ribbon Commission [, A Report to Governor John Engler, § 5, p 29]. The charge in the present case is effectively compulsory. The property owner has no choice whether to use the service and is unable to control the extent to which the service is used. The dissent

> suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property. [*Bolt, 459 Mich at 167-168* (footnote omitted).]

Finally, the Court found that the following factors also supported the conclusion that the storm water charge was a tax: (1) the revenue generated by the charge was to be used on that portion of the project that had been previously funded by general fund revenue; (2) the indebtedness generated by the levying of the charge could be secured by a lien on property; and (3) the charge was billed through the city assessor's office and may [***20] be sent with the [**912] December property tax statements. *Id. at 168-169*.

The Court closed its opinion with the following admonition:

> [*105] We conclude that the storm water service charge imposed by Ordinance 925 is a tax and not a valid user fee. To conclude otherwise would permit municipalities to supplement existing revenues by redefining various government activities as "services" and enacting a myriad of "fees" for those services. To permit such a course of action would effectively abrogate the constitutional limitations on taxation and public spending imposed by the Headlee Amendment, a constitutional provision ratified by the people of this state. In fact, the imposition of mandatory "user fees" by local units of government has been characterized as one of the most frequent abridgments "of the spirit, if not the letter," of the amendment.
>
> > The danger to the taxpayer of this burgeoning phenomenon [the imposition of mandatory user fees] is as clear as are its attractions to local units of government. The "mandatory user fee" has all the compulsory attributes of a tax, in that it must be paid by law without regard to the usage of a service, and becomes a tax lien of the property. However, it escapes [***21] the constitutional protections afforded voters for taxes. It can be increased any time, without limit. This is precisely the sort of abuse from which the Headlee Amendment was intended to protect taxpayers. [Headlee Blue Ribbon Commission Report, *supra*, § 5, pp 26-27.] [*Bolt, 459 Mich at 169*.]

In the present cases, the documents provided this Court reveal that the management charge serves a dual purpose. The charge furthers a regulatory purpose by financing a portion of the means by which the city protects local waterways, including the Grand River, from solid pollutants carried in storm and surface water runoff discharged from properties within the city, as required by state and federal regulations. The charge also serves a general revenue-raising purpose by shifting the funding of certain preexisting government activities from the city's declining general and street fund revenues to a charge-based method of revenue generation. [*106] This latter method of revenue generation raises revenue for general public purposes by augmenting the city's general and street funds in an amount equal to the revenue previously used to fund the activities once provided by the city's Engineering and Public [***22] Work Departments and now bundled together and assigned to the storm water utility. Because the ordinance and the management charge serve competing purposes, the question becomes which purpose outweighs the other. *Id. at 165-167, 169*. We conclude that the minimal

regulatory purpose served by the ordinance and the related management charge is convincingly outweighed by the revenue-raising purpose of the ordinance.

Ordinance 2011.02 suffers from the same lack of a significant element of regulation as the Lansing ordinance did. Although the ordinance confers the power of regulation on the utility's administrator, the ordinance contains few provisions of regulation and no provisions that truly regulate the discharge of storm and surface water runoff, with the exception of the provision that allows for credits against the management charge for the use of city-approved storm water best management practices. Moreover, as was the case in *Bolt*, the ordinance fails to require either the city or the property owner to identify, monitor, and treat contaminated storm and surface water runoff and allows untreated storm water to [**913] be discharged into the Grand River. *Bolt, 459 Mich at 164-167*. In these [***23] regards, the city's ordinance suffers from the same regulatory weaknesses as did the Lansing ordinance struck down as unconstitutional in *Bolt*.

Further, the documents generated by and on behalf of the city and provided this Court clearly show that the desire to protect the city's general and street funds from the costs of operating and maintaining the existing [*107] storm water management system constituted the most significant motivation for adopting the ordinance and management fee. As previously noted, before the adoption of the ordinance, the city paid the costs of operating and maintaining the storm water system, including the costs of street and catch basin cleaning and leaf pickup and mulching, with revenue from the city's general and street funds. In the documents supplied this Court, the city readily admits that the costs associated with maintaining the storm water system resulted in money from these funds being directed away from "other critical programs" and that budgetary pressures, including declining general fund revenue, necessitated the tapping of new sources of funding for the maintenance of the storm water system. Similarly, the storm water utility feasibility study commissioned [***24] by the city reflects that the primary purposes of the study were to devise a method of calculating a storm water management charge of sufficient amount to fund the preexisting services the city desired to delegate to the utility and to convince the city council that the imposition of the recommended management charge would not violate *Bolt* and the Headlee Amendment. The fact that the impetus for creating the storm water utility and for imposing the charge was the need to generate new revenue to alleviate the budgetary pressures associated with the city's declining general fund and street fund revenues, and the fact that the city's activities were previously paid for by these other funds are factors that support a conclusion that the management charge has an overriding revenue-generating purpose that outweighs the minimal regulatory purpose of the charge and, therefore, that the charge is a tax, not a utility user fee. The Headlee Amendment bars municipalities from supplementing their existing revenue [*108] streams by redefining various government activities as services and then enacting "user fees" for those services. *Id. at 169*.

Likewise, the lack of a correspondence between the charge imposed [***25] and any particularized benefit conferred by the charge supports a conclusion that the charge is a tax and not a utility user fee. A true fee confers a benefit upon the particular person on whom it is imposed, whereas a tax confers a benefit on the general public. *Id. at 165*. Although a regulatory fee may confer a benefit on both the general public and the particular individuals who pay the fee and still maintain its regulatory character, 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. *Id. at 165-166*; *USA Cash #1, Inc v Saginaw, 285 Mich App 262, 281; 776 NW2d 346 (2009)*. In the present cases, we cannot readily identify any particularized benefit the charge confers on the property owners that is not also conferred upon the general public. The city indicated in its original response to plaintiffs' complaints that the charge "assur[es] cleanliness and safety of the State's waters and watercourses." The city also indicated that the management charge enables the city to protect the public health and safety, to reduce the likelihood of flooding [**914] caused by excessive storm water runoff, [***26] to reduce the potential for land erosion, which can damage roads, bridges and other infrastructure and thereby endanger the public, and to prevent sewer overflows by providing a mechanism to collect and divert rain water runoff from the sanitary sewer system. We do not doubt that a well-maintained storm water management system provides such benefits. Nevertheless, these concerns addressed by the city's ordinance, like the environmental concerns addressed by Lansing's ordinance in *Bolt*, [*109] benefit not only the property owners subject to the management charge, but also everyone in the city in roughly equal measure, as

well as everyone who operates a motor vehicle on a Jackson city street or roadway or across a city bridge, everyone who uses the Grand River for recreational purposes downriver from the city, and everyone in the Grand River watershed. This lack of a correspondence between the management charge and a particularized benefit conferred to the parcels supports our conclusion that the management charge is a tax. *Bolt, 459 Mich at 166*.

Our conclusion regarding the proportionality of the charge further buttresses the conclusion that the management fee is a tax.

"Fees charged by a municipality [***27] must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged." *Kircher v City of Ypsilanti, 269 Mich App 224, 231-232; 712 NW2d 738 (2005)*. The fact that the fee only needs to be "reasonable proportionate" suggests that mathematic precision is not necessary in calculating the fee. *Graham v Kochville Twp, 236 Mich App 141, 154-155; 599 NW2d 793 (1999)*. Thus, the fee need not generate an amount equal to that required to support the services the ordinance regulates in order to survive scrutiny; however, where the revenue generated by a regulatory "fee" exceeds the cost of regulation, the "fee" is actually a tax in disguise. *Westlake Transp, Inc v Pub Serv Comm, 255 Mich App 589, 614-615; 662 NW2d 784 (2003)*. This Court must presume the amount of the fee to be reasonable, "'unless the contrary appears upon the face of the law itself, or is established by proper evidence' . . . ." *Graham, 236 Mich App at 154-155*, quoting *Vernor v Secretary of State, 179 Mich 157, 168;* [*110] *146 NW 338 (1914)*; see also *Wheeler v Shelby Charter Twp, 265 Mich App 657, 665-666; 697 NW2d 180 (2005)*.

A permissible utility service charge is one that "'reflects [***28] the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component . . . .'" *Bolt, 459 Mich at 164-165*, quoting *Bolt, 221 Mich App at 92* (MARKMAN, J., dissenting). In the present cases, the management charge is predicated on the assumption that properties contribute to runoff, and, hence, storm sewer use, as a direct function of the size of a parcel's imperious and pervious areas. Despite this assumption, residential parcels measuring two acres or less are charged a flat rate based on the average EHA of all single family parcels, and not on the individual measurements of each parcel's impervious and pervious areas. Single family residential parcels account for 12,209 or 83 percent of the 14,743 parcels within the city. According to the city, it is cost-prohibitive to calculate the EHA units for each single family residential parcel on the basis of actual measurements of impervious and pervious areas of each parcel. In contrast, residential parcels measuring over two acres and commercial, industrial [**915] and institutional parcels of all sizes are assessed a management charge based on the individual measurements of [***29] each parcel's impervious and pervious areas. This method of apportioning the management charges among all urban properties emphasizes administrative convenience and ease of measurement and, thereby, suggests an absence of a close proportional relationship between the amount of runoff attributable to a particular parcel and the management charge, as does the fact that the method of calculating the charge fails to consider property characteristics relevant to runoff generation, such as a parcel's location in reference to storm gutters and drains and soil grade. [*111] This lack of proportionality is further demonstrated by the fact that the charge generates sufficient revenue to allow the city to maintain a working capital reserve of 25 to 30 percent of the storm water utility's total expenses. Although maintaining a capital reserve is a common practice amongst rate-based public utilities that provides a degree of fiscal stability to utilities, see 73B CJS, Public Utilities, § 64; *64 Am Jur 2d, Public Utilities, § 107*, those reserves are funded by true user fees closely calibrated to the actual use of the service or a price paid for a commodity. The management charge at issue in these cases [***30] in not such a fee. For these reasons, the actual use of the storm water sewer system by each parcel is not accounted for with the requisite level of precision necessary to support a conclusion that the charge is proportionate to the costs of the services provided.

Finally, our conclusion that the city's management charge is a tax is bolstered by the fact that Ordinance 2011.02, like Lansing Ordinance 925, is effectively compulsory. Although Ordinance 2011.02 allows property owners to receive credits against the management charge for actions taken to reduce runoff from their respective properties, it does not guarantee all property owners will receive a 100 percent credit. Indeed, if the ordinance realistically allowed for all property owners to receive a 100 percent credit, the credit system would undermine the central purpose of the ordinance,

which is to generate dedicated funding to maintain and operate the current storm water management system. The city would be left with a storm water sewer system to operate and maintain and no dedicated revenue source to fund street sweeping, catch-basin cleaning, and leaf pickup, among other activities necessary to the city's stewardship of the [***31] system. More importantly, however, this system of credits effectively mandates that property [*112] owners pay the charge assessed or spend their own funds on improvements to their respective properties, as specified by the ordinance and the city, in order to receive the benefit of any credits. In other words, property owners have no means by which to escape the financial demands of the ordinance. Additionally, the ordinance authorizes the administrator of the storm water utility to discontinue water service to any property owner delinquent in the payment of the fee, as well as to engage in various civil remedies, including the imposition of a lien and the filing of a civil action, to collect payment of past-due charges. All of these circumstances demonstrate an absence of volition. This lack of volition lends further support for our conclusion that the management charge is a tax. *Bolt, 459 Mich at 168*.

III

We enter a declaratory judgment in favor of plaintiffs. The city's storm water system management charge is a tax imposed in violation of *§ 31 of the Headlee Amendment*. The city shall cease collecting the charge and shall reimburse only [**916] plaintiffs for any charges paid to date. *Bolt v City of Lansing (On Remand), 238 Mich App 37, 51-60; 604 NW2d 745 (1999)*. [***32] Plaintiffs may tax their costs, including a reasonable attorney fee. *Const 1963, art 9, § 32*; *Adair v Michigan, 486 Mich 468, 494; 785 NW2d 119 (2010)*.

/s/ William B. Murphy

/s/ Joel P. Hoekstra

/s/ Donald S. Owens

EXHIBIT - 4

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.

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

Core Terms

storm water, summary disposition, trial court, Drain, property owner, parcel, ordinance, runoff, residential, impervious, charges, Counts, user fee, Charter, combined, rates, sewer, de novo, calculated, equitable, estimated, funded, costs, alleged violation, square foot, regulations, collecting, factors, sewage, defendant argues

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

Opinion

PER CURIAM.

Defendant appeals by leave granted[1] 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.[2] 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

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

[2] 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.

the required improvements, defendant began assessing the Storm Water Charge under an ordinance it adopted 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.[3] 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.[4] 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*

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[3] 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

One billing unit

greater than 3,500 sq. ft.

[4] The trial court certified the plaintiff class on March 22, 2018.

141.91,[5] 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.

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

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[5] 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.

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),[6] 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, 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

[6] Unpublished opinions are not binding under the rule of stare decisis, but may be considered for their instructive of 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.

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.[7]

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[8] 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.[9] *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.[10] Moreover, based on the testimony of

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[7] 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.

[8] In 2016, a "billing unit" was $210.

[9] 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.

[10] While a benefit to the public at large does not always negate the regulatory character of a charge, "a charge is not a regulatory fee in the first instance unless it is designed to

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 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)*,[11] and did not

confer a particularized benefit on the property owners who must pay the fee." *Jackson, 302 Mich App at 108*.

[11] *MCL 280.423(3)* authorizes the MDEQ to issue an order of determination identifying unlawful discharge of sewage or waste, the user or users responsible for the unlawful discharge, and the necessity of remedial measures to purify

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 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."

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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).]

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.*[12]

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 oneyear 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.[13]

B. INJUNCTIVE RELIEF

Plaintiff also argues that the trial court abused its **[*30]** discretion by denying his request to enjoin defendant

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[12] "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)*.

[13] 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.

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*)

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EXHIBIT - 5

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

BRAD M. PATRICK, individually, as a representative of a class of similarly-situated persons and entities,

Plaintiff,

vs.

Case No. 2017-003018-CZ

CITY OF ST. CLAIR SHORES,

Defendant.
_____/

OPINION AND ORDER

Plaintiff Brad M. Patrick, individually and as a representative of a class of similarly-situated persons and entities ("Plaintiff") has filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10). Defendant City of St. Clair Shores (the "City") has filed a response in opposition to the motion and a counter motion for summary disposition pursuant to MCR 2.116(I)(2) and MCR 2.116(C)(7).

Factual and Procedural History

This action arises out of Plaintiff's claim challenging a mandatory stormwater service charge ("Stormwater Charge") imposed on property owners in the City. The City's charter became effective on January 15, 1951 and provides, in pertinent part:

> 10.331 – Sewers, drains; council, powers.
> Sec. 13.1. The council may acquire, maintain, operate, improve, enlarge and/or extend, either within or without the city, drains, sewers and facilities for the collection and treatment of stormwater and/or sanitary sewage. The council may contract with any other governmental unit or units for sewerage and drainage facilities for the treatment of sewage.
>
> 10.334 – Sewage disposal service; charges.

> Sec. 13.4. The city may fix and collect charges for sewage disposal services, the proceeds whereof shall be exclusively used for the purpose of its sewage disposal system, which charges may include a return on the fair value of the property devoted to such service, excluding from such valuations such portions of the system as may have been paid for by special assessment. Such charges may be made a lien upon the property served, and if not paid when due, may be collected in the same manner as other city taxes.

The City has a sewer system which includes a "separated" system, in which one set of pipes collects and conveys sanitary sewage for treatment and another set of pipes collects stormwater that either flows into the pipes for treatment or into Lake St. Clair without treatment. Prior to 1993, the City was utilizing gas and weight tax fund revenues and general funds, which were also used to repair the roads, to repair, maintain and replace storm drains. In 1992, the City considered establishing the Stormwater Charge to fund stormwater management. A Stormwater Utility Implementation Report (the "Report") was prepared to study the need of the Stormwater Charge and to provide recommendations if the City elected to implement the Stormwater Charge. The Report's stated purpose was to "increase the amount of money available for street reconstruction and to establish a dedicated funding source for stormwater management." *See* Plaintiff's motion, Exhibit G. The Report further stated that the purpose of the Stormwater Charge would be to generate revenue to fund both operation and maintenance expenses and capital improvements to the storm drainage system. *Id.*

Following the outcome of the Report, the City adopted its stormwater utility ordinance, effective July 27 1993, which was not approved by the City's voters prior to its implementation and requires all owners of real property in the City to pay the Stormwater Charge on a quarterly basis. The current stormwater utility ordinance is contained in sections 25.111 – 25.121 of the City's ordinances.

Relevant here, the ordinance states that "all owners of real property in the City of St. Clair Shores shall be charged for the use of a stormwater system based on the amount of stormwater and rate of flow of stormwater which is determined to be entering the stormwater system from the property. *See* Plaintiff's motion, Exhibit I at Section 25.112. The quarterly charges are $8.52 for single-family residential, $4.26 for single family residential located on waterfront or canal and duplex, $6.09 for condominium units, $3.65 for apartment units, and $121.71 per equivalent hydraulic area ("EHA") multiplied by .20 for pervious area and .95 for impervious area for all other properties. *Id.* at Section 25.113, 25.114. A Stormwater Charge Review Board must be appointed to consider owner appeals. *Id.* at Section 25.114A. Unpaid stormwater service charges shall constitute a lien against the property affected. Charges unpaid for a period of six months prior to March 31 of any year may be certified by the City Assessor and placed on the next tax roll or the City Attorney may file suit to collect the unpaid charges. *Id.* at Section 25.117.

In May 2017, the City received a $2,000,000 grant from the State of Michigan Stormwater, Asset Management, and Wastewater ("SAW") grant program through the Michigan Department of Environmental Quality to investigate the condition of its stormwater system. The SAW grant was used to evaluate and assess the condition of the City's stormwater system and create an asset management plan ("AMP"). The AMP made the following conclusions and recommendations: the cost to repair or replace any storm sewer line, structure, or pump station which warranted repair or replacement based on their condition is $20,905,000, a 5-10 year capital improvement plan to ensure the stormwater system continues to operate at the desired level of service to provide for current and future use will cost $2,417,400 annually, and the Stormwater Charge will generate an annual revenue of $1,677,629 for the fiscal year 2018.

On November 3, 2017, Plaintiff filed his first amended complaint in this action alleging count I – violation of Headlee Amendment, count II – assumpsit for money had and received, violation of MCL 141.19, count III – unjust enrichment, violation of MCL 141.19, and count IV – assumpsit for money had and received, unreasonable water and sewer rates. On January 29, 2018, Plaintiff filed this instant motion for partial summary disposition as to counts I, II and III. On March 26, 2018, the City filed its response in opposition to Plaintiff's motion and a counter motion for summary disposition. On April 17, 2018, Plaintiff filed his reply brief in support of his motion. On April 23, 2018, the Court held a hearing in connection with the motion and took the matter under advisement. On June 15, 2018, Plaintiff filed a supplemental brief in support of his motion.

Standard of Review

Pursuant to MCR 2.116(C)(7), a party may be entitled to summary disposition if a statute of limitations bars the claim. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 278; 769 NW2d 234 (2009). "In reviewing a motion under subrule (C)(7), a court accepts as true the plaintiff's well-pleaded allegations of fact, construing them in the plaintiff's favor." *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). Furthermore, the trial court considers all documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* at 61-62.

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, 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. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* "A genuine issue of material fact exists when the record leaves

open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

Arguments

Plaintiff argues that the Stormwater Charge imposed on the property owners of the City is a tax and is in violation of the Headlee Amendment. Plaintiff further avers that the Headlee Amendment is applicable because the Stormwater Charge was not authorized by the City's charter. Lastly, Plaintiff avers that the Stormwater Charge constitutes an unlawful tax under MCL 141.91.

In response, the City contends that the Stormwater Charge is a lawful user fee, not a tax. The City also argues that even if the Stormwater Charge is a tax, Headlee analysis is not appropriate because it is authorized by its charter. Lastly, the City maintains that Plaintiff's claims are subject to a one-year statute of limitations.

Law and Analysis

Headlee Amendment Analysis

The relevant portion of the Headlee Amendment to the Michigan Constitution, which was ratified on November 7, 1978, states as follows:

> 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.

Plaintiff argues that the City's stormwater utility ordinance imposes a mandatory tax on property owners in violation of the Headlee Amendment. Whether the Stormwater Charge is a tax or user fee is a question of law. *Saginaw Co v John Sexton Corp of Michigan*, 232 Mich App 202, 209; 591 NW2d 52 (1998). "There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt v City of Lansing*, 459 Mich 152, 160;

587 NW2d 265 (1998). However, the *Bolt* Court set forth three primary criteria to be considered when distinguishing between a fee and a tax. *Id.* at 161. First, "a user fee must serve a regulatory purpose rather than a revenue-raising purpose. *Id.* Second, "user fees must be proportionate to the necessary costs of the service". *Id.* at 161-162. Third, a user fee is voluntary. *Id.* at 162. It is undisputed that the Stormwater Charge is not voluntary.

Plaintiff relies on the case of *County of Jackson v City of Jackson*, 302 Mich App 90; 836 NW2d 903 (2013) and contends that Defendant fails to distinguish this case from *Jackson*. In *Jackson*, property owners and the county brought an action against the city alleging violation of the Headlee Amendment. The Jackson city council adopted an ordinance in which the city created a stormwater utility and imposed a stormwater management charge on all property owners within the city to generate revenue to pay for the services provided by the utility. *Jackson*, 302 Mich at 93. In *Jackson*, the question posed was "whether the city, by shifting the method of funding certain preexisting government activities from tax revenues to a utility charge was in violation of the Headlee Amendment. *Id.* The *Jackson* Court held that the city's stormwater management charge was a tax, the imposition of which violated the Headlee Amendment because the city did not submit the ordinance to a vote. *Id.*

In this case, Plaintiff first argues that as to criteria one in *Bolt*, the Stormwater Charge is motivated by a revenue-raising purpose that far outweighs any regulatory purpose. Plaintiff argues that, as in *Jackson*, the City imposed the Stormwater Charges to relieve tax-supported funds of the obligation to finance stormwater management activities. *See* Plaintiff's motion, Exhibit E, Letter Regarding Stormwater Charge dated 9/16/1992. Further, Plaintiff argues that, as in *Jackson*, the feasibility study commissioned by the City prior to instituting the Stormwater Charge confirmed the City's "desire to devise a method of calculating a stormwater management charge of sufficient

amount to fund the preexisting services the City desired to delegate" to the stormwater utility. *See* Plaintiff's motion, Exhibit G, the Report.

Further, Plaintiff contends that, as in *Jackson*, the City's ordinance contains few provisions of regulation and no provisions that truly regulate the discharge of the storm and surface water runoff. Plaintiff contends that the Stormwater Charge does not take into consideration the presence of pollutants on each parcel that contributes to such runoff and contributes to the need for treatment before discharge into navigable water. *See* Plaintiff's Motion, Exhibit C, p. 54-55, Deposition transcript of Michael Smith. Plaintiff further argues that the City does not distinguish between those responsible for greater or lesser levels of runoff.

With regard to the method of imposing the Stormwater Charge, Plaintiff avers that the Stormwater Charge does not account for the actual use of the stormwater sewer system by each parcel with the requisite precision necessary. Plaintiff argues that the Stormwater Charge is even less proportionate than the charges at issue in *Jackson*. In *Jackson* all residential parcels two acres or less in size where assigned one EHA. *Jackson*, 32 Mich App at 96. However, in this case, all residential parcels are assigned one EHA, regardless of size. Further, like *Jackson*, a large percentage of the parcels in the City are residential and therefore charged a flat rate. *Id.* at 110. Also, like *Jackson*, the method of calculating the Stormwater Charge fails to consider property characteristics relevant to runoff generation. *Id.*

As to criteria two of *Bolt*, Plaintiff contends that the Stormwater Charge far exceeds the City's actual stormwater management expenses. Plaintiff presents evidence that the City's total stormwater system revenues during the six year period preceding this action, including the Stormwater Charge, grants and contributions, was $8,776,671. *See* Plaintiff's motion, Exhibit K, p. 2, the City's response to Plaintiff's first interrogatories. Of that amount, the Stormwater Charge

constituted $6,689.159. *Id.*; Plaintiff's motion, Exhibit R. Plaintiff further presents evidence that during that same time period, the total stormwater expenses were $5,349,797. *See* Plaintiff's motion, Exhibit C, p. 38-51, Deposition transcript of Michael Smith. Plaintiff argues that based on this evidence, the City maintains a working capital reserve of almost 400 percent of the total annual stormwater expended, which is far in excess of the 25-30 percent in *Jackson*. *Jackson*, 302 Mich App at 111.

In further support of its argument regarding criteria two of *Bolt*, Plaintiff argues that the Stormwater Charge is not proportional because it does not confer any particularized benefit on the persons paying the Stormwater Charge. Plaintiff argues that, like *Jackson*, any benefit that the City's stormwater management activities conferred on property owners is also a benefit conferred on the general public. *Id.* at 108. Lastly, Plaintiff argues that the Stormwater Charge is not proportionate to the cost of the stormwater system because the City is imposing the Stormwater Charge to finance future capital improvements before a plan for such improvements has even been made. *See* Plaintiff's motion, Exhibit D, Asset Management Plan.

In response, the City contends that the Stormwater Charge is user fee and does not violate the Headlee Amendment. As to the first *Bolt* criteria, the City maintains that the Stormwater Charge's purpose is to sustain, operate and maintain the stormwater system in order to protect real property from flooding and to ensure compliance with federal and state law concerning discharges from municipal stormwater systems. The City claims that the location and make-up of the City requires a complex system to regulate and prevent flooding of public and private property within the City for purposes of public health. *See* the City's response, Exhibit C, p. 19, Asset Management Plan.

The City further argues that it must maintain a stormwater permit in order to properly discharge stormwater to comply with the Clean Water Act and the Michigan Natural Resources and Environmental Protection Act. The City asserts that it is required to investigate and document actions to eliminate illicit discharges and/or connections to the City's stormwater system; develop a public education plan designated to encourage the public to reduce the discharge of pollutants in stormwater; and develop and implement a watershed management plan for the purpose of identifying and executing actions needed to resolve both water quality and water quantity concerns within the watershed. *See* the City's response, Exhibit D, p. 3-15, General Permit. The City further contends that the Stormwater Charge serves a regulatory purpose since the City must regularly inspect the stormwater system, clean and repair catch basins and storm sewers, perform street sweeping and inspect and eliminate illicit discharge connections. *See* the City's response, Exhibit E, NPDES Storm Water 2015-2017 Progress Report.

In regards to the second criteria of *Bolt*, the City avers that the Stormwater Charge is proportionate to the cost of the stormwater system. First, the City contends that the owners of real property are charged the Stormwater Charge based on the amount of stormwater and rate of flow of stormwater entering the stormwater system from the property. *See* the City's response, Exhibit H, p. 5, the Report. The City further argues that the flat rate charged to residential property owners pursuant to the stormwater utility ordinance was based on a study of typical residential lots within the City with varying frontage and an average area that is covered by a house, driveway and other obstacles to stormwater penetration. *Id.* The City states that City personnel undertook a detailed estimate of the number of flat rate customers and performed impervious/pervious area measurements for all properties requiring individual measurements. *Id.* at p. 5-6.

Additionally, in support of its argument that the Stormwater Charge is proportionate to the cost of the service, the City avers that maintaining a positive balance is necessary for emergency repairs, replacement reserve of the system, the probability of failure, and the consequence of failure of the various components of the stormwater system. *See* Plaintiff's response, Exhibit C, p. 4, 8, Asset Management Plan. Further, in order for the City to maintain the level of service of the stormwater it will need an estimated $20,905,000 over the next 5 to 20 year period. *Id.* at p. 29. The projected cost for the most critical stormwater assets needing rehabilitation and repair over the next 5 years will cost an estimated $7,702,000. *Id.* at p. 30. The AMP further concludes that the City would need to spend an estimated $2,417,400 annually for its capital improvement plan in order to ensure the stormwater system continues to operate at the desired level of service. *Id.* at p. 31. In fact, the City contends, that the revenue derived from the Stormwater Charge will be insufficient to maintain the level of service for the current and future use of the stormwater system. *Id.*

Based on the above, the Court finds that the City has failed to provide any evidence that differentiates this case from *Jackson*. First, both *Jackson* and *Bolt* specifically rejected the City's argument that the Stormwater Charge is justified because the storm drain system is necessary in order to regulate and prevent flooding of public and private property and to ensure compliance with federal and state laws. The *Jackson* Court held that: "these concerns…benefit not only the property owners subject to the management charge, but also everyone in the city in roughly equal measure, as well as everyone who operates a motor vehicle on a Jackson city street or roadway across the city bridge…" *Jackson*, 302 Mich App at 108-109; *Bolt*, 459 Mich at 166. The Jackson Court went on to hold that "[t]his lack of correspondence between the management charge and a

particularized benefit conferred to the parcels support our conclusion that the management charge is a tax. *Id.*

Further, the Court finds that the Stormwater Charge is not proportionate to the cost of the service and is mandatory. The Court is convinced that the property owners paying the Stormwater Charge do not receive any particularized benefit that is not conferred on the general public. The Court is also convinced that the Stormwater Charge generates a profit for the city, and is therefore revenue raising. Lastly, the AMP specifically recommends that the revenue from the Stormwater Charge be used for a 5-10 year capital improvement plan. Thus, the Court finds that the Stormwater Charge is a tax, rather than a user fee. Therefore, since the Stormwater Charge was not approved by the majority of qualified electors of the City, the Stormwater Charge is in violation of the Headlee Amendment.

Applicability of the Headlee Amendement

The City claims that the Stormwater Charge is exempt from Headlee analysis because it was authorized by its charter prior to the ratification of the Headlee Amendment. The City states that its charter became effective on January 15, 1951, over twenty-seven years prior to the ratification of the Headlee Amendment. The City avers that section 13.4 of its charter authorizes it to fix and collect charges for sewage disposal services, which includes the Stormwater Charge. The City relies on the language of section 13.1 of its charter to argue that sewage disposal services includes stormwater management. Additionally, the City provides the definition of "sewage" as "the matter carried off by sewers or drains." *Webster's New World College Dictionary* (4th ed). The City contends that since stormwater is carried off by sewers and drains it is part of its sewage disposal services.

In response, Plaintiff argues that the City's 1951 charter does not authorize the Stormwater Charge. First, Plaintiff contends that the City's charter makes a distinction between "drains" and "sewers" and "stormwater" and "sanitary sewage" in section 10.331. Second, Plaintiff contends that the definitions contained in section 20.020 of the City's charter create a distinction between the "drainage system" and the "sewer system". Plaintiff argues that the only drainage water that is included in the definition of sewage is drainage water that unintentionally gets into the City's sanitary sewer system. Lastly, Plaintiff argues that the City's charter also differentiates between charges for "sewage disposal service provided by the wastewater system (section 25.060) and "stormwater service charges" "for the use of a stormwater system" (section 25.112). Plaintiff relies on the following definitions as set forth in the section 25.020 of the City's charter:

> Combination Sewer or Combined Sewer shall mean a sewer receiving both surface runoff and sewage.
>
> Drain or Storm Drain shall mean a watercourse, ditch, drainage swale, or pipe intended for the conveyance of a drainagewater.
>
> Drainage System shall mean any part, or all, of the property, structures, equipment, drains, watercourses, materials, and appurtenances used in conjunction with the collection and disposal of drainagewater.
>
> Drainagewater shall mean storm water, subsurface ground water, melting snow or ice, roof and/or other surface water runoff. (amend. ord. eff. May 1, 2015)
>
> Wastewater or Sewage shall mean spend water which may be in combination of the liquid and water-carried wastes from residences, commercial buildings, industrial plants, institutions, or other uses, including drainage water inadvertently present in said waste.

The Court is convinced that the City's charter makes a clear distinction between drainage water and sewage in sections 10.331, 25.020, and sections 25.060 and 25.112. The Court is further convinced that the City's charter also clearly states that the only drainage water that is included in wastewater and sewage is that which is inadvertently present. Therefore, the Court finds that

Headleee analysis is appropriate because the City's charter did not authorize the Stormwater Charge prior to the ratification of the Headlee Amendment and must grant summary disposition as to count I – violation of the Headlee Amendment.

Violation of MCL 141.91- Assumpsit for Money had and Received & Unjust Enrichment

Plaintiff avers that the Stormwater Charge is a tax, is not an ad valorem tax and was not being imposed by the City on January 1, 1964. Therefore, Plaintiff argues, the Stormwater Charge is in violation of MCL 141.91. In response, the City argues that it has not violated MCL 141.91 because the Stormwater Charge is not a tax.

MCL 141.91, provides:

> "Except as otherwise provided by law and not withstanding 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."

However, the Court finds that neither Plaintiff nor the City fully briefed the issue of assumpsit for money had and received or unjust enrichment. Therefore, the Court must deny summary disposition as to count II and count III.

Statute of Limitations

The City argues that Plaintiff's individual claim for refund prior to August 15, 2016 and his claim for refund on behalf of members of a purported class prior to June 6, 2017 are barred by the statute of limitations. The City relies on *Taxpayers Allied for Constitutional Taxation (TACT) v Wayne County*, 450 Mich 119 (1995). Per *TACT*, when an individual plaintiff brings a Headlee Amendment claim, the cause of action accrued on the date the tax is due. *Id.* at 124. However, when a representative plaintiff acting on behalf of the public, the one-year statute of limitations, provided in MCL 600.308a, begins running at the time the alleged tax was enacted by the local unit of government. *Id.* at n 7. The City also contends that the one year statute of limitations

applicable to the Headlee claim should also apply to Plaintiff's assumpsit claims contained in count II and count III of the amended complaint.

In response, Plaintiff contends that his Headlee Amendment claim properly seeks refunds for overcharges billed to him individually and the class after August 15, 2016. Plaintiff further asserts that his assumpsit claims are subject to a six-year statute of limitations and he therefore properly seeks refunds for Stormwater Charges billed to him individually and the class after August 15, 2010. Plaintiff argues that this case is differentiated from *TACT* because this certified class action is not brought on behalf of the "public." Lastly, Plaintiff asserts that his assumpsit claims are separate and independent causes of actions from his Headlee Amendment claim.

Here, the Court finds that Plaintiff brought this action on behalf of himself and on behalf of a certified class, rather than as a member of the public. Plaintiff is a taxpayer and also a representative of other taxpayers in the City, unlike the plaintiff is *TACT*. Therefore, the Court finds that Plaintiff properly seeks a refund one year back from the filing of this case on his Headlee Amendment claim. The Court is also convinced that Plaintiff's assumpsit claims are separate and independent from his Headlee Amendment claim. Therefore, the Court finds that Plaintiff properly seeks a refund for six years back from the filing of this case on his assumpsit claims.

Conclusion

For the reasons stated above, Plaintiff's motion for summary disposition is GRANTED as to count I- violation of the Headlee Amendment, and DENIED as to count II – assumpsit for money had and received, violation of MCL 141.19, and count III – unjust enrichment, violation of MCL 141.19. Defendant's motion for summary disposition is DENIED. Until all matters are resolved, this case remains OPEN. MCR. 2.602(A)(3). IT IS SO ORDERED.

DATED:

JENNIFER FAUNCE
CIRCUIT JUDGE

OCT 18 2018

A TRUE COPY
COUNTY CLERK
BY: Court Clerk

Jennifer M. Faunce
Circuit Judge

cc: Gregory D. Hanley, Attorney for Plaintiff
Randall S. Toma, Attorney for Plaintiff
Richard Albright, Attorney for Defendant
Ronald A. King, Attorney for Defendant

EXHIBIT - 6

STATE OF MICHIGAN

COURT OF APPEALS

NICOLA BINNS, JAYNE CARVER, SUSAN MCDONALD, GOAT YARD, LLC, and END OF THE ROAD MINISTRIES, LLC,

Plaintiffs,

v

CITY OF DETROIT, CITY OF DETROIT WATER AND SEWAGE DEPARTMENT, DETROIT BOARD OF WATER COMMISSIONERS, and GREAT LAKES WATER AUTHORITY,

Defendants.

UNPUBLISHED
November 6, 2018

No. 337609
Original Action
(Headlee Amendment)

DETROIT ALLIANCE AGAINST THE RAIN TAX, DETROIT IRON & METAL COMPANY, AMERICAN IRON & METAL COMPANY, MCNICHOLS SCRAP IRON & METAL COMPANY, MONIER KHALIL LIVING TRUST, and BAGLEY PROPERTIES, LLC,

Plaintiffs,

v

CITY OF DETROIT, DETROIT WATER AND SEWAGE DEPARTMENT, and DETROIT BOARD OF WATER COMMISSIONERS,

Defendants.

No. 339176
Original Action
(Headlee Amendment)

Before: RIORDAN, P.J., and MURPHY and BOONSTRA, JJ.

PER CURIAM.

In Docket No. 337609, plaintiffs, Nicola Binns, Jayne Carver, Susan McDonald, Goat Yard, LLC, and End of the Road Ministries, LLC (referred to collectively as the Binns plaintiffs), filed this original action under Const 1963, art 9, §§ 25-34, popularly known as the Headlee Amendment.[1] In Docket No. 339176, plaintiffs, Detroit Alliance Against the Rain Tax (DAART), Detroit Iron & Metal Company, American Iron & Metal Company, McNichols Scrap Iron & Metal Company, the Monier Khalil Living Trust, and Bagley Properties, LLC (referred to collectively as the DAART plaintiffs),[2] likewise filed an original action under the Headlee Amendment. This Court consolidated these original actions. *Detroit Alliance Against the Rain Tax v Detroit*, unpublished order of the Court of Appeals, entered October 24, 2017 (Docket No. 339176). In accordance with MCR 7.206(E)(3)(b), we now deny plaintiffs' requests for relief.

I. FACTUAL AND PROCEDURAL HISTORY

In both cases, plaintiffs,[3] all of whom are property owners in the city of Detroit or, in the case of DAART, an unincorporated voluntary association of property owners in the city of Detroit, allege that a drainage charge assessed by the city of Detroit and its agencies, the Detroit Water and Sewage Department (DWSD) and the Detroit Board of Water Commissioners (BWC)

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[1] The Headlee Amendment "grants this Court original jurisdiction to hear and decide Headlee Amendment claims[.]" *City of Riverview v Michigan*, 292 Mich App 516, 520; 808 NW2d 532 (2011); see also Const 1963, art 9, § 32 ("Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article . . . ."); MCL 600.308a(1) ("An action under section 32 of article 9 of the state constitution of 1963 may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action.").

[2] The original plaintiffs other than DAART in Docket No. 339176 were Galilee Missionary Baptist Church, Danto Furniture Company, Central Avenue Auto Parts, and Judith Sale, but pursuant to a stipulation of the parties, those plaintiffs were dismissed, and the other plaintiffs identified above were substituted into the case "as DAART Representative and Named Plaintiffs in place of the dismissed parties." *Detroit Alliance Against the Rain Tax v Detroit*, unpublished order of the Court of Appeals, entered March 27, 2018 (Docket No. 339176). We also note that on May 31, 2018, a stipulation was filed in the DAART case to add Belmont Shopping Center, LLC, as an additional representative plaintiff. We deny this request as moot in light of our conclusion in this opinion that plaintiffs are not entitled to relief in these cases. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("As a general rule, an appellate court will not decide moot issues. A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights. An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief.") (citations omitted).

[3] We will use the general term "plaintiffs" when referring collectively to both the Binns plaintiffs and the DAART plaintiffs.

(referred to collectively as the Detroit defendants),[4] constitutes a tax for which voter approval has not been obtained as required by the Headlee Amendment. In each case, the Detroit defendants seek dismissal or a judgment in their favor on multiple grounds, including: this Court lacks subject-matter jurisdiction because plaintiffs' actions are preempted by federal regulations; plaintiffs have failed to state a claim because the drainage charge was preauthorized by the Detroit Charter and is thus exempt from the strictures of the Headlee Amendment; and the drainage charge constitutes a user fee, rather than a tax, and is thus not subject to the Headlee Amendment.

The pertinent facts concerning the Detroit drainage charge are derived by the parties largely from documents published by the Detroit defendants. As with many older cities, Detroit has a combined sewer system, meaning that storm water runoff flows into the same pipes as unsanitary wastewater, i.e., sewage. Every year, billions of gallons of storm water flow into Detroit's combined sewer system from impervious surfaces, i.e., hard surfaces that limit the ability of storm water to soak into the ground. Impervious surfaces include roofs, driveways, parking lots, and compacted gravel and soil. This storm water is contaminated with dirt and debris. The combined sewage is treated at Detroit's wastewater treatment plant (WTP) and combined sewer overflow (CSO) facilities before being released back into the environment. Federal and state regulations have required the DWSD to invest more than $1 billion in CSO control facilities in order to prevent untreated CSOs from spilling into Michigan waterways. The DWSD has instituted drainage charges that pay for capital, operations, and maintenance costs for the WTP, CSO control facilities, and combined sewer system components.[5]

As of January 2016, the DWSD no longer provides services to wholesale suburban customers; that function is now performed by defendant, the Great Lakes Water Authority (GLWA). The GLWA is a regional water, sewer, and storm water authority established through a September 9, 2014 memorandum of understanding (MOU) executed between the city of Detroit, Oakland County, Wayne County, Macomb County, and the state of Michigan, pursuant to 1955 PA 233. *United States v Detroit*, unpublished order of the United States District Court for the Eastern District of Michigan, entered December 15, 2015 (Docket No. 77-71100), p 1. Under the MOU, the GLWA operates, controls, and improves the regional water and sewage assets owned by the city of Detroit – which were previously operated by the DWSD – under lease agreements for an initial term of 40 years, and the city of Detroit continues to manage and operate its own local water and sewer infrastructure. *Id*. at 1-2. In short, the city of Detroit and its agencies continue to manage the supply of water, drainage, and sewage services to retail customers of the city of Detroit. *Id*. at 4. Pursuant to a December 15, 2015 order entered in a

[4] The city of Detroit is a municipal corporation that, through the DWSD, provides water, sewer, and drainage services to its customers. The BWC is a seven-member board whose members are appointed by the Detroit Mayor; the BWC oversees the DWSD.

[5] There is no plan to separate Detroit's sewer system. The DWSD explains: "Detroit's combined sewer system includes nearly 3,000 miles of sewer collection piping. The costs to effectively separate the sewer system would be highly cost prohibitive. While selective sewer separation may be an option in some parts of the City, widespread implementation is not anticipated."

decades-old federal lawsuit concerning efforts to ensure the city of Detroit's compliance with federal requirements pertaining to its combined sewer system,[6] the city of Detroit's BWC must establish retail rates for the city's water, drainage, and sewer services, in order to satisfy revenue requirements established by the GLWA for water, sewer, and drainage services in addition to the expenses of operating the city of Detroit's local water and sewer infrastructure. *Id*. The city of Detroit is authorized by the federal district court's order to continue or modify its customary practices regarding the establishment of rates for water, sewage, and drainage charges. *Id*. The federal district court's order further provides, in part:

> The [BWC] shall continue to exercise its existing authority under the City Charter to assess drainage fees, charges, or assessments to the users of the City's local water and combined sewer and drainage infrastructure because these charges are necessary and critical to ensure that the City is able to comply with (i) its regulatory requirements under NPDES [National Pollutant Discharge Elimination System[7]] Permit No. MI0022802 to treat and dispose of the City's combined sewage overflows and (ii) its obligations under the Clean Water Act. The City may set these drainage charges based, in part, on the impervious area of each parcel of land assessed a drainage charge, or on some other legally acceptable method for assessing the charge, in order to provide each user with a transparent and equitable method for calculating the drainage charge associated with managing, operating and improving the combined sewer and drainage infrastructure respectively allocable to each user. [*Id*. at 5-6.]

DWSD customers have been paying some form of a drainage charge as part of their water and sewer bills since 1975. Effective beginning in October 2016, the DWSD revised or updated its method of calculating the drainage charge for property owners in Detroit.[8] On the basis of flyover views and aerial photography conducted in 2015 to determine impervious areas, as well as city assessor data, the DWSD identified 22,000 parcels that had not previously been charged for drainage, including parcels that did not have a water account and thus were not in the DWSD billing system. The DWSD determined that these parcels, except those owned by faith-based institutions, would be charged $750 per impervious acre beginning in October 2016.[9] All customers would be charged on the basis of impervious surface area by 2018. In particular, the new impervious surface rate would apply to industrial properties beginning in January 2017, commercial properties in April 2017, tax-exempt properties (other than faith-based) in June 2017, residential properties in October 2017, and faith-based properties in January 2018.

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[6] Some of the procedural history concerning this federal litigation, which commenced in 1977, is recounted in *Detroit v Michigan*, 803 F2d 1411, 1412-1413 (CA 6, 1986).

[7] The NPDES is "a federal permit program designed to regulate the discharge of polluting effluents." *Int'l Paper Co v Ouellette*, 479 US 481, 489; 107 S Ct 805; 93 L Ed 2d 883 (1987).

[8] Detroit ordinances set forth the authority of the Detroit defendants to levy such charges. See Detroit Ordinances, §§ 56-3-2 and 56-3-12.

[9] This amount was later lowered in varying degrees as part of a phase-in plan discussed later.

Transition credits would apply for two fiscal years. The DWSD adopted its phased-in approach to the updated drainage charge in order to afford customers time to prepare for the new rate and to avoid overwhelming the DWSD billing system. The DWSD has asserted that it possesses various options if a customer refuses to pay the drainage charge, including termination of water service for the property, the imposition of a lien on the property, a legal action to recover unpaid fees, and the suspension or revocation of a license to do business in the city of Detroit.

No drainage charge will be imposed for parcels containing fewer than .02 impervious acres because that is the margin of error from flyover views. Further, if a property owner verifies that storm water runoff flows directly into the Detroit River or the Rouge River and that the parcel is disconnected from the DWSD system, there is no charge. The DWSD provides procedures whereby customers may dispute the measurement of the impervious acreage for a parcel or may seek an adjustment in billing on the basis of a modification to the impervious surface area or the direct discharge of surface waters to one of the above-mentioned rivers. The DWSD provided the following explanation in a publication: "By simply reducing the impervious cover on a property, customers reduce the amount of storm water leaving their property and thus reduce their drainage charge. Examples of impervious cover reduction include removal of asphalt or concrete parking spaces and replacing the impervious cover." The DWSD also permits drainage credits of up to 80% for customers who use green infrastructure systems or practices that reduce the amount of storm water flowing from the property into the DWSD's combined sewer system. "Green infrastructure examples include disconnecting downspouts, rain gardens, bioretention practices, installing permeable pavement, green roof designs, detention and subsurface detention and other practices that manage storm water volume."

The DWSD indicated that its drainage revenue requirement would exceed $151 million for fiscal year 2017, including more than $125 million in operation and implementation costs as well as drainage credits. The DWSD's expense for debt service is $59.8 million; this expense is comprised essentially of a GLWA-held mortgage payment for facilities that are in place to address wet weather flows. The DWSD notes that "[t]his debt service expense relates to both municipal bond issues and to state revolving fund loans." Bad debt in the form of uncollectible bills must be recovered from the DWSD's other remaining customers. In compliance with federal Environmental Protection Agency (EPA) regulations to prevent excessive pollution into waterways, the DWSD invested more than $1 billion in CSO control facilities. "The cost was financed almost entirely through bonds which are being repaid by the drainage fee. Direct CSO costs have two components: $25.7 million for annual CSO bond debt, and $6.2 million in annual operating costs specific to the control facilities." The DWSD expects the rate of the drainage charge to decrease by 32% through fiscal year 2019.

The DWSD does not charge the city of Detroit itself a drainage fee for storm water flowing from city streets into the combined sewer system. The DWSD explains: "City streets, which are lower than parcels, are part of the conveyance infrastructure for facilitating the flow of storm water from Detroit properties into the catch basins, then into the combined sewer system, and then finally terminating at the [WTP]." However, "[c]ity owned parcels will not be characterized as conveyance. This term only applies to city streets, i.e., areas common to all that serve as storm water conveyance."

Effective in April 2017, and applied retroactively to October 2016, the DWSD has revised its drainage charge policy to provide transition credits for properties that were not previously billed for drainage services or that were previously billed on the basis of meter size and are now converted to the drainage rate based on impervious area. Under this revised policy, full implementation of the uniform impervious area based drainage charge is to be phased in over five years. Further, residential parcels received an automatic credit of 25% to reflect the flow characteristics of such parcels. The DWSD also indicated that it would provide a property owner with up to 50% of the cost, with a maximum payment of $50,000, for eligible green storm water infrastructure measures installed and maintained by the property owner.

In Docket No. 337609, the Binns plaintiffs commenced this original action under the Headlee Amendment by filing a complaint on March 27, 2017, and filed a first amended complaint one day later. The Binns plaintiffs asserted that the Detroit drainage charge constitutes a disguised tax for which voter approval has not been obtained as purportedly required by the Headlee Amendment. The Binns plaintiffs requested "declaratory relief that the 'drainage charge' is a tax, injunctive relief to stop the unconstitutional collection of this tax, and monetary relief in the form of return of tax payments, costs, and attorney fees." The Binns plaintiffs sought to pursue this action as representatives of a proposed class consisting of all persons who have been charged the drainage fee and who own property in Detroit.

On May 2, 2017, the Detroit defendants filed an answer and affirmative defenses to the Binns plaintiffs' complaint. The Detroit defendants sought dismissal of the complaint, a finding of no cause of action, or denial of the Binns plaintiffs' requested relief. The Detroit defendants asserted numerous affirmative defenses, including: this Court lacks subject-matter jurisdiction because the Binns plaintiffs' claims are preempted by federal law, regulations, or orders mandating assessment of the drainage charge; the Binns plaintiffs have failed to state a claim because the drainage charge was authorized by the Detroit Charter before the Headlee Amendment was ratified such that voter approval is not required under the Headlee Amendment; the Binns plaintiffs' claims are barred by the Revenue Bond Act of 1933, MCL 141.101 *et seq*.; and the drainage charge constitutes a valid user fee, rather than a tax that is subject to the Headlee Amendment.

On May 3, 2017, the Binns plaintiffs filed a motion for a preliminary injunction to preclude assessment or enforcement of the drainage charge until it is approved by voters. The Detroit defendants filed an answer opposing the Binns plaintiffs' motion for a preliminary injunction. On June 20, 2017, this Court entered an order denying the Binns plaintiffs' motion for a preliminary injunction. *Binns v Detroit*, unpublished order of the Court of Appeals, entered June 20, 2017 (Docket No. 337609).

On June 26, 2017, the Binns plaintiffs filed a motion for class certification. On June 29, 2017, the Detroit defendants filed a motion seeking permission to extend the due date for responding to the Binns plaintiffs' motion for class certification to 90 days after this Court rules on the Detroit defendants' request for peremptory dismissal of plaintiffs' claim; the Detroit defendants asserted that the Binns plaintiffs' motion for class certification was premature because the Detroit defendants' request for peremptory dismissal of plaintiffs' complaint on multiple grounds was still pending and because discovery had not yet occurred in this case. The Binns plaintiffs filed an answer to the Detroit defendants' motion for extension of the due date

for responding to the Binns plaintiffs' motion for class certification; the Binns plaintiffs noted that there was no properly filed motion to dismiss pending and that the Detroit defendants had not requested discovery when the Binns plaintiffs filed the class certification motion.

On August 4, 2017, the Binns plaintiffs filed a request for entry of default against the GLWA, which had been named as a defendant in the Binns plaintiffs' action but had not yet filed a pleading or otherwise asserted a defense. On August 10, 2017, an attorney filed a notice of appearance on behalf of the GLWA. On the same date, the GLWA filed a motion to strike or set aside the request for default and for leave to answer or otherwise respond to the Binns plaintiffs' first amended complaint. The GLWA stated that it had not been served with the Binns plaintiffs' original complaint and that no proof of service had been filed regarding the first amended complaint, although the GLWA acknowledged that the first amended complaint had been delivered to the offices of the GLWA on June 26, 2017, and that a courtesy copy of the first amended complaint had been previously provided to the GLWA sometime in the spring of 2017. The GLWA stated that the request for default was not notarized or supported by affidavit. The GLWA has not received any notice that the Clerk of this Court has entered a default, and the Binns plaintiffs have not moved for the entry of a default judgment. Further, the GLWA stated that it possesses a meritorious defense. The GLWA does not set storm water rates for properties located in Detroit, the properties owned by the Binns plaintiffs are located in Detroit, and the purported class that the Binns plaintiffs seek to represent consists of persons who own property in Detroit. The GLWA does not operate the combined sewer system in Detroit.

On August 23, 2017, this Court entered an order in the Binns plaintiffs' case stating as follows:

> The Court DIRECTS the parties to file supplemental briefs within 28 days of the date of this order addressing the following:
>
> (1) Does the pre-existing authority exemption of the Headlee Amendment, Const 1963, art 9, § 31 (no voter approval for taxes is needed if the taxes were "authorized by law or charter" when the amendment was ratified in 1978), apply in light of the fact that the City's charter had been revised/replaced twice since 1974, with the City's actual authority for levying the at-issue drainage charge deriving from the latest 2012 charter? See *Streat v Vermilya*, 268 Mich 1, 5; 255 NW 604 (1934) (stating that an adopted new charter "will entirely supersede the former charter").
>
> (2) Applying the factors articulated in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998), use documentary evidence to support your position that the drainage charge is either a tax or a fee.
>
> The motions that have been filed remain pending. [*Binns v Detroit*, unpublished order of the Court of Appeals, entered August 23, 2017 (Docket No. 337609).]

The parties subsequently filed supplemental briefs in accordance with this Court's order.

Meanwhile, on July 11, 2017, the DAART plaintiffs commenced their original action under the Headlee Amendment by filing a complaint. Like the Binns plaintiffs, the DAART plaintiffs asserted that the drainage charge constituted a tax such that the imposition of the drainage charge without the approval of the voters constituted a Headlee Amendment violation. The DAART plaintiffs requested certification as a class action. The DAART plaintiffs asked for a declaration that the drainage charge is a tax that is void because it has not been approved by voters as required by the Headlee Amendment, a refund of all drainage charges collected since October 1, 2016, the dissolution of any DWSD liens against properties for an owner's failure to pay the drainage charge, and an award of costs and attorney fees.[10]

On August 29, 2017, the Detroit defendants filed an answer and affirmative defenses in the DAART case. The Detroit defendants requested peremptory dismissal of the complaint or a finding of no cause of action. The Detroit defendants asserted the same pertinent affirmative defenses as summarized above in connection with the Binns case.

On September 28, 2017, the DAART plaintiffs filed a motion to consolidate the DAART case with the Binns case. On October 5, 2017, the Detroit defendants filed a response indicating that they did not oppose consolidation in general but suggesting that the DAART plaintiffs had improperly delayed seeking consolidation until after the submission of supplemental briefs in the Binns case in order to obtain an unfair advantage in briefing. On October 24, 2017, this Court entered an order granting the motion to consolidate and directing the parties to file supplemental briefs addressing the questions set forth in this Court's August 23, 2017 order in the Binns case. *Detroit Alliance Against the Rain Tax v Detroit*, unpublished order of the Court of Appeals, entered October 24, 2017 (Docket No. 339176). The parties in the DAART case filed supplemental briefs in accordance with this Court's order.

Meanwhile, on October 9, 2017, the DAART plaintiffs filed a motion for class certification. On October 16, 2017, the Detroit defendants filed a motion for an extension of time to respond to the DAART plaintiffs' class certification motion, for essentially the same reasons they sought such an extension in the Binns case.

On January 5, 2018, a motion for leave to file an amici-curiae brief was filed by entities that own commercial property in Detroit; those entities are Trappers Properties, LLC, Atheneum Hotel Corporation, Helicon Development, LLC, Pegasus Greektown, LLC, PF Investments, LLC, and Foreman Properties, LLC. On February 13, 2018, this Court granted the motion for leave to file an amici-curiae brief. *Detroit Alliance Against the Rain Tax v Detroit*, unpublished order of the Court of Appeals, entered February 13, 2018 (Docket No. 339176). The amici-curiae brief was subsequently filed in this Court. The Detroit defendants and the DAART plaintiffs filed briefs responding to the amici-curiae brief.[11]

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[10] The DAART plaintiffs sued only the Detroit defendants; the GLWA was not named as a defendant in the DAART plaintiffs' action.

[11] Amici curiae filed a motion for leave to participate in oral argument. That motion is denied as moot in light of our disposition of these cases without oral argument pursuant to MCR

II. WHETHER THE DRAINAGE CHARGE IS A USER FEE OR A TAX

Plaintiffs argue that the drainage charge constitutes a tax that is subject to the Headlee Amendment, while the Detroit defendants contend that the drainage charge constitutes a valid user fee that is not subject to the Headlee Amendment. We agree with the Detroit defendants.

Whether the drainage charge constitutes a tax or a user fee is a question of law that this Court reviews de novo. *Bolt*, 459 Mich at 158. Plaintiffs have the burden of establishing the unconstitutionality of the drainage charge. *Jackson Co v City of Jackson*, 302 Mich App 90, 98; 836 NW2d 903 (2013).

We are deciding these cases without oral argument pursuant to MCR 7.206(E)(3)(b). Referral to a judicial circuit pursuant to MCR 7.206(E)(3)(d) for discovery or fact-finding is not necessary in these cases. As explained earlier, this Court's order directing supplemental briefing instructed the parties to use documentary evidence to support their respective positions regarding whether the drainage charge is a tax or a user fee. The parties thereafter filed supplemental briefs, and plaintiffs in both cases submitted extensive documentary evidence. Plaintiffs in neither case have suggested that there is a need for referral to a judicial circuit for discovery or fact-finding proceedings. In fact, the DAART plaintiffs have specifically stated that the case can be decided as a matter of law on the basis of the factual background provided by the pleadings, briefs, and exhibits submitted to this Court, without referral to a judicial circuit for discovery. We conclude that the record is sufficiently complete for this Court to rule as a matter of law.

The relevant provision of the Headlee Amendment, Const 1963, art 9, § 31, states as follows:

> 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. . . .

"An application of § 31 is triggered by the levying of a tax." *Jackson Co*, 302 Mich App at 98, citing *Bolt*, 459 Mich at 158-159. The levying of a new tax without voter approval violates § 31. *Jackson Co*, 302 Mich App at 99, citing *Bolt*, 459 Mich at 158. However, a charge that constitutes a user fee is not subject to the Headlee Amendment. *Jackson Co*, 302 Mich App at 99, citing *Bolt*, 459 Mich at 159.

"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 the service or benefit. A tax, on the other hand, is designed to

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7.206(E)(3)(b). See generally, *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

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).

In *Bolt*, 459 Mich at 154, our Supreme Court held that the city of Lansing's storm water service charge was a tax for which voter approval was required under the Headlee Amendment, and because the city of Lansing did not obtain voter approval, the storm water service charge was unconstitutional and thus void. The pertinent facts of *Bolt* are as follows. The city of Lansing decided to separate the remaining portion of its combined sanitary and storm sewer systems; approximately 75% of the property owners were already served by a separated storm and sewer system. *Id*. at 154-155, 155 n 3. The cost of this project was $176 million over 30 years. *Id*. at 155. In order to fund the storm water share of this project, the city of Lansing created a storm water enterprise fund and imposed the storm water service charge on each parcel of real property, using a formula to estimate each parcel's storm water runoff. *Id*. The storm water enterprise fund replaced funding previously provided "by general fund revenues secured through property and income taxes." *Id*. at 155 n 4. Estimated storm water runoff was calculated by equivalent hydraulic area (EHA), which was based on "the amount of pervious and impervious areas within the parcel multiplied by the runoff factors applicable to each." *Id*. at 155-156. However, a flat rate was charged for residential parcels of two acres or less. *Id*. at 156.

Our Supreme Court noted in *Bolt* that approximately 63% of the cost of the project was for capital expenditures. *Id*. at 163. "This constitutes an investment in infrastructure as opposed to a fee designed simply to defray the costs of a regulatory activity." *Id*. Our Supreme Court quoted with approval the analysis of the dissenting Court of Appeals judge on that point:

> No effort has been made to allocate even that portion of the capital costs that will have a useful life in excess of thirty years to the general fund. This is 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. Accordingly, the "fee" is not structured to simply defray the costs of a "regulatory" activity, but rather to fund a public improvement designed to provide a long-term benefit to the city and all its citizens. The revenue to be derived from the charge is clearly in excess of the direct and indirect costs of actually using the storm water system over the next thirty years and, being thus disproportionate to the costs of the services provided and the benefits rendered, constitutes a tax.
>
> I do not believe that the capital investment component of a true fee may be designed to amortize such an expense, and to enable the city to fully recoup its investment, in a period significantly shorter than the actual useful service life of the particular public improvement. This fundamental principle of basic

> accountancy guides public utility regulators, as well as tax assessors. It ought to apply equally here.
>
> This is not to say that a city can never implement a storm water or sewer charge without running afoul of art 9, § 31. A proper fee must reflect the bestowal of a corresponding benefit on the person paying the charge, which benefit is not generally shared by other members of society. Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component, sewerage may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax. [*Id*. at 163-165 (brackets and citations omitted).]

Our Supreme Court in *Bolt* further stated that the first two factors for determining whether a charge constitutes a user fee were not satisfied because "the charges imposed do not correspond to the benefits conferred." *Id*. at 165. The Court noted that approximately 75% "of the property owners in the city were already served by a separated storm and sanitary sewer system." *Id*. Many of those property owners had already "paid for such separation through special assessments." *Id*. Yet they were "charged the same amount for storm water service as the [25%] of the property owners who will enjoy the full benefits of the new construction." *Id*. "The appeal process and available credits do not make the charge proportionate to the necessary costs of the service because there is no credit for the [75%] of the property owners who are already served by a separated sewer system." *Id*. at 165 n 15. "[T]he charge applies to all property owners, rather than only to those who actually benefit. A true 'fee,' however, 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. In short, "the lack of correspondence between the charges and the benefit conferred demonstrates that the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public." *Id*. at 166. This conclusion was buttressed by the fact that the acknowledged goal of the storm water service charge was to address environmental concerns regarding water quality. *Id*.

Further supporting the conclusion in *Bolt* that the first two factors were not satisfied was the absence of a significant element of regulation. *Id*. Only the amount of rainfall shed from a parcel as surface runoff was regulated; there was no consideration of "the presence of pollutants on each parcel that contaminate such runoff and contribute to the need for treatment before discharge into navigable waters." *Id*. at 166-167. Nor was there any effort "to distinguish between those responsible for greater and lesser levels of runoff[,]" and street rights of way were excluded from the charge. *Id*. at 167. "Moreover, there is no end-of-pipe treatment for the storm water runoff. Rather, the storm water is discharged into the river untreated." *Id*.

The third factor – voluntariness – was also unsatisfied in *Bolt*. *Id*. A tax is compulsory by law, whereas user fees are compulsory only "for those who use the service, have the ability to choose how much of the service to use, and whether to use it at all." *Id*. (quotation marks and citation omitted). The charge in *Bolt* was "effectively compulsory. 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 167-168. Suggesting that a property owner may control the amount of the charge by building less on the property is not "a legitimate method for controlling the amount of the fee

because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property." *Id*. at 168.

Finally, the *Bolt* Court noted additional factors that were not dispositive but that further supported the conclusion that the storm water service charge was a tax. *Id*. The storm water enterprise fund replaced a portion of a program that was previously funded by general fund revenues from income and property taxes. *Id*. Also, a lien could be placed on property for failing to pay the storm water service charge. *Id*. "While ordinarily the fact that a lien may be imposed does not transform an otherwise proper fee into a tax, this fact buttresses the conclusion that the charge is a tax in the present case, where the charges imposed are disproportionate to the costs of operating the system and to the value of the benefit conferred, and the charge lacks an element of volition." *Id*. That the storm water charge was billed through the city assessor's office and the bill was sent with property tax statements was also significant. *Id*. at 168-169.

This Court applied the *Bolt* test to a similar storm water charge in *Jackson Co*. In *Jackson Co*, 302 Mich App at 93, the city of Jackson "created a storm water utility and imposed a storm water management charge on all property owners within the city to generate revenue to pay for the services provided by the utility, which include, among others, street sweeping, catch basin cleaning, and leaf pickup and mulching." In so doing, the city of Jackson "shift[ed] the method of funding certain preexisting government activities from tax revenues to a utility charge[.]" *Id*. This Court held that "the city's storm water management charge is a tax, the imposition of which violates the Headlee Amendment because the city did not submit [the ordinance creating the charge] to a vote of the qualified electors of the city." *Id*.

The pertinent facts of *Jackson Co* are as follows. The city of Jackson maintained separate storm water and waste water systems. *Id*. at 94. The city of Jackson historically funded the operation of the storm water management system through general and street funds, including ad valorem property taxes, gasoline taxes, and vehicle registration fees. *Id*. In 2011, however, the city of Jackson adopted an ordinance funding the storm water management program through a storm water management charge imposed on each parcel of real property in the city. *Id*. at 95. The charge was computed through a formula developed to roughly estimate the amount of storm water runoff from each parcel. *Id*. In particular, the EHA was used to estimate the amount of storm water running off each parcel on the basis of the impervious and pervious surface areas of each parcel. *Id*. at 95-96. For residential parcels of two acres or less, a flat rate was used in lieu of individual measurements. *Id*. at 96. A property owner could receive credits for actions taken to reduce storm water runoff. *Id*. at 97. An administrative appeal was available to challenge the estimate of impervious area or the amount of credit awarded against the charge. *Id*.

Applying the *Bolt* factors, this Court in *Jackson Co* stated that the storm water charge served dual purposes. *Id*. at 105. A regulatory purpose was furthered by financing the protection of local waterways from solid pollutants carried in storm water discharged from properties, and a general revenue-raising purpose was served by shifting the funding of preexisting government activities from declining general and street fund revenues to a storm water charge. *Id*. "This latter method of revenue generation raises revenue for general public purposes by augmenting the city's general and street funds in an amount equal to the revenue previously used to fund the activities . . . now . . . assigned to the storm water utility." *Id*. at 106. This Court concluded that "the minimal regulatory purpose served by the ordinance and the related management charge is

convincingly outweighed by the revenue-raising purpose of the ordinance." *Id*. The ordinance "contain[ed] few provisions of regulation and no provisions that truly regulate the discharge of storm and surface water runoff, with the exception of the provision that allows for credits against the management charge for the use of city-approved storm water best management practices." *Id*. Like in *Bolt*, the ordinance in *Jackson Co* "fail[ed] to require either the city or the property owner to identify, monitor, and treat contaminated storm and surface water runoff and allow[ed] untreated storm water to be discharged into the Grand River." *Id*. This constituted a regulatory weakness akin to that of the city of Lansing ordinance deemed unconstitutional in *Bolt*.

Further, there was evidence in *Jackson Co* that "the desire to protect the city's general and street funds from the costs of operating and maintaining the existing storm water management system constituted the most significant motivation for adopting the ordinance and management fee." *Id*. at 106-107. The city of Jackson admitted "that budgetary pressures, including declining general fund revenue, necessitated the tapping of new sources of funding for the maintenance of the storm water system." *Id*. at 107. This Court thus concluded that there was "an overriding revenue-generating purpose that outweighs the minimal regulatory purpose of the charge and, therefore, that the charge is a tax, not a utility user fee." *Id*.

In addition, "the lack of a correspondence between the charge imposed and any particularized benefit conferred by the charge supports a conclusion that the charge is a tax and not a utility user fee." *Id*. at 108. This Court could not "identify any particularized benefit the charge confers on the property owners that is not also conferred upon the general public." *Id*. The city of Jackson indicated that the storm water charge helped to protect public health and safety, reduce the likelihood of flooding, reduce land erosion, and prevent sewer overflows. *Id*. But this Court held that addressing such concerns "benefit[s] not only the property owners subject to the management charge, but also everyone in the city in roughly equal measure, as well as" persons operating motor vehicles in the city and persons who use the Grand River downriver from the city. *Id*. at 109. "This lack of a correspondence between the management charge and a particularized benefit conferred to the parcels supports our conclusion that the management charge is a tax." *Id*.

With respect to the proportionality of the storm water charge, this Court noted that "residential parcels measuring two acres or less are charged a flat rate based on the average EHA of all single family parcels, and not on the individual measurements of each parcel's impervious and pervious areas." *Id*. at 110. Single-family residential parcels comprised 83% of the parcels within the city. *Id*. By contrast, residential parcels in excess of two acres, as well as commercial, industrial, and institutional parcels of all sizes, were charged on the basis of individual measurements of each parcel's impervious and pervious areas. *Id*.

> This method of apportioning the management charges among all urban properties emphasizes administrative convenience and ease of measurement and, thereby, suggests an absence of a close proportional relationship between the amount of runoff attributable to a particular parcel and the management charge, as does the fact that the method of calculating the charge fails to consider property characteristics relevant to runoff generation, such as a parcel's location in reference to storm gutters and drains and soil grade. This lack of proportionality is further demonstrated by the fact that the charge generates sufficient revenue to

> allow the city to maintain a working capital reserve of 25 to 30 percent of the storm water utility's total expenses. Although maintaining a capital reserve is a common practice amongst rate-based public utilities that provides a degree of fiscal stability to utilities, those reserves are funded by true user fees closely calibrated to the actual use of the service or a price paid for a commodity. The management charge at issue in these cases in not such a fee. For these reasons, the actual use of the storm water sewer system by each parcel is not accounted for with the requisite level of precision necessary to support a conclusion that the charge is proportionate to the costs of the services provided. [*Id*. at 110-111 (citation omitted).]

This Court further concluded that the storm water charge was effectively compulsory. *Id*. at 11. Although property owners could receive credits for actions taken to reduce runoff, there was no guarantee that all property owners would receive a 100% credit. *Id*. Allowing a 100% credit for all property owners would undermine the purpose of the storm water charge, which was to generate funding for the water management system. *Id*. Also, to obtain credits, property owners must pay for improvements to their respective properties. *Id*. at 111-112. "In other words, property owners have no means by which to escape the financial demands of the ordinance." *Id*. at 112. Delinquency in payment of the charge may result in discontinuation of water service, and past-due charges could be collected through the imposition of a lien and the filing of a civil action, further demonstrating an absence of volition. *Id*. The lack of volition supported the conclusion that the storm water charge was a tax. *Id*.

The application of the *Bolt* criteria to the facts of the present case leads to the conclusion that the city of Detroit's drainage charge is a user fee rather than a tax and that the charge is therefore not subject to the Headlee Amendment. With respect to the first factor, the drainage charge serves a regulatory purpose rather than a revenue-raising purpose. Again, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Bolt*, 459 Mich at 161 (quotation marks and citations omitted). Here, a service is rendered in the form of removal and treatment of storm water runoff. The present case differs from *Bolt* and *Jackson Co* in that, unlike the separated storm water and sewer systems being created and maintained respectively in *Bolt* and *Jackson Co*, the city of Detroit has a combined sewer system, meaning that storm water runoff flows into the same pipes as unsanitary wastewater, i.e., sewage, and there is no plan to separate Detroit's sewer system because it would be cost prohibitive to do so. The combined sewage is treated at Detroit's WTP and CSO facilities before being released back into the environment. Federal and state regulations have required the DWSD to invest more than $1 billion in CSO control facilities in order to prevent untreated CSOs from spilling into Michigan waterways. As noted in *Detroit v Michigan*, 803 F2d 1411, 1421 (CA 6, 1986), the city of Detroit has been legally required since 1977 to render full secondary treatment to storm water flows. The DWSD has instituted the present drainage charge to pay for capital, operations, and maintenance costs for the WTP, CSO control facilities, and combined sewer system components. Therefore, unlike in *Bolt* and *Jackson Co*, in which storm water was allowed to be released back into the environment untreated, *Bolt*, 459 Mich at 167; *Jackson Co*, 302 Mich App at 106, the DWSD provides full treatment to the combined sewage comprised of storm water and unsanitary waste water, as

required by federal regulations and orders. This indicates the existence of a significant regulatory component in the present cases that was absent in *Bolt* and *Jackson Co*.

This federally mandated treatment of combined sewage that includes storm water runoff constitutes the provision of a service. This conclusion is supported by the persuasive analysis of a federal appellate court addressing Detroit's combined sewer system in the context of a claim under the Revenue Bond Act of 1933.[12] In *Detroit*, 803 F2d at 1418, the federal appellate court held that "the treatment of storm water runoff from [the Wayne County Road Commission's (WCRC)] roads within the City of Detroit constitutes a 'service rendered' within the meaning of the Michigan Revenue Bond Act of 1933." The court reasoned that a municipality has a right "to charge those who use a municipality's sewer system for the disposal or treatment of storm water runoff." *Id*. at 1419. "[A] municipality, acting pursuant to a proper delegation of authority, may charge those who use or otherwise benefit from its sewer system, even though such use or benefit is based upon the disposal or treatment of storm water running into the municipality's sewers." *Id*. at 1420. The court determined that the "WCRC receives a benefit from the disposal and treatment of the storm water running off WCRC's roads and into the City of Detroit's sewer system, and as such, we believe that this is a 'service rendered' within the meaning of the Revenue Bond Act of 1933." *Id*.

> Plainly, WCRC is benefitted by being relieved from the dangers and damages which may be occasioned by flooding from storm waters and which might, in the absence of drainage into the DWSD's sewer system, result in liability, or at least in damage to WCRC's roads. . . . Obviously, no one is responsible for this flow. The fact remains, however, that this water has to go somewhere, especially if WCRC is to keep its roads in reasonable repair and, for at least some of this water, WCRC has obtained drainage by tapping into the DWSD sewer system. [*Id*. at 1420-1421.]

The federal appellate court further reasoned:

> The storm water which constitutes the runoff from WCRC's roads may have come from God or nature in the first place, just as all water entering the DWSD's sewer system must have at one time or another. Nevertheless, the refuse or foreign matter that water accumulates as it courses through WCRC's roads must now be subjected by law to primary and secondary treatment to the extent such runoff enters Detroit's sewage treatment system. And to that extent, at least, WCRC is a user of the facility provided by DWSD. [*Id*. at 1421.]

Accordingly, the court held that "[t]he drainage and treatment of storm water from WCRC's roads into the City of Detroit's sewer system constitutes a 'service rendered' within the meaning of section 18 of the Revenue Bond Act of 1933." *Id*. (citation omitted).

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[12] The opinions of lower federal courts are not binding but may be considered as persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

Likewise, in the present cases, a service is provided to property owners by virtue of the drainage and treatment of storm water that enters Detroit's combined sewer system from the property owners' parcels. The regulatory weakness identified in *Bolt* and *Jackson Co* concerning the release of untreated storm water back into the environment is not present in the instant cases.

Further, there is an adequate correspondence in the present cases between the charges imposed and the benefits conferred. A lack of correspondence was found to exist in *Bolt* because approximately 75% of the property owners in the city of Lansing were already served by a separate storm and sanitary sewer system, many of those property owners had already paid special assessments to fund such separation, and yet those property owners were "charged the same amount for storm water service as the [25%] of the property owners who will enjoy the full benefits of the new construction." *Bolt*, 459 Mich at 165. No such disparity exists here. The drainage charge is not being imposed to provide a service that benefits only some property owners. Rather, the charge is used to fund capital, operations, and maintenance costs for facilities treating all of the storm water entering Detroit's combined sewage system. And for the reasons discussed below in connection with the proportionality factor, the city of Detroit's method of assessing the drainage charge assures a higher degree of precision between the service provided and the benefits conferred than did the charges at issue in *Bolt* and *Jackson Co*.[13]

Further distinguishing the present cases from *Bolt* and *Jackson Co* is the absence of any evidence of a revenue-generating purpose that outweighs the regulatory purpose of the drainage charge. "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). In *Bolt*, 459 Mich at 168, our Supreme Court noted that the storm water enterprise fund replaced a portion of a program that was previously funded by general fund revenues from income and property taxes. Similarly, in *Jackson Co*, 302 Mich App at 105, the city of Jackson shifted the funding of preexisting government activities from declining general and street fund revenues to a storm water charge. This Court concluded that the revenue-raising purpose convincingly outweighed the minimal regulatory purpose of the charge. *Id*. at 106-107. The city of Jackson had admitted "that budgetary pressures, including declining general fund revenue, necessitated the tapping of new sources of funding for the maintenance of the storm water system." *Id*. at 107. No such evidence or admission exists here. There is no indication that the city of Detroit has adopted the drainage charge to fund activities previously funded by general fund revenues, let alone that any such motivation outweighs the regulatory purpose of the drainage charge.[14] Although the version of the drainage charge being challenged in these cases was adopted effective in October 2016, a drainage charge had already existed in Detroit in one form or another for many decades before that.[15] Marcus D. Hudson, the

[13] This Court has noted that the first two *Bolt* factors are closely related and may be analyzed together. *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

[14] And the regulatory purpose here is far from minimal because, unlike in *Bolt* and *Jackson Co*, the storm water is required to be treated before being released back into the environment.

[15] DWSD customers have been paying some form of a drainage charge as part of their water and sewer bills since 1975, although it appears that a federally acceptable user charge system was not

chief financial officer of the DWSD from August 2015 to August 2017, has averred without contradiction that "[t]he [c]ity has never used general fund expenses to pay for the costs of its combined sewer system treatment and disposal services." The DAART plaintiffs present argument essentially speculating that the drainage charge is being used to replace revenue purportedly lost as a result of the city of Detroit's bankruptcy and the formation of the GLWA, but the DAART plaintiffs have presented no evidence to support such a hypothesis. Accordingly, the lack of evidence of a significant revenue-generating purpose that outweighs the regulatory purpose leads to the conclusion that the drainage charge at issue primarily serves a regulatory purpose.

Next, the fact that the drainage charge is used in part to service debt incurred to pay for federally required capital investments does not by itself require the conclusion that the drainage charge constitutes a tax. See *Bolt*, 459 Mich at 164-165 ("Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, *including some capital investment component*, sewerage may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax.") (emphasis added; citation omitted); *Jackson Co*, 302 Mich App at 111 (noting that "maintaining a capital reserve is a common practice among rate-based utilities that provides a degree of fiscal stability to utilities[]" but that such capital reserves must be "closely calibrated to the actual use of the service or a price paid for a commodity[]"). "[W]hile a utility fee must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged, mathematic precision is not required." *Trahey v City of Inskter*, 311 Mich App 582, 597; 876 NW2d 582 (2015), citing *Jackson Co*, 302 Mich App at 109. It is also beyond question that a utility's costs may properly include a debt component. In particular, this Court has recognized that timely payment of a water and sewer department's debt is necessary for that department's continued operation and thus constitutes part of the actual cost of providing service. *Trahey*, 311 Mich App at 597. Further, a municipal utility's rates are presumed to be reasonable, *id*. at 594, citing *Novi v Detroit*, 433 Mich 414, 428; 446 NW2d 118 (1989), and the burden is on the plaintiff to present evidence overcoming the presumption of reasonableness, *Trahey*, 311 Mich App at 594, citing *Novi*, 433 Mich at 432-433, and *Jackson Co*, 302 Mich App at 109; see also *Wheeler*, 265 Mich App at 665-666 ("This Court presumes the amount of the fee to be reasonable, unless the contrary appears on the face of the law itself or is established by proper evidence[.]"). "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." *Novi*, 433 Mich at 430.

Plaintiffs have presented no basis to conclude that the amount of the drainage charge in the instant cases is unreasonable merely because it is used in part to service debt incurred to finance capital improvements. It is true that in *Bolt*, our Supreme Court, in finding that the charge at issue was a tax, noted in relevant part that the charge was being used to fund "an investment in infrastructure that will substantially outlast the current 'mortgage' that the storm

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in place until 1980 pursuant to a consent judgment entered as part of federal litigation regarding the Detroit sewage system. See *Detroit*, 803 F2d at 1412-1413.

water charge requires property owners to amortize." *Bolt*, 459 Mich at 164 (citation omitted). In *Bolt*, 459 Mich at 155, 165, however, the city of Lansing was using the storm water service charge to fund the costs over 30 years of a major project that would separate the remaining portion of the city's combined sewer system and that would benefit only 25% of the property owners. Here, the city of Detroit uses the drainage charge in part to service debt incurred to finance federally mandated capital investments in the combined sewage system for the benefit of all property owners.[16] The city of Detroit's drainage charge is not used to fund future expenses for large-scale capital improvements; it is instead used to amortize present debt costs incurred to pay for capital improvements in conformance with accepted accounting principles.[17] This payment method is consistent with the "fundamental principle of basic accountancy" identified in *Bolt*, 459 Mich at 164, that "ratepayers are charged for the amortization expense when it occurs and, therefore, rates coincide with the expense and are not retroactive[,]" *id*., quoting *Ass'n of Businesses Advocating Tariff Equity v Pub Serv Comm*, 208 Mich App 248, 261; 527 NW2d 533 (1994). It thus appears that the capital expenses here were amortized in accordance with basic accounting principles and that the drainage charge is not a means of paying future expenses required to fund large-scale infrastructure improvements.

Turning to the second *Bolt* factor, the drainage charge is reasonably proportionate to the necessary costs of service. The charge is calculated on the basis of aerial photography as well as city assessor data to determine the amount of impervious area on each parcel.[18] No drainage

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[16] The DWSD indicated that its drainage revenue requirement would exceed $151 million for fiscal year 2017, including more than $125 million in operation and implementation costs as well as drainage credits. The DWSD's expense for debt service is $59.8 million; this expense is comprised essentially of a GLWA-held mortgage payment for facilities that are in place to address wet weather flows. The DWSD notes that "[t]his debt service expense relates to both municipal bond issues and to state revolving fund loans." In compliance with EPA regulations to prevent excessive pollution into waterways, the DWSD invested more than $1 billion in CSO control facilities. The DWSD explains: "The cost was financed almost entirely through bonds which are being repaid by the drainage fee. Direct CSO costs have two components: $25.7 million for annual CSO bond debt, and $6.2 million in annual operating costs specific to the control facilities." The DWSD expects the rate of the drainage charge to decrease by 32% through fiscal year 2019.

[17] In particular, Hudson's affidavit avers, in relevant part:

> The City's drainage fee does not pay for large-scale capital improvements in the future. Rather, the fee covers costs of debt incurred to fund these capital improvements – costs that are properly amortized in accordance with governmental accounting principles. The fee only contemplates costs for necessary repairs to maintain infrastructure (which are included among GLWA's allocated costs).

[18] The DWSD has indicated that it plans to update its 2015 aerial data with flyover imagery obtained in 2018.

charge will be imposed for parcels containing fewer than .02 impervious acres because that is the margin of error from flyover views. Further, if a property owner verifies that storm water runoff flows directly into the Detroit River or the Rouge River and that the parcel is disconnected from the DWSD system, there is no charge. The DWSD provides procedures whereby customers may dispute the measurement of the impervious acreage for a parcel or may seek an adjustment in billing on the basis of a modification to the impervious surface area or the direct discharge of surface waters to one of the above-mentioned rivers. The DWSD also permits drainage credits of up to 80% for customers who use green infrastructure systems or practices that reduce the amount of storm water flowing from the property into the DWSD's combined sewer system. The Detroit defendants have provided studies and manuals supporting the conclusion that a parcel's impervious area may be used as a way to measure or estimate the volume of storm water runoff from a parcel of property.[19] This supports the conclusion that the amount of the charge is reasonably related to the costs of regulation. This Court is not required to determine whether that relationship is mathematically precise. See *Jackson Co*, 302 Mich App at 109, citing *Graham*, 236 Mich App at 154-155. The fact that parcels discharging storm water directly to a river or containing fewer than .02 acres of impervious surface are exempt reflects that the city has undertaken reasonable efforts to ensure that only parcels which discharge water into the combined sewer system are subject to the charge. Moreover, the individual measurements that are taken of each parcel further distinguishes the instant cases from *Bolt* and *Jackson Co*, in which flat rates were used for residential parcels of two acres or less. See *Bolt*, 459 Mich at 156; *Jackson Co*, 302 Mich App at 96. Also, Hudson's affidavit states that for the fiscal year ending on June 30, 2016, the cash on hand was 5.4% of total receipts, which constituted approximately 115 days of operating expenses, less than the industry standard of 250 days.[20] This indicates that the city was not collecting more than it needed to operate the system.

The DAART plaintiffs and amici curiae suggest that the drainage charge is disproportionate because of the gradual phase-in of the new charge for various customers over five years. The DAART plaintiffs and amici curiae fail to establish that the use of a phase-in period, which is by definition temporary, is pertinent to determining the overall essence or character of a charge as a user fee or a tax. In an affidavit, Palencia Mobley, PE, the DWSD's deputy director and chief engineer, explained the rationale for the phase-in period as follows:

> 5. DWSD ultimately decided to phase-in the uniform drainage rate as a way to mitigate the rate shock that was being experienced by all customers transitioning to the impervious acreage rate. Rate shock occurs when a customer experiences a rate increase that is much higher than the customer's previous rate.

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[19] In addition, federal regulations permit the consideration of a user's land area as a means to distribute costs in the context of a user charge system. See 40 CFR 35.2140(e)(2)(*ii*).

[20] Hudson explained that cash on hand is critical to address unforeseen events such as "emergencies, unexpected drops in demand, seasonal expenditures (e.g. building cash in the winter to pay for large summer costs), and settlement of potential legal claims like flood claims." It also is essential "to improving the City's borrowing rate, since all of the ratings agencies consider cash-on-hand as a bellwether for organizational health."

> Rate shock can lead to customers not paying their bills (which causes an increase in future bad debt expense).
>
> 6. For example, before DWSD decided to phase-in the drainage rate for new-to-world customers, 59.4% of its billings to these customers for the full amount of the drainage rate remained outstanding. After the implementation of the phase-in, the total percentage of outstanding billings decreased to 9.2%.

Indeed, it is well understood in the context of utility ratemaking that a phase-in period is a permissible administrative mechanism to ensure a gradual and orderly transition to a uniform rate in order to avoid rate shock. See, e.g., *Citizens Action Coalition of Indiana, Inc v Northern Indiana Pub Serv Co*, 76 NE3d 144, 153 (Ind App, 2017) (referring to the use of "gradualism" to "moderate any rate shock") (quotation marks and citation omitted);[21] *Watergate East, Inc v Pub Serv Comm of Dist of Columbia*, 665 A2d 943, 949 (DC, 1995) (describing a "policy of gradualism in the setting of utility rates, which dictates that utility customers generally should not be subjected to dramatic fluctuations in their rate payments[]"). Great deference is owed to the exercise of legislatively authorized ratemaking authority by municipal utility entities such as the DWSD. See *Novi*, 433 Mich at 425-426, 428, 430. The DAART plaintiffs and amici curiae have failed to establish that the phase-in period adopted here falls outside the DWSD's ratemaking authority or affects the overall character of the drainage charge.

Further, the drainage charge is not rendered disproportionate by the DWSD's failure to charge the city of Detroit itself a drainage fee for storm water flowing from city streets into the combined sewer system. Plaintiffs have presented no evidence to dispute the DWSD's explanation that "[c]ity streets, which are lower than parcels, are part of the conveyance infrastructure for facilitating the flow of storm water from Detroit properties into the catch basins, then into the combined sewer system, and then finally terminating at the [WTP]." See *Detroit*, 803 F2d at 1416 (the city of Detroit's failure to charge itself a drainage fee was not relevant to the city's claim against the WCRC for treatment of storm water running off the WCRC's roads within the city). Further, it is notable that city-owned parcels, as opposed to city streets, are not characterized by the DWSD as part of the conveyance infrastructure. Overall, the drainage charge is reasonably proportionate to the necessary costs of service.

Turning to the third factor, the drainage charge in the instant cases is effectively compulsory rather than voluntary. Property owners who have .02 or more impervious acres and whose storm water does not discharge directly into a river have essentially no control over whether to use the drainage service and pay the drainage charge. Although a green infrastructure credit system is available, it permits a credit only of up to 80% of the drainage charge. See *Jackson Co*, 302 Mich App at 111 (noting that the city of Jackson's credit system did not guarantee property owners would receive a 100% credit and finding the city's charge effectively compulsory). Moreover, property owners must either pay the drainage charge or pay at least

[21] Although not binding on this Court, the decisions of the courts of other states may be considered persuasive. See *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559 n 38; 705 NW2d 365 (2005).

some of the costs for making the green infrastructure improvements required to obtain a credit, thus making it impossible for property owners to escape the financial demands of the drainage charge. See *id*. at 111-112 (noting that property owners could not escape the financial demands of the city of Jackson ordinance because the property owners must either pay the charges assessed or pay for improvements to their respective properties). Although property owners are free to reduce the impervious areas on their properties, this is not "a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property." *Bolt*, 459 Mich at 168. It is also notable that if a customer refuses to pay the drainage charge, the DWSD may terminate water service for the property, impose a lien on the property, commence a legal action to recover unpaid fees, and suspend or revoke a license to do business in the city of Detroit, which further indicates the effectively compulsory nature of the drainage charge. See *Jackson Co*, 302 Mich App at 112 (stating that the compulsory nature of the charge was demonstrated in part by the fact that delinquent payments could result in the discontinuation of water service, the imposition of a lien, and the filing of a civil action to collect past-due charges).

Overall, we determine that the application of the *Bolt* factors leads to the conclusion that the drainage charge in the present cases is a permissible user fee rather than a tax. The *Bolt* "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*, 265 Mich App at 665 (quotation marks and citation omitted). As discussed, the first two *Bolt* factors indicate that the drainage charge is a user fee because it serves a regulatory purpose and is proportionate to the necessary costs of the service. See *Bolt*, 459 Mich at 161-162. Although our analysis under the third *Bolt* factor indicates that the drainage charge is effectively compulsory rather than voluntary, "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. Because the application of the first two *Bolt* criteria clearly demonstrates that the drainage charge is a proper user fee rather than a tax, the effectively compulsory nature of the drainage charge does not render the drainage charge a tax for the purpose of the Headlee Amendment. See *id*. at 667. Therefore, the drainage charge is a permissible user fee that is not subject to the Headlee Amendment.[22]

[22] The DAART plaintiffs' discussion in their supplemental brief criticizing a settlement agreement reached in another Headlee Amendment lawsuit challenging the city of Detroit's drainage charge, *Mich Warehousing Group, LLC v Detroit*, Wayne Circuit Court Case No. 15-010165-CZ, has no relevance to the determination whether the drainage charge is a user fee or a tax. Moreover, the present cases are original actions and not appeals from any order issued in *Mich Warehousing*. The DAART plaintiffs may not use their original action here to collaterally attack any order entered in a separate case. See *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995) ("[A] collateral attack occurs whenever a challenge is made to a judgment in any manner other than through a direct appeal."); *SS Aircraft Co v Piper Aircraft Corp*, 159 Mich App 389, 393; 406 NW2d 304 (1987) ("The decision of a court having jurisdiction is final when not appealed and cannot be collaterally attacked.").

Given our resolution of the above issue, we need not address the other issues raised and discussed in the parties' original and supplemental briefs.

For the foregoing reasons, we deny plaintiffs' requests for relief. MCR 7.206(E)(3)(b).[23]

/s/ Michael J. Riordan
/s/ William B. Murphy
/s/ Mark T. Boonstra

[23] In light of our decision to deny plaintiffs' requests for relief, plaintiffs' respective motions for class certification are denied because plaintiffs lack a cause of action. See *Zine v Chrysler Corp*, 236 Mich App 261, 287; 600 NW2d 384 (1999) (holding that "[a] plaintiff who cannot maintain the cause of action as an individual is not qualified to represent the proposed class[]" and that because the plaintiff in *Zine* lacked a cause of action, he could not serve as a representative of the proposed class, making it proper to deny his motion for class certification on that basis alone), citing *McGill v Auto Ass'n of Mich*, 207 Mich App 402, 408; 526 NW2d 12 (1994) (finding no error in the refusal to certify the plaintiffs' proposed class and explaining that "[b]ecause plaintiffs cannot maintain their individual causes of action, they are unqualified to represent the purported class[]"). The Detroit defendants' motions seeking an extension of the due dates for responding to plaintiffs' respective motions for class certification are denied as moot. See generally, *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

Further, the Binns plaintiffs' request for entry of default against the GLWA is denied because the request is not properly supported by an affidavit or otherwise. The "default request, affidavit, and entry" form filed by the Binns plaintiffs contained the signature of the Binns plaintiffs' attorney in the "request and affidavit" section of the form, but the document was not notarized, the Binns plaintiffs offered no other support for their request, and no default has been entered by the Clerk of this Court in the "default entry" section of the form. See MCR 2.603(A)(1) ("If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear *by affidavit or otherwise*, the clerk must enter the default of that party.") (emphasis added); *Sherry v East Suburban Football League*, 292 Mich App 23, 31; 807 NW2d 859 (2011) ("[A]n affidavit lacking notarization is invalid[.]"), citing *Detroit Leasing Co v Detroit*, 269 Mich App 233, 236; 713 NW2d 269 (2005) ("[A] document that is not notarized is not a 'valid affidavit.' "). Finally, the GLWA's motion to strike or set aside the Binns plaintiffs' request for default and for leave to answer or otherwise respond is denied as moot. See generally, *B P 7*, 231 Mich App at 359.

EXHIBIT - 7

Order

Michigan Supreme Court
Lansing, Michigan

December 11, 2020

158856

NICOLA BINNS, JAYNE CARVER, SUSAN McDONALD, GOAT YARD, LLC, and END OF THE ROAD MINISTRIES, LLC,
Plaintiffs-Appellants,

v

SC: 158856
COA: 337609

CITY OF DETROIT, CITY OF DETROIT WATER AND SEWERAGE DEPARTMENT, DETROIT BOARD OF WATER COMMISSIONERS, and GREAT LAKES WATER AUTHORITY,
Defendants-Appellees.

_____/

By order of January 24, 2020, the application for leave to appeal the judgment of the Court of Appeals was held in abeyance pending the decision in *DAART v City of Detroit* (Docket No. 158852). On the Court's own motion, the application for leave to appeal the November 6, 2018 judgment of the Court of Appeals is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and REMAND this case to that court, which, while retaining jurisdiction, shall refer the case to a judicial circuit for proceedings under MCR 7.206(E)(3)(d).

We do not retain jurisdiction.

ZAHRA, J. (*concurring*).

I concurred in the Court's order vacating and remanding *Detroit Alliance Against the Rain Tax v Detroit* (Docket No. 158852) (*DAART*) to the Court of Appeals for reconsideration in light of our decision in this case, *Binns v Detroit* (Docket No. 158856). I write separately, however, to observe that the fact-finding process under MCR 7.206(E)(3)(d) that will take place in this case and which will subsequently be applied in

DAART is critical to reaching a sound result under *Bolt v City of Lansing*, 459 Mich 152 (1998). *Bolt* set out a three-factor test for distinguishing a fee from a tax under Const 1963, art 9, § 31. See *Bolt*, 459 Mich at 161-162. Of particular importance to this case is the second factor, the proportionality analysis, especially in light of the following statement of fact from amicus Kickham Hanley PLLC's late-filed brief in *DAART*:

> The City [of Detroit (the City)] inexplicably does not collect Drainage Charges from the City's largest landowner, the Detroit Land Bank Authority ("DLBA"), a component unit of the City that owns and controls approximately 25% of the parcel-based acres in the City, a land area the size of the City of Royal Oak. As a result, the lost revenues attributable to the City's failure to collect from the DLBA must be made up through higher Drainage Charge rates imposed on other landowners[.][1]

Given the foregoing, it is at best unclear to me how the City's drainage charge is best classified as a user fee rather than as a tax where: (1) "user fees must be proportionate to the necessary costs of the service," *Bolt*, 459 Mich at 161-162; (2) a subunit of the City is exempted from paying the drainage charge that other impervious-acreage landowners must pay, see Kickham Hanley amicus brief at 3; and (3) that results in the imposition of "higher Drainage Charge rates" on other, non-DLBA landowners, see *id.*—all of which applies to plaintiffs in these cases.

[1] Kickham Hanley amicus brief at 3 (emphasis omitted).

EXHIBIT - 8

City of Ann Arbor
Proprietary Funds
Statement of Net Position
June 30, 2020

	Enterprise Funds							
	Water Supply System	Sewage Disposal System	Parking System	Airport	Stormwater Sewer System	Solid Waste	Total	Internal Service Funds
Assets								
Current assets								
Cash and cash equivalents	$ 450	$ -	$ -	$ 30	$ -	$ 187,951	$ 188,431	$ 298
Equity in pooled cash and investments	33,897,934	47,844,831	1,986,621	1,743,348	17,794,184	25,690,826	128,957,744	35,134,508
Investments	3,036,051	10,731,891	-	-	-	-	13,767,942	-
Receivables								
Accounts, net	4,959,473	5,857,135	-	70,054	2,686,335	812,961	14,385,958	234,361
Special assessments, current	510	683	-	-	-	-	1,193	-
Improvement charges	12,459	27,002	-	-	1,977	-	41,438	-
Due from other units of government	227,244	20,727	500	-	460,651	-	709,122	-
Inventories	533,829	59,807	-	-	-	-	593,636	1,123,397
Prepaid items	-	3,387,359	-	-	155,033	-	3,542,392	2,365,395
Total current assets	42,667,950	67,929,435	1,987,121	1,813,432	21,098,180	26,691,738	162,187,856	38,857,959
Noncurrent assets								
Improvement charges	154,484	262,786	-	-	57,568	-	474,838	-
Due from other units of government	4,198,191	-	-	-	-	-	4,198,191	-
Capital assets not being depreciated	19,428,809	6,820,759	3,934,897	708,927	2,750,172	2,407,836	36,051,400	11,916,506
Capital assets, net of accumulated depreciation	112,139,243	223,290,698	25,903,059	1,162,705	18,505,015	9,094,637	390,095,357	624,130
Total noncurrent assets	135,920,727	230,374,243	29,837,956	1,871,632	21,312,755	11,502,473	430,819,786	12,540,636
Total assets	178,588,677	298,303,678	31,825,077	3,685,064	42,410,935	38,194,211	593,007,642	51,398,595
Deferred Outflows of Resources								
Deferred amount on refunding	780,032	1,533,524	95,788	-	-	-	2,409,344	-
Deferred amount relating to net pension liability	1,203,773	972,583	-	-	523,504	500,258	3,200,118	-
Deferred amount relating to net OPEB liability	1,654,768	1,536,696	-	-	435,251	744,526	4,371,241	-
Total deferred outflows of resources	3,638,573	4,042,803	95,788	-	958,755	1,244,784	9,980,703	-

See Accompanying Notes to the Financial Statements

City of Ann Arbor
Proprietary Funds
Statement of Net Position
June 30, 2020

	Enterprise Funds							Internal Service Funds
	Water Supply System	Sewage Disposal System	Parking System	Airport	Stormwater Sewer System	Solid Waste	Total	
Liabilities								
Current liabilities								
Accounts payable	$ 4,221,144	$ 1,120,492	$ -	$ 28,168	$ 1,372,970	$ 1,602,419	$ 8,345,193	$ 1,219,230
Accrued and other liabilities	169,987	123,223	-	-	48,878	67,458	409,546	890
Due to other funds	-	-	-	90,596	-	-	90,596	-
Accrued interest payable	227,871	856,458	16,533	1,138	48,698	-	1,150,698	-
Deposits	111,748	-	-	-	33,584	-	145,332	684,810
Bonds payable, current	2,382,356	3,119,710	510,399	-	-	-	6,012,465	-
Other debt, current	1,133,253	5,105,000	-	-	939,619	-	7,177,872	-
Estimated claims payable, current	-	-	-	-	-	-	-	484,775
Compensated absences, current	375,123	282,161	-	-	139,634	114,919	911,837	-
Total current liabilities	8,621,482	10,607,044	526,932	119,902	2,583,383	1,784,796	24,243,539	2,389,705
Noncurrent liabilities								
Bonds payable, net	29,978,294	118,698,935	2,022,957	-	13,534,764	-	164,234,950	-
Estimated claims payable, net	-	-	-	-	-	7,528,264	7,528,264	2,073,732
Compensated absences, net	729,537	440,518	-	-	222,234	296,269	1,688,558	-
Advances from other funds	-	-	-	243,206	-	-	243,206	-
Net pension liability	10,893,151	8,791,383	-	-	4,887,051	4,696,543	29,268,128	-
Net OPEB liability	7,014,789	6,626,056	-	-	1,087,323	3,364,067	18,092,235	-
Total noncurrent liabilities	48,615,771	134,556,892	2,022,957	243,206	19,731,372	15,885,143	221,055,341	2,073,732
Total liabilities	57,237,253	145,163,936	2,549,889	363,108	22,314,755	17,669,939	245,298,880	4,463,437
Deferred Inflows of Resources								
Deferred amount relating to net pension liability	202,070	162,840	-	-	94,393	91,353	550,656	-
Deferred amount relating to net OPEB liability	1,251,586	1,118,402	-	-	626,647	481,511	3,478,146	-
Total deferred inflows of resources	1,453,656	1,281,242	-	-	721,040	572,864	4,028,802	-

See Accompanying Notes to the Financial Statements

City of Ann Arbor
Proprietary Funds
Statement of Net Position
June 30, 2020

	Enterprise Funds							
	Water Supply System	Sewage Disposal System	Parking System	Airport	Stormwater Sewer System	Solid Waste	Total	Internal Service Funds
Net Position								
Net investment in capital assets	$ 98,854,181	$ 104,721,336	$ 27,400,388	$ 1,871,632	$ 6,780,804	$ 11,502,473	$ 251,130,814	$ 12,540,636
Restricted for								
Debt service	2,516,716	10,364,199	-	-	-	-	12,880,915	-
Equipment replacement	12,369,561	8,321,098	-	-	-	-	20,690,659	-
Landfill	-	-	-	-	-	180,991	180,991	-
Unrestricted	9,795,883	32,494,670	1,970,588	1,450,324	13,553,091	9,512,728	68,777,284	34,394,522
Total net position	$ 123,536,341	$ 155,901,303	$ 29,370,976	$ 3,321,956	$ 20,333,895	$ 21,196,192	353,660,663	$ 46,935,158
Some amounts reported for business-type activities in the statement of net position are different because certain internal service funds assets and liabilities are reported with business-type activities							7,576,389	
Net position of business-type activities							$ 361,237,052	

City of Ann Arbor
Proprietary Funds
Statement of Revenues, Expenses and Changes in Fund Net Position
For the Year Ended June 30, 2020

	Enterprise Funds							
	Water Supply System	Sewage Disposal System	Parking System	Airport	Stormwater Sewer System	Solid Waste	Total	Internal Service Funds
Operating revenue								
Charges for services	$ 25,277,253	$ 31,984,321	$ 1,271,600	$ 933,066	$ 12,485,490	$ 3,714,281	$ 75,666,011	$ 52,672,960
Operating expenses								
Personnel services	8,122,968	6,873,602	-	300,161	2,989,757	3,556,193	21,842,681	8,726,606
Municipal service charge	438,360	629,100	-	31,908	251,616	445,452	1,796,436	1,628,988
Information technology charge	904,853	347,524	-	10,692	244,296	180,262	1,687,627	1,041,547
Other operating costs	5,681,636	5,200,348	-	425,554	2,662,520	12,920,842	26,890,900	34,277,726
Depreciation	4,279,786	7,464,127	1,687,837	71,963	749,193	842,740	15,095,646	2,414,131
Total operating expenses	19,427,603	20,514,701	1,687,837	840,278	6,897,382	17,945,489	67,313,290	48,088,998
Operating income (loss)	5,849,650	11,469,620	(416,237)	92,788	5,588,108	(14,231,208)	8,352,721	4,583,962
Nonoperating revenue (expenses)								
Property taxes	2,941	-	-	-	-	13,725,346	13,728,287	-
Interest income	1,267,744	1,987,232	75,107	65,939	639,202	1,002,256	5,037,480	1,366,677
Interest expense	(697,985)	(2,917,695)	(66,385)	(16,034)	(191,097)	-	(3,889,196)	-
Total nonoperating revenues (expenses)	572,700	(930,463)	8,722	49,905	448,105	14,727,602	14,876,571	1,366,677
Income (loss) before contributions and transfers	6,422,350	10,539,157	(407,515)	142,693	6,036,213	496,394	23,229,292	5,950,639
Capital contributions	-	-	-	-	-	-	-	498,873
Transfers in	6,524,547	1,030,892	-	17,746	476,170	162,738	8,212,093	328,585
Transfers out	(1,814,823)	(2,016,564)	-	(8,664)	(2,480,737)	(485,730)	(6,806,518)	(4,940,415)
Change in net position	11,132,074	9,553,485	(407,515)	151,775	4,031,646	173,402	24,634,867	1,837,682
Net position - beginning of year	112,404,267	146,347,818	29,778,491	3,170,181	16,302,249	21,022,790	329,025,796	45,097,476
Net position - end of year	$ 123,536,341	$ 155,901,303	$ 29,370,976	$ 3,321,956	$ 20,333,895	$ 21,196,192	$ 353,660,663	$ 46,935,158
Change in net position - total enterprise funds							$ 24,634,867	
Some amounts reported for business-type activities in the statement of activities are different because the net revenue (expense) of certain internal service funds is reported with business-type activities							1,895,089	
Change in net position of business-type activities							$ 26,529,956	

See Accompanying Notes to the Financial Statements

City of Ann Arbor
Proprietary Funds
Statement of Cash Flows
For the Year Ended June 30, 2020

	Enterprise Funds							
	Water Supply System	Sewage Disposal System	Parking System	Airport	Stormwater Sewer System	Solid Waste	Total	Internal Service Funds
Cash flows from operating activities								
Receipts from customers	$ 24,817,327	$ 32,072,652	$ 1,274,700	$ 930,250	$ 11,810,747	$ 3,748,273	$ 74,653,949	$ -
Payments to suppliers	(4,987,957)	(4,148,440)	-	(338,841)	(1,112,935)	(8,555,610)	(19,143,783)	(36,157,520)
Payments to employees	(7,409,619)	(6,241,735)	-	(300,161)	(2,676,713)	(3,222,192)	(19,850,420)	(8,726,606)
Receipts (payments) for interfund services used	(3,177,614)	(2,502,787)	-	(159,103)	(1,431,567)	(3,505,206)	(10,776,277)	52,589,637
Net cash provided (used) by operating activities	9,242,137	19,179,690	1,274,700	132,145	6,589,532	(11,534,735)	24,883,469	7,705,511
Cash flows from noncapital financing activities								
Transfer from other funds	6,524,547	1,030,892	-	17,746	476,170	162,738	8,212,093	328,585
Transfers to other funds	(1,814,823)	(2,016,564)	-	(8,664)	(2,480,737)	(485,730)	(6,806,518)	(4,940,415)
Repayment of advances from other funds	-	-	-	(87,001)	-	-	(87,001)	-
Property taxes	2,941	-	-	-	-	13,725,346	13,728,287	-
Net cash provided (used) by noncapital financing activities	4,712,665	(985,672)	-	(77,919)	(2,004,567)	13,402,354	15,046,861	(4,611,830)
Cash flows from capital and related financing activities								
Proceeds from sale of bonds and notes	3,008,191	-	-	-	139,080	-	3,147,271	-
Capital contributions	-	-	-	-	-	-	-	498,873
Purchases/construction of capital assets	(16,080,828)	(3,397,714)	-	-	(1,557,197)	(505,077)	(21,540,816)	(5,713,098)
Principal and interest paid on long-term debt	(3,961,659)	(10,903,775)	(1,271,600)	(16,330)	(1,101,832)	-	(17,255,196)	-
Proceeds from sale of capital assets	-	-	-	-	-	-	-	1,224,708
Net cash used by capital and related financing activities	(17,034,296)	(14,301,489)	(1,271,600)	(16,330)	(2,519,949)	(505,077)	(35,648,741)	(3,989,517)

See Accompanying Notes to the Financial Statements

City of Ann Arbor
Proprietary Funds
Statement of Cash Flows
For the Year Ended June 30, 2020

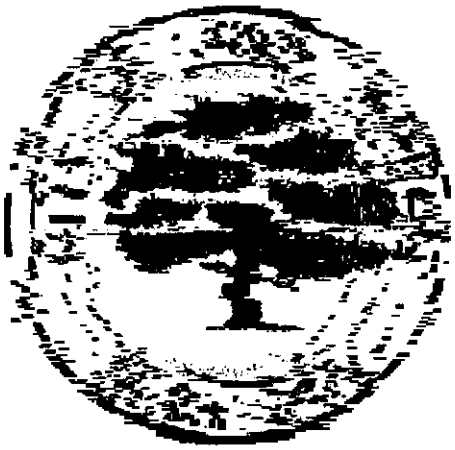
	Enterprise Funds							
	Water Supply System	Sewage Disposal System	Parking System	Airport	Stormwater Sewer System	Solid Waste	Total	Internal Service Funds
Cash flows from investing activities								
Proceeds from sales and maturities of investments	$ 2,986,792	$ 10,557,770	$ -	$ -	$ -	$ -	$ 13,544,562	$ -
Purchases of investments	(3,036,050)	(10,731,891)	-	-	-	-	(13,767,941)	-
Interest received	1,267,744	1,987,232	75,107	65,939	639,202	1,002,256	5,037,480	1,366,677
Net cash provided by investing activities	1,218,486	1,813,111	75,107	65,939	639,202	1,002,256	4,814,101	1,366,677
Net change in cash and cash equivalents	(1,861,008)	5,705,640	78,207	103,835	2,704,218	2,364,798	9,095,690	470,841
Cash and cash equivalents - beginning of year	35,759,392	42,139,191	1,908,414	1,639,543	15,089,966	23,513,979	120,050,485	34,663,965
Cash and cash equivalents - end of year	$ 33,898,384	$ 47,844,831	$ 1,986,621	$ 1,743,378	$ 17,794,184	$ 25,878,777	$ 129,146,175	$ 35,134,806
Reconciliation of operating income (loss) to net cash provided (used) by operating activities								
Operating income (loss)	$ 5,849,650	$ 11,469,620	$ (416,237)	$ 92,788	$ 5,588,108	$ (14,231,208)	$ 8,352,721	$ 4,583,962
Adjustments to reconcile operating income to net cash from operating activities								
Depreciation and amortization expense	4,279,786	7,464,127	1,687,837	71,963	749,193	842,740	15,095,646	2,414,131
Changes in assets and liabilities								
Receivables (net)	(174,899)	109,058	3,600	(2,816)	(214,092)	33,992	(245,157)	(83,323)
Due from other units of government	(285,027)	(20,727)	(500)	-	(460,651)	-	(766,905)	-
Inventories	(102,021)	(4,953)	-	-	-	-	(106,974)	(91,101)
Prepaid items	-	(13,743)	-	-	153,245	-	139,502	780,501
Accounts payable	(1,013,096)	(455,559)	-	(29,790)	456,644	598,210	(443,591)	(235,337)
Accrued and other liabilities	41,432	33,891	-	-	9,023	21,075	105,421	257
Deposits	-	-	-	-	4,041	-	4,041	315,930
Estimated claims payable	-	-	-	-	-	887,530	887,530	20,491
Customer deposits payable	(25,605)	-	-	-	-	-	(25,605)	-
Net pension liability	588,561	476,788	-	-	236,460	222,509	1,524,318	-
Net OPEB liability	67,693	60,489	-	-	33,893	26,043	188,118	-
Compensated absences	15,663	60,699	-	-	33,668	64,374	174,404	-
Net cash provided (used) by operating activities	$ 9,242,137	$ 19,179,690	$ 1,274,700	$ 132,145	$ 6,589,532	$ (11,534,735)	$ 24,883,469	$ 7,705,511
Reconciliation to the statement of net position								
Cash and cash equivalents	$ 450	$ -	$ -	$ 30	$ -	$ 187,951	$ 188,431	$ 298
Equity in pooled cash and investments	33,897,934	47,844,831	1,986,621	1,743,348	17,794,184	25,690,826	128,957,744	35,134,508
Cash and cash equivalents per cash flows	$ 33,898,384	$ 47,844,831	$ 1,986,621	$ 1,743,378	$ 17,794,184	$ 25,878,777	$ 129,146,175	$ 35,134,806

See Accompanying Notes to the Financial Statements

EXHIBIT - 9

Stormwater Utility Regulations

City of Ann Arbor, Michigan



August 6, 2007

City Of Ann Arbor, Michigan
Stormwater Utility Regulations

Table of Contents

Section 1 - Introduction and Authorization

The City of Ann Arbor established a Stormwater Management Utility on August 20, 1980. The utility provides the City with the authorization to establish and collect just and equitable rates, fees, and charges for the services and facilities provided by the utility system. The City is further authorized by the Michigan Statutes to construct, reconstruct, improve, and extend the Stormwater Management system.

The City's Stormwater Management Utility establishes a mechanism for billing the costs of operating and maintaining the City's stormwater management system and financing the necessary repairs, replacements, improvements, and extensions in a manner that protects the health, safety, and welfare of the citizens of the City of Ann Arbor. The City's ordinance, codified under Chapters 29 and 33 of the Code, City of Ann Arbor, Michigan, provides the mechanisms for billing and payment, accounting for capital contributions, and establishing the Stormwater Utility Fund.

Chapters 29 (section 2:69) and 33 (sections 2:213 and 2:217) of the City Code authorize the public services area administrator to adopt regulations implementing those chapters. These regulations were adopted in the manner provided in the city code and took effect July 18, 2007.

These Regulations outline the guidelines and framework under which the stormwater utility will operate, including procedures for credits, adjustments, and appeals to stormwater utility bills. It also establishes policies and procedures for the operation and maintenance of the City's stormwater utility system.

Section 2 - Definitions

The following definitions shall apply in the use of these Regulations. Words used in the singular shall include the plural, and the plural, the singular; words used in the present tense shall include the future tense. The word "shall" is mandatory and not discretionary. The word "may" is permissive. Words not defined herein shall be construed to have the meaning given by common and ordinary use as defined in the latest edition of Webster's Dictionary.

ADJUSTMENT. The adjustment of the user charge assessed to a particular property based on the more detailed assessment of the impervious area on that property.

ADMINISTRATOR is the public services area administrator or such other person as the city administrator may designate.

APPEAL. The process of filing a dispute with the charge determination, charge adjustment or credit as recognized by the City.

APPLICANT. Any person, or a duly designated representative applying for a permit or other type of City, federal, or state regulatory approval to proceed with a project.

CITY. City of Ann Arbor, Michigan and its authorized agents.

CLEARING. The removal of trees, brush, and other ground cover from all or a part of a tract of land, but shall not include mowing.

COUNCIL. The City Council of City of Ann Arbor, Michigan.

CUSTOMER. The owner of any property that is receiving a stormwater utility service from City of Ann Arbor, Michigan.

CUSTOMER CHARGE shall mean a monthly or quarterly base charge that recovers costs for billing, collection, customer service, and public involvement and public education activities.

DETENTION or TO DETAIN. The prevention of, or to prevent, the discharge, directly or indirectly, of a given volume of stormwater runoff into the stormwater system by providing temporary on-site storage.

DEVELOPMENT or DEVELOPMENT ACTIVITY. The alteration, construction, installation, demolition or removal of a structure, impervious surface, pipe, conduit, cable or line, above or below ground, or the clearing, scraping, grubbing, killing or otherwise removing the vegetation from a site; or adding, removing, exposing, excavating, leveling, grading, digging, burrowing, dumping, piling, dredging or otherwise significantly disturbing the soil, mud, sand or rock of a site.

DISCHARGE. The flow of water from a project, site, aquifer, drainage basin, or other drainage facility.

DWELLING UNIT. Any building or portion thereof designed or used exclusively as the residence or sleeping place of one or more families, but not including a tent, cabin, trailer or trailer coach, boarding or rooming house, hotel, or mobile home.

EASEMENT. A grant by a property owner for a specified use of all or a specified portion of land to a person or the public at large.

EROSION. The wearing or washing away of soil by the action of water.

FREEBOARD. The space from the top of an embankment to the highest water elevation expected for the largest design storm stored. The space is often required as a safety margin in a pond or detention basin.

FREQUENCY YEAR STORM. A rainfall event expressed as an exceedence probability with a specified chance of being equaled or exceeded in any given year, as follows:

One Year.....100 percent
Two Year..... 50 percent
Ten Year..... 10 percent
Twenty-Five Year..... 4 percent
Fifty Year..... 2 percent
One-Hundred Year..... 1 percent

IMPERVIOUS SURFACE. means a surface which is compacted or covered with material that is resistant to or impedes permeation by water, including but not limited to, most conventionally

surfaced streets, roofs, sidewalks, patios, driveways, parking lots, and any other oiled, graveled, graded, or compacted surfaces.

NON-RESIDENTIAL DEVELOPED PROPERTY. A developed property that is not utilized for dwelling units with the City.

NON-STORMWATER is all flows to the stormwater system not defined as stormwater, as determined by the administrator. This includes, but is not limited to, cooling water, process water, ground water from a purge well and non-residential swimming pool discharge.

NON-STORMWATER DISCHARGE RATE is the charge applicable to any non-stormwater use of the stormwater system, as defined by the Administrator.

NOTICE. A written or printed communication conveying information or warning.

OPERATION AND MAINTENANCE includes any component of a stormwater system requiring expenditure for materials, labor, utilities and other items for the management and uninterrupted operation of the stormwater system in a manner for which the stormwater system was designed and constructed.

OPERATION AND MAINTENANCE COSTS include all costs, direct and indirect, of operation and maintenance of a stormwater system.

OWNER. The person in whom the charge, ownership, dominion, or title of property (i.e., the proprietor) is vested. This term may also include a tenant, if chargeable under his lease for the maintenance of the property, and any agent of the owner or tenant including a developer.

PARCEL or PARCEL OF LAND. A tract, or contiguous tracts, of land in the possession of, owned by, or recorded as property of the same claimant person.

PERMITTEE. Any person who has been granted a permit to proceed with a project.

PERSON. Any individual, firm, association, public or private corporation or public agency or instrumentality.

PRIVATE. Property or facilities owned by individuals, firms, entities, corporations, and other organizations and not by local, state or federal governments.

PROFESSIONAL ENGINEER. A professional engineer licensed by the State of Michigan, skilled in the practice of civil engineering and the engineer of record for the project under consideration.

PROPERTY means any land within the boundary of the City of Ann Arbor, both publicly and privately owned, including public and private rights of way, but excluding the Huron River.

PUBLIC. Property or facilities owned by local, state or federal governments.

RETENTION or TO RETAIN. The prevention of, or to prevent, the discharge, directly or indirectly, of any stormwater volume into the stormwater system.

SEDIMENT. Solid material, whether mineral or organic, that is in suspension, is being transported, or has been moved from its place of origin by water.

SITE. Any tract, lot, or parcel of land or contiguous combination of tracts, lots, or parcels of land that is in one ownership, or contiguous and in diverse ownership, where development is to be performed as part of a unit, subdivision, or project.

SITE STORMWATER MANAGEMENT PLAN. Refers to the approved, detailed analysis, design, and drawings of the stormwater management system required for all construction.

STORM EVENT. A storm of a specific duration, intensity, and frequency.

STORMWATER means stormwater runoff, snowmelt runoff,footing drain discharges, surface runoff and drainage, and other discharges allowed by Administrative Regulations.

STORMWATER DESIGN STANDARDS. *Rules of the Washtenaw County Drain Commissioner, Procedures and Design Criteria for Storm Water Management Systems,* and such other standards that may be adopted by the City from time to time.

STORMWATER DISCHARGE RATE means the portion of the stormwater utility charge proportionate to the quantity and representative of the quality of stormwater being discharged from a property, calculated based upon the impervious area of the property.

STORMWATER MANAGEMENT means one or more of the following:

- The quantitative control achieved by the stormwater system of the increased volume and rate of surface runoff caused by alterations to the land;
- The qualitative control achieved by the stormwater system, pollution prevention activities, and ordinances to reduce, eliminate or treat pollutants that might otherwise be carried by stormwater; and
- Public education, information, and outreach programs designed to educate and inform the public on the potential impacts of stormwater.

STORMWATER MANAGEMENT PROGRAM means one or more aspects of stormwater management undertaken for the purpose of complying with applicable federal and state law and regulation or the protection of the public health, safety, and welfare related to stormwater runoff.

STORMWATER MANAGEMENT PLAN. The technical and policy manuals, plans, regulations and/or calculations, and any subsequent updates or amendments thereto, used by the City Engineer to administer the stormwater regulations.

STORMWATER SYSTEM means roads, streets, catch basins, curbs, gutters, ditches, storm sewers and appurtenant features, lakes, ponds, channels, swales, storm drains, canals, creeks, catch basins, streams, gulches, gullies, flumes, culverts, siphons, retention or detention basins, dams, floodwalls, levees, pumping stations, and other like facilities, and natural watercourses and features located within the geographic limits of the City which are designed or used for

collecting, storing, treating or conveying stormwater or through which stormwater is collected, stored, treated or conveyed, or any other physical means by which stormwater management is achieved.

STORMWATER UTILITY CHARGE means a charge to property pursuant to Chapters 29 and 33 of the Code: City of Ann Arbor, Michigan, intended to offset all or part of the cost incurred by City of preparing and conducting a stormwater management program, and operating and maintaining a stormwater system.

STRUCTURE. Anything constructed or installed with a fixed location on or in the ground.

USER is a firm, person or property which directly or indirectly contributes stormwater or non-stormwater to the stormwater system.

UTILITY. The stormwater management utility provided for in Chapter 33 of the Code, City of Ann Arbor.

WATER QUALITY. Those characteristics that relate to the physical, chemical, biological or radiological integrity of water.

WATER QUANTITY. Those characteristics that relate to the rate and volume of the stormwater runoff to downstream areas.

WATERSHED. Drainage area contributing stormwater runoff to a single point.

Section 3 - Stormwater Utility Charge Adjustments

All customers shall report their changes in impervious area and submit these measurements to the City. The City also grants charge adjustments when customers identify incorrect information contained in the City's billing database. Adjustments typically occur when the City has incorrectly delineated the impervious area within a nonresidential property, when residential customers are assigned the incorrect stormwater billing category, or when some or all of the stormwater discharge from the property does not enter the City's stormwater system, either because it discharges directly to the Huron River, discharges across the City limit, or is completely retained on-site. Charge adjustment forms are available online at www.a2gov.org/storm or by calling 994-2666. The Administrator, or designee, will review adjustment requests within a 6-month period from the date of filing of the request.

The Administrator has authority to administer the procedures and standards, and review criteria for the adjustment of charges as established herein. All requests shall be judged on the basis of the amount of impervious area on the site, topography, and/or site drainage characteristics.

Any customer who has paid stormwater utility charges, and who believes the charge to be incorrect, may submit an adjustment request .Based on the information provided, the Administrator may grant an adjustment if one or more of the following situations exist:

- Owner demonstrates that the City has incorrectly interpreted and/or calculated the impervious area of the property.

- Owner demonstrates that some or all of the impervious area does not discharge into the City's stormwater system, including discharges directly to the Huron River as well as discharges to systems outside the City limits that do not subsequently re-enter the City limits.

- Owner demonstrates rainfall that occurs on property does not generate runoff as per WCDC code (has no outlet), is completely watertight, and has at least 18 inches of freeboard. This adjustment is for unusual structures, such as swimming pools, hazardous material storage areas, quarries, etc. For these specific cases, a customer's billable impervious area will be adjusted by removing the amount of impervious area that does not generate runoff.

- Owner demonstrates that on-site gravel is not compacted, not used for vehicular traffic, and not impervious. The City may grant adjustments for non-compacted gravel areas used for landscaping or other purposes. The City considers all compacted gravel areas (drives, storage areas, etc.) as impervious areas, and as such, no adjustment will be granted. The Administrator will make the decision regarding the intended purpose of gravel areas and the degree of imperviousness.

The City may request that the customer provide supplemental information to the Administrator including, but not limited to, survey data prepared by a registered Professional Land Surveyor (P.L.S.) that represents the amount of impervious area and compacted gravel area on a property and/or engineering reports prepared by a registered Professional Engineer (P.E.). Failure to provide such information may result in the denial of the adjustment request.

The Adminstrator shall respond in writing to all adjustment requests. The response shall provide an explanation of adjustment approval or denial. Adjustment denials may be appealed according to the process presented in Section 5.

Section 4 - Stormwater Utility Charge Credits

Any customer may qualify for stormwater credits when they can demonstrate that their existing or proposed stormwater facilities and management practices provide the City with a quantifiable cost savings in managing their stormwater system. The reduction available for each type of credit will be established by City Council in Chapter 29 of the Code, City of Ann Arbor, Michigan, with the actual credit reduction for a specific property determined by the Administrator based on the characteristics of the actual facility or management practice employed by the customer.

Stormwater utility credits are associated with the construction, operation, and maintenance of privately owned stormwater facilities and/or actions by property owners that provide benefit to the City in the cost of providing stormwater services. Credit applications are available online at www.a2gov.org/storm or by calling 994-2666. The Administrator, or designee, will review credit requests within a 6-month period from the date of filing of the request.

4.1 Restrictions

- No public or private property shall receive Credit to offset Charges for any condition or activity unrelated to the City's cost of providing stormwater management services.

- No Credit will be applied to any property that reduces the Charge to an amount less than zero.

- Credits will not apply to Stormwater Pollution Prevention Plan (SWP) Review and Inspection fees attributable to new development or redevelopment projects.

- Credit shall only be given to the property..

4.2 Credits for Single Family and Two-Family Residential Properties

Credit may be issued to a single-family or two-family residential property where the property owner has implemented one or more of the following stormwater facilities or management practices. The application form will be posted online at www.a2gov.org/storm or may be obtained by calling 994-2666.

4.2.1 Credit for On-Site Stormwater Management Practices

A single-family or two-family resident may receive a credit for physical stormwater management practices installed on their property. Credit will be granted to both the stormwater discharge rate (proportionate to the reduction in stormwater discharges achieved by these practices) and to the customer charge (proportionate to the public education benefits provided to the City by citizen involvement in such practices). The following types of practices are eligible to receive credits based upon a complete application to the City and subject to review and inspection by the Administrator. More detailed information on each of these practices is available online at a2gov.org/storm or by calling 994-2666.

- Install rainbarrel(s), totaling 35 gallons or more, onto the downspouts from structures on the property. Between storm events, owner shall direct discharges from rainbarrels either directly or indirectly to pervious areas of the property.

- Install one or more cisterns or dry wells able to capture a total stormwater volume of at least 500 gallons or 66 cubic feet and drain the captured volume to soil in less than 24 hours. Facilities designed according to these criteria should accept runoff from at least 50 percent of the roof area of the property. In no event may the discharge from the facility cause an increase in the runoff to an adjoining property.

- Install one or more rain gardens at least 130 square feet in area, and at least 3 to 6 inches deep. The rain garden should be able to drain the captured volume to soil in less than 24 hours, and should accept runoff from at least 50 percent of the roof area of the property. In no event may the discharge from the facility cause an increase in the runoff to an adjoining property.

4.2.2 Credits for Off-Site Stormwater Management Practices

Most properties within the City developed since 1978 are served by stormwater detention facilities built as a condition of development. Design criteria for these facilities have evolved since then:

- *1978*: Detention of the 100-year storm event for new impervious surfaces exceeding 15,000 square feet. Outlet rate restricted to 0.2 cfs/acre (also referred to as the agricultural runoff rate for the 10 year storm event)

- *1994:* Washtenaw County Drain Commissioner adopts new design standards requiring control of the First Flush, Bankfull, and 100-year storm events. City staff requests voluntary compliance with WCDC design standards as developments are proposed.

- *2000:* WCDC revises design rules. Lowers outlet restriction rate to 0.15 cfs. City adopts new stormwater management requirements. Eliminates the "grandfather clause". Requires compliance with the rules of the WCDC.

- *2002:* City makes minor revisions to it's stormwater management standards to provide an exception of minor projects that do not increase impervious area.

Generally, these facilities are owned and maintained by a homeowners association or similar organizations. The City maintains records of these facilities, their design criteria, and the properties served by these facilities. The City also periodically inspects these facilities to determine if they are properly maintained and operating as designed.

Single-family and two-family residential properties that completely drain into one or more stormwater management facilities designed according to criteria in Chapter 63 of the Code, City of Ann Arbor in effect at the time the facility was constructed are eligible for a credit to their stormwater discharge rate. To receive this credit, the facility must be fully maintained to preserve the intended functionality of the facility. . Credits will be granted based upon the design criteria of the facility, which determines the amount of stormwater discharged into the City's stormwater system. Credits will be granted to qualifying property owners based upon information available to the City. No application is required.

4.2.3 Credits for RiverSafe Home Participants

In 2007, the Washtenaw County Drain Commissioner initiated the RiverSafe Home program, which provides recognition to home owners or occupants who employ best stormwater management practices in the maintenance of their property. Information about this program and an on-line survey to determine if property owners are eligible can be found at the Drain Commissioner's web site:

http://www.ewashtenaw.org/government/drain_commissioner/dcRiverSafeHomes2

The City is supporting this program by providing customer credits as additional recognition to participating property owners and tenants who are in full compliance with the most current criteria of the RiverSafe Home program published by the Washtenaw County Drain Commissioner. Ann Arbor Stormwater Utility Customers must apply directly to the City for this credit by filling out the credit application online at a2gov.org/storm or by calling 994-2666. The City will periodically verify that the properties receiving this credit are in good standing with the WCDC's RiverSafe Home program.

4.3 Credits for Other Residential and Non-Residential Properties

Property owners or eligible tenants can apply for these credits, and may be required to submit supporting documentation with their credit application to allow the Administrator to properly determine the value of the credit to be granted. The following credits 4.3.1 through 4.3.4 are included as part of the program. The Application Form for other residential and non-residential properties can be found online at www.a2gov.org/storm or by calling 994-2666.

4.3.1 School-Based Education Credit

Those schools, public or private, that perform public education and outreach practices in full compliance with an NPDES stormwater discharge permit issued by the Michigan Department of Environmental Quality (MDEQ) may receive a Credit for educating students and employees in the area of water quality awareness and protection. To be considered for this credit, the school must submit a copy of the NPDES permit, with the permit number, the latest stormwater management plan and annual report prepared under this permit, and the estimated number of residents of the City of Ann Arbor who received or participated in each educational practice.

The Administrator will review the application, and determine a credit amount based on the estimated cost-reduction in the City's public education programs provided by the school-based educational activities.

4.3.2 Credits for Stormwater Management Practices Required under Chapter 63

Most properties within the City developed since 1978 are served by stormwater detention facilities built as a condition of development. Design criteria for these facilities have evolved since then:

- *1978*: Detention of the 100-year storm event for new impervious surfaces exceeding 15,000 square feet. Outlet rate restricted to 0.2 cfs/acre (also referred to as the agricultural runoff rate for the 10 year storm event)

- *1994:* Washtenaw County Drain Commissioner adopts new design standards requiring control of the First Flush, Bankfull, and 100-year storm events. City staff requests voluntary compliance with WCDC design standards as developments are proposed.

- *2000:* WCDC revises design rules. Lowers outlet restriction rate to 0.15 cfs. City adopts new stormwater management requirements. Eliminates the "grandfather clause". Requires compliance with the rules of the WCDC.

- *2002:* City makes minor revisions to it's stormwater management standards to provide an exception of minor projects that do not increase impervious area.

The City maintains records of these facilities, their design criteria, and the properties served by these facilities. The City also periodically inspects these facilities to determine if they are properly maintained and operating as designed.

Other residential or non-residential properties that completely drain into one or more stormwater management facilities designed according to criteria in Chapter 63 of the Code, City

of Ann Arbor in effect at the time the facility was constructed are eligible for a credit to their stormwater discharge rate. To receive this credit, the facility must be fully maintained according to criteria established by the Administrator. Credits will be granted based upon the design criteria of the facility, which determines the amount of stormwater discharged into the City's stormwater system. Properly designed and maintained facilities that receive stormwater from off-site sources may be eligible for an additional credit, subject to Administrator review. Credits will be granted to qualifying property owners based upon information available to the City. No application is required for facilities that were approved by the City prior to their construction.

4.3.3 Stormwater Quality Control Structural BMP Credit

Stormwater quality control structures that do not fully satisfy the criteria of Chapter 63 of the Code, City of Ann Arbor may be eligible for a credit. In order to qualify for this credit, one or more facilities must be able to capture runoff from the first one-half inch of rain and at least 50 percent of the impervious area of the property, release the captured volume to the City drainage system in no less than 24 hours, and otherwise be designed and maintained according to criteria in the Stormwater Design Standards, low impact design fact sheets available from the Washtenaw County Drain Commissioner, or generally accepted engineering practice. The City will determine whether to provide this Credit based upon a complete application including necessary hydrologic data, water quality data, design specifications, and other pertinent data supplied by qualified, licensed professionals on behalf of property owners. Structural stormwater quality management facilities that are eligible for credits include, but are not limited to the following:

- Vegetated Swales and Filter Strips,
- Infiltration and Percolation Basins,
- Percolation Trenches,
- Buffer Strips and Swales,
- Porous Pavement,
- Extended (Dry) Detention Basins,
- Retention (Wet) Ponds,
- Constructed Wetlands
- Media Filtration, and
- Other Stormwater Treatment System.

Credits for on-site stormwater facilities shall be generally proportional to the benefit that such systems have on complementing or enhancing the water quality benefit to the City's stormwater management system. Property access, adequate and routine facility maintenance, and self-reporting must be provided by the property owner to the City to verify that the facility is providing its intended benefit. Properly designed and maintained facilities that receive stormwater from off-site sources may be eligible for an additional credit, subject to Administrator review. In all cases, the facility must be designed to fully meet criteria in the Stormwater Design Standards based upon the total drainage area of the facility.

4.3.4 Credits for Community Partners for Clean Streams Participants

The Washtenaw County Drain Commissioner administers the Community Partners for Clean Streams program, which provides recognition to businesses that employ best stormwater

management practices in the maintenance of their property. Information about this program can be found at the Drain Commissioner's web site:

http://www.ewashtenaw.org/government/drain_commissioner/dc_cpcs.html

The City is supporting this program by providing customer credits as additional recognition to participating businesses that are in full compliance with the latest criteria of the Community Partners for Clean Streams program published by the Washtenaw County Drain Commissioner. Ann Arbor Stormwater Utility Customers must apply directly to the City for this credit by filling out the credit application and attaching a copy of the letter of recognition provided by the Drain Commissioner. The City will periodically verify that the properties receiving this credit are in good standing with the WCDC's Community Partners for Clean Streams program.

4.4 Credits for Stormwater Systems within Public Rights of Way

Most of the City's drainage system lies within public rights of way, sharing that property with public roads and other public and private utility systems. Public roads and other impervious surfaces within these rights of way discharge stormwater to the stormwater system and are subject to stormwater utility charges like every other property within the City. However, the public ROW also provides service to the stormwater utility (and all of its other customers) by serving as a conduit for stormwater drainage that augments the utility's other assets - and that the Utility would have to construct independently but for the existence of the public ROW.

In this light, the Administrator shall periodically determine the value of the services provided by the public ROW to the stormwater utility compared with the stormwater utility charge for runoff from impervious areas within the public ROW.

4.5 Application Procedures

A property owner seeking a Stormwater Credit must comply with the procedures outlined in these Regulations and must submit the appropriate credit application. All information necessary for the Administrator to make a determination must be supplied as outlined in these Regulations and the Credit application. Failure to comply with the procedures outlined in these Regulations will result in a denial of the Credit application.

In cases requiring a hydrologic analysis, a qualified professional engineer registered in the State of Michigan must prepare and certify the documentation provided to verify the hydrologic benefit.

4.6 Enforcement Policy

The Administrator reserves the right to review a credit application for accuracy and/or inspect and review documentation confirming the provision of the stormwater facility or management practice at any time. If, after its review or inspection, the Administrator finds the application to be inaccurate or the projected level of service is not being provided or continued, the customer will be notified in writing and given 45 days to correct the deficiency. The property owner must provide written documentation to the Administrator within 45 days of the original notice by the Administrator that the stormwater facility or management practice is being provided or

continued as agreed in addition to such evidence as the Administrator reasonably requires showing that the deficiency has been corrected. If, in the opinion of the Administrator, the deficiency is not satisfactorily corrected, the Credit attributable to the deficiency will be terminated on the following billing cycle and will remain in effect for a minimum of 12 months. Reapplication for Credit will not be reviewed until the delinquent stormwater facility or management practice has been adequately reinstated for three continuous months and evidence of the corrections has been provided with the reapplication.

Once the Credit reduction has been canceled, a customer may not reapply for that particular Credit for a period of 12 months and then only if the deficiency has been corrected, as determined by the City inspection. It will be the responsibility of the customer to prove the stormwater management goals are met prior to the Credit being reissued.

All structural water quality control systems that are not listed in the Stormwater Design Standards may require, at the request of the City and at no cost to the City, periodic certified laboratory water quality sampling and reporting to insure that the water quality standards are being met.

Section 5 - Appeals

Any person disagreeing with the interpretation or application of a provision of Chapters 33, 29 (as related to Stormwater), or the regulations in these Regulations may appeal in writing by using Stormwater Utility Petition to Appeal found online at www.a2gov.org/storm or by calling 995-2666.

All appeals will be processed first through the Administrator, for a recommendation, and then to the City of Ann Arbor, City Administrator for final decision. Any person still aggrieved may appeal the City Administrator's decision to a court of competent jurisdiction.

EXHIBIT - 10

CITY OF ANN ARBOR

STORMWATER FAQS

Ann Arbor has had a stormwater utility since 1980 to make sure that all users of this stormwater system pay their fair share for the needed maintenance and system upgrades. During 2006 and 2007, a Stormwater Citizen's Advisory Task Force met to review the rate system and determine how that could be modified to more equitably charge customers. In 2017, a public advisory group reexamined the rate structure to ensure that the rates reflect the cost of the services that are funded by the Stormwater Utility.

As a result of those efforts, a new rate system was developed that charges customers based on impervious area, which was determined to be the best indicator of stormwater runoff. The measurement of impervious area is based on a computer analysis of aerial infrared photography. That information is posted online at www.a2gov.org/storm, allowing customers to provide feedback on areas that may have incorrectly been identified as impervious.

STORMWATER MANAGEMENT

When it rains, the stormwater that runs off roofs, parking lots, and open ground needs to be conveyed to the Huron River through a series of drainage pipes located under the streets, and through small creeks and storm drains located throughout the city. This system is largely hidden from view, except for the approximately 23,000 catch basins located at the curbs of many streets. In fact, the streets themselves are used to convey and sometimes temporarily store these flows before the stormwater system moves the water away. This stormwater system is largely taken for granted by city residents, but it is an important part of making Ann Arbor a desirable community to live in.

Q. What is stormwater?

Stormwater begins as rain or snowmelt that falls on or washes over both pervious (grass, woodlands, gardens and other undeveloped lands) and impervious surfaces (roofs, driveways, parking lots, streets, and other hard surfaces). Stormwater runoff is created from excess water that cannot be absorbed by pervious surfaces or from water flowing off impervious areas. Rather than being absorbed into the ground, rainwater enters the city's stormwater drainage system, a network of catch basins, yard inlets and pipes that keep water from flooding roads and property. Water is diverted through the network to the city's creeks, lakes, and eventually the Huron River.

Q. Why is stormwater such a problem?

Stormwater can cause quality and quantity problems. Stormwater runoff picks up anything in its path and delivers it to our water resources. Pollutants including oil, yard waste, fertilizers, litter, and sediment can create stormwater of poor quality which can harm our waters. The initial inch of stormwater runoff tends to carry the most pollution as it washes fertilizers, automotive fluids, animal waste, deicers, and dirt into the street and down the gutter. Too much stormwater is also harmful. Increased runoff can cause flooding, erosion and property damage if not wisely managed.

Q. Why are the stormwater and sewer systems separate?

Unlike wastewater, which is treated before it is released back into the environment, stormwater goes directly into a community's ponds, streams and lakes. Because stormwater comes in large amounts at unpredictable times, treating it as wastewater would be extremely expensive.

Q. What does the stormwater program do?

The stormwater program is charged with the maintenance and improvement of the drainage systems. These systems consist of storm drains, catch basins, underground pipes, open channels, culverts, and creeks. Program activities include:

- The administration, planning, implementation, and maintenance of stormwater Best Management Practices (BMPs) to reduce the introduction of sediment and other pollutants into local water resources.
- The installation, operation, maintenance and replacement of public drainage systems.
- Activities necessary to maintain compliance with the National Pollutant Discharge Elimination System (NPDES) Permit requirements established by the U.S. Environmental Protection Agency (EPA), including preparation, implementation and management of a Storm Water Management Program (SWMP) to address the following control measures:
  - Public education and outreach on storm water impacts.
  - Public involvement/participation.
  - Illicit discharge detection and elimination.
  - Construction site stormwater runoff control.
  - Post-construction runoff control in new development and redevelopment.
  - Pollution prevention for municipal operations.
- Other education, engineering, inspection, monitoring, testing and enforcement activities as necessary to maintain compliance with local, state and federal stormwater requirements.

Q. Why have cities implemented these programs?

Federal and state regulations require the City of Ann Arbor to address the amount of runoff and the pollution carried by the water that is deposited, untreated, into the Huron River. Stormwater quality management programs are a response to regulations from the Environmental Protection Agency (EPA) connected to the federal Clean Water Act (CWA). These regulations require cities with more than 100,000 people to obtain a permit under the National Pollutant Discharge Elimination System (NPDES) and to create a comprehensive program to seek out and eliminate, to the maximum extent practical, pollutants carried by stormwater.

History

It all started with the 1972 Clean Water Act (CWA) which prohibited the discharge of any pollutant to waters of the United States from a "point source" unless the discharge is authorized by a National Permit Discharge Elimination System (NPDES) permit. A "point source" is a specific site, such as an industry, business, or sewer system, that you can say for sure is polluting streams and water supplies.

In 1987, the US government established that water quality studies showed that sparse sources of water pollution were also significant causes of pollution and the CWA was amended to require implementation of a national program for non-agricultural sources of storm water runoff. These sparse sources of pollutants were called "nonpoint sources." A "nonpoint source" pollution is water pollution that is difficult to trace to a specific discharge point because it comes from many diverse sources. Examples of common nonpoint source pollutants include fertilizers, pesticides, sediments, oils, salts, trace metals, and litter. They come from farms, yards, roofs, construction sites, automobiles, and streets.

Phase I of the U.S. Environmental Protection Agency's (EPA) stormwater program was announced in 1990 under the CWA. Phase I relies on National Pollutant Discharge Elimination System (NPDES) permit coverage to address stormwater runoff from: (1) "medium" and "large" municipal

separate storm sewer systems (MS4s) generally serving populations of 100,000 or greater, (2) construction activity disturbing 5 acres of land or greater, and (3) ten categories of industrial activity. Ann Arbor is considered a "medium" MS4.

Implemented in 2003, Phase II requires permit coverage for all small MS4s located within urbanized areas. An ***urbanized area*** is a land area comprising one or more places — central place(s) — and the adjacent densely settled surrounding area — urban fringe — that together have a residential population of at least 50,000 and an overall population density of at least 1,000 people per square mile.

UTILITY FEE

Q. What is a stormwater utility fee?

A stormwater utility fee is similar to a water or sewer fee. In essence, customers pay a fee to convey stormwater from their properties. The utility is the result of unfunded United States Environmental Protection Agency (EPA) and the Michigan Department of Environmental Quality (MDEQ) mandates that require a stormwater utility of all cities with an urbanized area of 50,000 or more people and a population density of greater than 1,000 residents per square mile. The fee is used to finance annual compliance with the National Pollutant Discharge Elimination System (NPDES) permitting standards. The NPDES is the compliance system for the Clean Water Act (CWA) and requires that all stormwater discharges that enter waters of the United States must meet minimum federal water quality requirements.

Q. Why does the City of Ann Arbor charge a stormwater fee?

The utility fee raises the revenues needed to fund the city's stormwater management program. This program brings us into compliance with federal regulations and safeguards our community through improved drainage and protection of local waters. The fee structure primarily enables the city to make needed improvements to storm drainage infrastructure including stormwater inlets and pipes, culverts, open stream channel systems, and other public drainage ways. These improvements will further help protect surface water quality and minimize flood hazards. The utility fee also enables the city to meet its responsibilities to closely manage the storm drain system, study the contents of stormwater, seek out and eliminate illicit connections and illegal dumping, enforce codes more strictly, and facilitate public awareness.

Q. Where do your stormwater dollars go?

The stormwater utility fee pays for the operations and maintenance costs of the stormwater program. Some of the services provided under the stormwater program include:

- Flood protection through capital improvement projects
- catch basin cleaning and repair
- Street sweeping
- Shoulder and ditch maintenance within the publicly owned right-of-way
- Pipe cleaning
- Public education and outreach
- Illicit discharge elimination program
- Post Construction Stormwater Management program
- Construction inspection and runoff control
- Project design and management
- Federal regulatory compliance

Q. Is the stormwater utility fee legal?
Yes, stormwater utility fees are legal. State and federal courts have ruled that stormwater utility fees are necessary to maintain the public stormwater system and such fees represent an equitable way for the community to share the cost of a public service. They are becoming more and more common throughout the United States.

RATE STRUCTURE

Q. How is the stormwater utility rate structured?
The stormwater utility fee rates are based on the total amount of impervious surface on a property (including: buildings, dwelling, parking lots, driveway, sidewalk, etc.). Fees fall into one of two rate categories; single-family or commercial.

The Single-Family and Two-Family Residential rate consists of four tiers:
Tier One – Up to 2,187 square feet = $31.55 per quarter
Tier Two – 2,187 to 4,175 square feet = $55.22 per quarter
Tier Three – 4,178 to 7,110 square feet = $94.65 per quarter
Tier Four – Above 7,110 square feet = $165.66 per quarter
**Note: The above rates do not include the customer service charge $4.15 per quarter.*

Commercial and other properties (e.g. multifamily, office, institutional, commercial industrial land uses): Rate of $851.44 per acre of impervious area per quarter, plus a customer service charge of $4.15 per quarter.

Q. What method is the city using to determine the new stormwater rates?
The stormwater utility fee is based on the estimated use of the stormwater system, calculated through impervious area measurements. Impervious surface is a good gauge of how much runoff your property has during a storm. A fee based on impervious surface area is viewed as a more equitable way to charge and collect revenues for this program.

Q. How does the city determine how much impervious area is on my property?
A computer analysis of infrared aerial photographs is able to distinguish hard, impervious surfaces in contrast to areas that can absorb stormwater, such as lawns and gardens. The computer program assigns the residential property into one of four billing tiers to more equitably distribute costs proportional to use instead of using a flat fee. Homes with larger impervious areas pay more. Customers can download images of their impervious area analysis through www.a2gov.org/storm and submit an appeal if areas were incorrectly identified.

IMPERVIOUS AREA

Q. What is impervious surface?
Impervious surface area is any surface that does not readily absorb water and impedes the natural infiltration of water into the soil. Common examples include roofs, driveways, parking areas, sidewalks, patios, tennis courts, concrete or asphalt streets, and crushed stone or gravel surfaces used for vehicles.

IMPERVIOUS OR PERVIOUS

Following is a list of surfaces that frequently generate questions regarding imperviousness.

Type of Structure	Impervious	Pervious	Notes
Deck, special construction	-	x	Spaces between boards with underlying pervious material
Driveway, asphalt	x	-	-
Driveway, bank run gravel	x	-	Use causes gravel to become compacted over time
Driveway, blue chip stone	x	-	Use causes stone to become compacted over time
Driveway, concrete	x	-	-
Driveway, dirt	x	-	Use causes soil to become compacted over time
Driveway, oyster shell	x	-	Use causes shells to become compacted over time
Driveway, standard pavers	x	-	Site-specific evaluation determines perviousness
Driveway, permeable pavers	-	x	Site-specific evaluation determines perviousness
Parking lots, gravel overflow	x	-	Use causes gravel to become compacted over time
Patios, brick on sand	x	-	Bricks prohibit growth of vegetation
Patios, slate	x	-	-
Sidewalks, concrete	x	-	-
Sidewalks, brick and mortar	x	-	-
Sidewalks, brick on sand	x	-	-
Sidewalk, wood (boardwalk)	-	x	Spaces between boards
Swimming pools, in-ground	-	x	Paved decks adjacent to pools are considered impervious
Walkways, gravel	-	x	-
Walkways, wood chip	-	x	-
Water, open	x	-	

Areas identified as impervious:

1. Hardened surfaces on or near the ground: sidewalks, private roads, private streets, parking lots, walkways, patios, concrete slabs, runways, taxiways, aprons or other hardened surfaces consisting of asphalt, concrete, or other paving material.
2. Hardened surfaces above ground: buildings, foundations, storage tanks, rooftops, athletic courts and tracks
3. Gravel and dirt driveways, and pavers that do not meet requirements to be classified as pervious.
4. Paved decks adjacent to pools
5. Wooden decks covered by a roof or having an impervious underlying surface
6. Surface water that is not part of the public conveyance system.

Areas identified as pervious:

1. grass
2. gardens
3. landscaped areas without impervious underlying membrane
4. natural rock formations
5. open-slatted decks

6. dirt paths
7. swimming pools (since they drain must to the sanitary sewer system)
8. pavers set in porous fill (photos, design plans, and specifications must be submitted)
9. porous pavements (photos, design plans, and specifications must be submitted)

Q. What does impervious surface have to do with stormwater?
Because rainwater can not be readily absorbed by impervious surfaces, the water must be managed through some sort of stormwater system. Furthermore, impervious surfaces are viewed as one of the most problematic factors leading to the degradation of watershed receiving waters by stormwater runoff. Stormwater runoff from impervious surfaces is often polluted with automotive fluids, metals, sediment, or litter. This polluted stormwater runoff eventually ends up in our streams and rivers.

ADDITIONAL QUESTIONS

Q. How accurate are the stormwater rates online impervious area analysis images?
Fairly accurate, but the impervious area analysis images are not without error. We encourage customers to view their images at www.a2gov.org/storm to evaluate whether there have been misinterpretations of their impervious and pervious surfaces.

Q. How can customers apply for an Impervious Area adjustment?
If a customer has reason to believe that their property's impervious area has been incorrectly identified, they should take the following steps:

1. Print the Stormwater Rates Online Impervious Area Analysis image or call Customer Service (734-794-6320) and request that a copy of the image be mailed to you.
2. Identify the areas that have been incorrectly identified as impervious (please use a contrasting pen or highlighter and label the features).
3. Email the document to: STORM@a2gov.org or
   Mail the document to:
   Ann Arbor –Stormwater
   Box 8647
   Ann Arbor, Mi 48107

** Please remember that if you are a one or two family residential property, you will need to reduce your impervious area by an amount sufficient to enter a lower tier. For example, if you are currently at 4,775 square feet, you will need to lower your impervious area by 600 square feet (to 4,175) in order to enter a lower tier.*

Common "Errors" Considered for Adjustment:

- Construction – building and demolition work may necessitate a change in the impervious area calculation for a property.
- Wood Decks - As stated in the ordinance, "Runoff Surfaces do not include wood decks located above a pervious (dirt, grass or gravel) surface area…". Wood decks that are located above an impervious area (e.g. concrete) are included in impervious surface calculations. Since the aerial imagery is unable to show the surface beneath wood decks, it is necessary for customers to contact the city about wood decks above pervious areas in shadows
- Wood chips

NOTE: All surfaces used by vehicles including gravel, dirt, and other graded surfaces should be included in the Impervious Area calculation. Customers should not contact the City to adjust gravel

surfaces used for vehicle use on their property. Please note: the Stormwater Utility Regulations as enabled by Section 2:69 of Chapter 29 and Sections 2:213 and 2:217 of Chapter 33 of the City Code specifies procedures and requirements for charge adjustments, credits, appeals, enforcement and other matters. Section 2 – Definitions reads: "IMPERVIOUS SURFACE. means a surface which is compacted or covered with material that is resistant to or impedes permeation by water, including but not limited to, most conventionally surfaced streets, roofs, sidewalks, patios, driveways, parking lots, and any other oiled, graveled, graded, or compacted surfaces."

Q. Why is gravel considered an impervious surface?

Gravel is an impervious surface because like concrete or asphalt, it functions as a barrier to absorption and places a demand on the storm drainage infrastructure. It is difficult for water to soak into a packed gravel surface. Once gravel is compacted by vehicular traffic, surface water runs off of it much like a paved surface. In addition, runoff from gravel surfaces carries sediment that is not present in runoff from concrete or asphalt. This sediment is problematic in the stormwater system.

Q. Who has to pay a stormwater utility fee?

All developed property within the City of Ann Arbor is charged a stormwater utility fee. This includes properties owned by the City of Ann Arbor, University of Michigan, Washtenaw County, the State of Michigan, and the Federal government. The only exceptions are properties that drain directly to the Huron River, which are still responsible for paying a stormwater customer service fee. Undeveloped properties (vacant lots) are also responsible for this customer service fee.

Q. Why should I have to pay for rain falling on my property?

While the stormwater program is in place to manage the pollution and runoff carried by rainwater, the fee is in no way related to the amount of rain that falls. Users are charged a fee for runoff discharged from their property to the city's stormwater management system, not the amount of rain falling on their property. Property owners control the level of development on their properties, which directly impacts the runoff characteristics of their site.

Q. Why do I have to pay if I don't have a drainage problem?

If you own property with impervious area such as rooftops, sidewalks, driveways, etc., you contribute to stormwater runoff. While you may not have drainage problems on your property, runoff generated from your site may be contributing to problems downstream. The approach being taken through this program recognizes that everyone contributes to the "problem" (runoff and pollution) and everyone will share in the results of the program (improved water quality, reduce flooding, unimpaired access to roads, etc.)

Q. I live in a subdivision with a storm drain that drains into a ditch. Why do I pay a stormwater fee if the city isn't collecting the rainwater?

The city's stormwater conveyance system includes much more than storm drains. Ditches, curbs, gutters, culverts and open stream channels all make up the citywide drainage system that conveys stormwater runoff away from structures and sites in a manner that minimizes the potential for flooding and erosion to properties. The city is responsible for maintaining the entire manmade and natural public conveyance system.

Q. The property I live on has a detention pond that collects all of our stormwater runoff. Why is the city still charging me a stormwater fee?

A detention pond is one example of a Chapter 63 compliant stormwater control that serves to improve the quantity and quality of stormwater that exits a property. However, as beneficial as these devices may be, the effectiveness is not absolute and stormwater still exits a property depending on a

number of factors, such as the intensity and duration of rainfall. While residents must pay the stormwater fee, the city recognizes the value of detention ponds and has established a Stormwater Credit Policy that may offer credits to eligible properties.

Q. If my landscape is designed to minimize run-off by doing things like directing down spouts into grassy areas, why can't my fee be reduced to reflect the steps taken to control the runoff from my property?

Simply directing downspouts into grassy areas will not qualify you for a credit. Rainwater from this arrangement will typically find its way into some part of the stormwater system during a heavy rain. However, if you direct at least 50% of your rooftop runoff into a specially designed rain garden that is at least 130 square feet and at least 3" deep, you can qualify for a stormwater credit.

Q. What credits are available to residential property owners?

The ordinance includes the following credit allowances, upon submittal and review of a request.

- **RiverSafe Homes Program ($1.14/quarter) –**
  - The RiverSafe Home Program, created and maintained by the Washtenaw County Water Resources Commissioner, gives you an opportunity to identify water quality protection activities that you do well and consistently around your home. It also provides an opportunity to commit to other proactive and "easy to do" pollution preventing activities that you may not have considered before. Homeowners complete a user-friendly online survey after reviewing the brief descriptions of the categories of questions in the survey including: Home Toxics Use and Disposal, Yard Care and Outdoor Housekeeping, Vehicle Care, and Pets and Urban Wildlife Waste. In return for taking the survey and making a commitment to water quality protection, participants receive a RiverSafe Homes marker to display in their home. Participants may also choose to be added to an e-mail list to receive periodic environmental tips and information. The survey is also available by mail by phoning (734) 222-6833. There is no cost to enroll at: www.ewashtenaw.org/riversafe.
- **Rain Barrels ($3.01/quarter) –**
  - Rain barrels harvest and store water from your rooftop by collecting it from a gutter downspout. The stored runoff can be used for watering or other purposes that don't require drinking water. Rain barrels offer several advantages. Using the runoff for watering can reduce your water bill, be beneficial for your plants, and help rain percolate into the ground and recharge groundwater supplies.
- **Rain Gardens, Cisterns, or Drywells ($6.24/quarter) –**
  - Rain gardens are planted depressions of deep-rooted native vegetation designed to absorb excess rainwater runoff from a house or other impervious area with a purpose (besides being beautiful) of allowing rain water to pool in a low spot just long enough to percolate into the ground.
  - Cisterns are water management devices that provide retention storage volume in above or underground storage tanks. Cisterns are often larger than rain barrels, with some underground cisterns having the capacity of 10,000 gallons. Only one credit can be taken for utilizing a dry well or cistern.
  - Drywells are small excavated pits, backfilled with aggregate, and used to infiltrate "good quality" stormwater runoff, such as uncontaminated roof runoff. Drywells are not to be used for infiltrating any runoff that could be significantly contaminated with sediment and other pollutants, such as runoff from high potential pollutant loading areas and parking lot runoff. Only one credit can be taken for utilizing a dry well or cistern.

Q. How is the stormwater utility fee different from a tax? (What is a user-fee?)

The storm water utility fee is not a tax. It is a fee generated to maintain the stormwater utility system and fund the NPDES permit compliance. The stormwater utility is a user-fee, much like the fee that you pay for your water utility or sanitation service. Users of these services are charged based on the demand they place on the system. The stormwater that flows off your property places demand on a vast system of infrastructure which is costly to operate and maintain. Stormwater must be channeled through a system of pipes and other devices before it can be safely discharged into local rivers, lakes, and streams. A property's value does not affect runoff, so property taxes are not the most equitable way to pay for stormwater services. While a high-rise building and a shopping mall may have similar property values and similar taxes, the shopping mall probably produces more runoff due to more rooftops and more parking. So, the fee system equitably will ensure that the customer pays only for the runoff that they produce.

Q. Where can I go for more stormwater utility information?

If you would like additional information on the stormwater rate system, or have specific concerns about stormwater issues, visit www.a2gov.org/storm, email storm@a2gov.org, or call 734-794-6320.

Q. Is stormwater management required for my single family residential construction project?

On Nov. 4, 2010, City Council approved an ordinance (Ordinance No. ORD-10-36) to amend the stormwater code (Chapter 63) to require stormwater management on single and two-family residential properties when properties increase impervious area by 200 or more square feet. All grading permit applicants for projects creating new impervious areas must complete an impervious area worksheet and submit it to the Planning and Development Services Unit along with their grading permit application. If the new impervious area is greater than 200 square feet then stormwater management must be provided. If the new impervious area is less than 200 square feet then no further information is necessary to obtain a grading permit.

The amendments to Chapter 63 require control of stormwater runoff from the "first flush" storm event on single and two-family residential property when adding 200-square feet or more of impervious area to the property. The "first flush" is the runoff from the first inch of rain during any storm event and carries approximately 90 percent of pollutants. The new requirement would only apply to the increase in impervious area.

Single Family Residential storm water management information and forms:
www.a2gov.org/StormResidentialConstruction

For general permit questions, contact the City's Permit Desk at (734) 794-6267.

For questions about the Stormwater Code Requirement program, call Peter Stephens at (734) 794-6430 x42592 or e-mail PStephens@a2gov.org

EXHIBIT - 11

City of Ann Arbor Water Utilities
PO Box 8647 301 E. Huron St.,
Ann Arbor, MI 48107-8647 (734) 794-6333

Document No. 3269102

1111

Service Address	Service Class	Account Number	District	Billing Period
2995 PACKARD RD	NON-RES	526167-194523	12	5/29/2021 - 8/25/2021

Meter ID	Meter Reading Date	Read Type	Current Read	Previous Read	Multiplier	Consumption
535687926-0.75	8/25/2021	Actual	259	248	N/A	11

Important Information:

Please be advised that our rates have changed as of 7/1/2021. You can view the rates and pay your bill online at a2gov.org. Also, Ann Arbor's A2H2O Quality Water Matters monthly newsletter features drinking water facts and monthly test results. It can be found at QualityWaterMatters.org. To receive a copy please call (734)794-6426.

Previous Balance	$67.11
Payment Received 06/28/2021 - Thank You	($60.39) CR
Discount Received	($6.72) CR
Old Rate: 5/30/2021 to 6/30/2021	
NON-RESIDENTIAL WATER 4.00 ccf for 32 days @ $4.34000/ccf	$17.36
Water 0.62 Domestic Customer Charge	$8.61
SEWER 4.00 ccf for 32 days @$6.33000/ccf	$25.32
Sewer 0.62 Domestic Customer Charge	$5.80
STORMWATER DISCHARGE 0.3910 acres x @$851.44/acre	$126.65
Stormwater Domestic Customer Charge	$1.58
New Rate: 7/1/2021 to 8/25/2021	
NON-RESIDENTIAL WATER 7.00 ccf for 56 days @ $4.62000/ccf	$32.34
Water 0.62 Domestic Customer Charge	$16.06
SEWER 7.00 ccf for 56 days @$6.33000/ccf	$44.31
Sewer 0.62 Domestic Customer Charge	$10.16
STORMWATER DISCHARGE 0.3910 acres x @$894.01/acre	$216.58
Stormwater Domestic Customer Charge	$2.62
Total Amount Due By 10/24/2021	$507.39
Discounted Amount Due if Paid by 10/14/2021	$456.65

0101130

Checks payable to: City of Ann Arbor Water Utilities
Please include your 12-digit account number on your check

Service Address: 2995 PACKARD RD
Account Number: 526167-194523
Document No. 3269102
District: 12

Amount Due If Paid By: 10/14/2021	$456.65
Amount Due if Paid After: 10/14/2021	$507.39
Ann Arbor Assistance Fund Donation	_____
Payment Enclosed	_____

Pg 1 of 1

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******AUTO**5-DIGIT 48108 C 5 P 2 1232 1 AV 0.423 30

PLATT CONVENIENCE
2995 PACKARD ST
ANN ARBOR MI 48108-1879

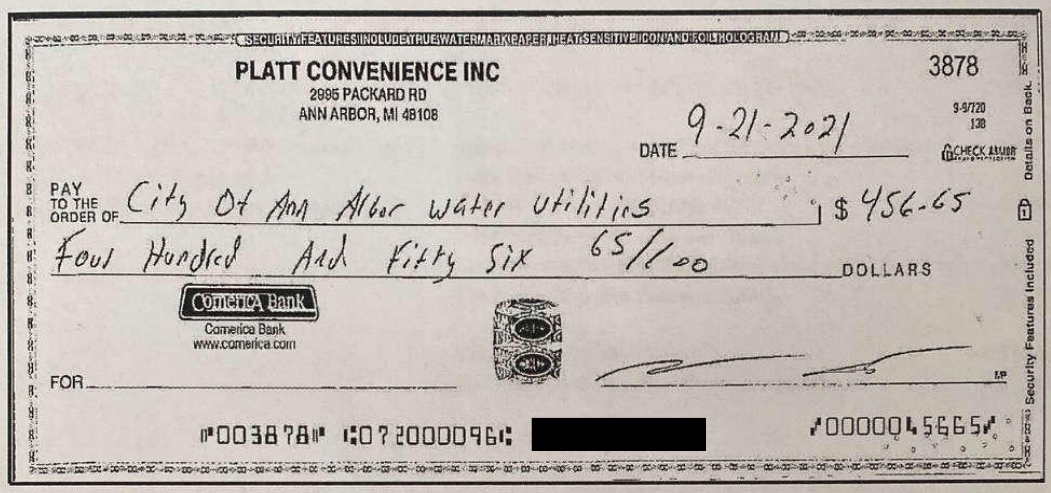
Remit To: DEPT. #77610
CITY OF ANN ARBOR TREASURER
PO BOX 77000
DETROIT, MI 48277-0610

09152114270101001232

0000 000000 526167194523 0003269102 0000045665 0

[redacted]

SEP 24 2021	3878	CHECK (SUBSTITUTE)	-$456.65	$80,450.02



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ANN ARBOR, MI 48108

3878

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DATE 9-21-2021

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www.comerica.com

FOR

⑈003878⑈ ⑆072000096⑆ [redacted] ⑈000045665⑈

Details on Back. Security Features Included

[redacted]

EXHIBIT - 12

Stormwater Rates and Credits

Stormwater Rates

The stormwater rate system bills properties based on usage of the storm water system, as represented by impervious area. Impervious surfaces do not absorb water. Examples of impervious areas include roofs, pavement, sidewalks, patios, and gravel or crushed stone surfaces.

How is stormwater usage measured by impervious area?

A computer analysis of infrared aerial photographs is able to distinguish hard, impervious surfaces in contrast to areas that can absorb stormwater, such as lawns and gardens. The computer program assigns the residential property into one of four billing tiers to more equitably distribute costs proportional to use instead of using a flat fee. Homes with larger impervious areas pay more. You can review your property's stormwater assessment online and, if desired, submit an appeal (see below).

What are the current stormwater rates?

Single and two-family residential properties are placed in one of the following four rate tiers, depending on the square footage of impervious area.

	Single-Family and Two-Family Residential		
Tier #	Measured impervious area	Representative Impervious Area Midpoint of Tier listed on the Water Utilities Bill	Quarterly Charge*
Tier 1	Up to 2,187 square feet	0.03706 acres	$31.55
Tier 2	> 2,187 to 4,175 square feet	0.06486 acres	$55.22
Tier 3	> 4,175 to 7,110 square feet	0.11117 acres	$94.65
Tier 4	> 7,110 square feet	0.19456 acres	$165.66

* Plus a $4.15 customer service charge per quarter.

Commercial and other properties (e.g., multi-family, office, institutional, and industrial land uses) are billed directly on the impervious areas at a rate of $851.44 per acre per quarter, plus a $4.15 customer charge per quarter.

How do I view my stormwater calculation online?

1. Link to your online stormwater calculation (impervious area and stormwater fee information) through mapAnnArbor (https://a2gov.org/AnnArborStormwater).
2. Type your address into the search bar in the upper right.

The property image will show the impervious area analysis for the property you have requested. This analysis has primarily been done with a computer, so some errors may have occurred. The following pervious materials might be interpreted by the computer as impervious:

- Wood chips
- Areas in shadows
- Decks with spaces between the boards with underlying pervious material

Please note that driveways are impervious regardless of the material, unless it is constructed with permeable pavers, permeable asphalt, or permeable concrete (these permeable system installations are rare).

How do I submit an appeal?

If you have reason to believe that the impervious area has been incorrectly identified, please take the following steps:

1. Save or print the online stormwater assessment
2. Identify the areas that have been incorrectly identified as impervious (contrasting pen or highlighter works best)
3. Email it to storm@a2gov.org (mailto:storm@a2gov.org) or mail the document to:

   City of Ann Arbor – Stormwater
   Box 8647
   Ann Arbor, MI 48107-8647

We will review your revisions, and return the results of the analysis to you. Please remember that if you are a one or two-family residential property, you will need to reduce your impervious area by an amount sufficient to enter a lower tier. For example, if you are currently at 4,775 square feet, you will need to lower your impervious area by 600 square feet (to 4,175) in order to enter a lower tier.

Stormwater Credits

You can take advantage of credits to lower your storm water bill.

- Residential (One and Two-Family) Credits (/departments/systems-planning/planning-areas/water-resources/stormwater/Pages/Residential-Stormwater-Credits.aspx)
- Commercial Stormwater Credits (/departments/systems-planning/planning-areas/water-resources/Pages/Commercial-Storm-Water-Credits.aspx)

Stormwater Credit Events

Several workshops on rain gardens and/or rain barrels are often conducted by local organizations and businesses. Please contact these organizations for more specific topics and upcoming dates. Rain garden presentations are available to local neighborhood and service groups from the Washtenaw County Water Resources Commissioner's Office.

- Washtenaw County Water Resources Commissioner (https://www.washtenaw.org/615/Water)
- City of Ann Arbor's Natural Areas Preservation (NAP) (/departments/Parks-Recreation/NAP/Pages/NaturalAreaPreservation.aspx) (http://www.growinghope.net/)
- Growing Hope, nonprofit based in Ypsilanti, MI (http://www.growinghope.net/)
- University of Michigan Matthai Botanical Gardens (http://www.lsa.umich.edu/mbg/about/ErosionControl.asp)
- Huron River Watershed Council (http://www.hrwc.org/)
- Michigan Rain Barrels, LLC (http://mirainbarrel.com/)

Frequently Asked Questions

Stormwater requirements, mangagment and rates FAQ (/departments/systems-planning/planning-areas/water-resources/Documents/Stormwater_Rates_FAQs_08_2020.pdf)(PDF)

Stormwater Utility Policy Documents

- A2 Stormwater Utility Rate Study 5-3-2018 (/departments/systems-planning/programs/Pages/Ann-Arbor-Storm-Water-Level-of-Service-and-Rate-Analysis-Project.aspx)
- A2 Stormwater Utility Update Report FINAL Sept 08 (/departments/systems-planning/planning-areas/water-resources/Documents/A2%20Stormwater%20Utility%20Update%20Report%20FINAL%20Sept%2008.pdf) (PDF)
- A2 Stormwater Utility Regulations FINAL 8-06-07 (/departments/systems-planning/planning-areas/water-resources/Documents/A2%20Stormwater%20Utility%20Regulations%20FINAL%208-06-07.pdf) (PDF)
- A2 Stormwater Utility Policies Procedures Manual FINAL 9-15-08 (/departments/systems-planning/planning-areas/water-resources/Documents/A2%20Stormwater%20Utility%20Policies%20%20Procedures%20Manual%20FINAL%209-15-08.pdf) (PDF)

Stormwater Management on Residential Construction Projects

Did you know that a stormwater management plan is required for residential construction projects with 200+ sq. ft. of impervious surfaces? Visit the Residential Stormwater Code Requirements page (/departments/build-rent-inspect/building/permits/Pages/Residential-Stormwater-Code-Requirements.aspx) for more information about the code changes and to download an impervious area worksheet that will help you determine if your project will require stormwater management as part of the grading permit application process.

If you are interested in receiving stormwater credits for your treatment measures visit the Residential Stormwater Credits page (/departments/systems-planning/planning-areas/water-resources/stormwater/Pages/Residential-Stormwater-Credits.aspx) to verify that your treatment measure will meet those minimum requirements before the design is complete and plans are submitted.

 (https://public.govdelivery.com/accounts/MIANNA/subscriber/new?topic_id=MIANNA_111) Sign for stormwater updates. (https://public.govdelivery.com/accounts/MIANNA/subscriber/new?topic_id=MIANNA_111)

Systems Planning
301 E Huron St., 4th Floor
P.O. Box 8647
Ann Arbor, MI 48107

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