# EXHIBIT - 16

# The Urban Forest

The urban and community forest is a defining and valued characteristic of the city of Ann Arbor, which residents affectionately call "Tree Town," helping make it a desirable place to live, work and play. It is made up of the trees, shrubs and woody vegetation growing along city streets; in public parks; and on institutional and private property. **The urban and community forest provides many environmental, economic and social benefits to the community**, including reducing stormwater runoff, improving water and air quality, moderating summer temperatures, lowering utility costs, improving quality of life and beautifying the city. It is estimated that Ann Arbor's city-managed urban and community forest, which includes trees growing along streets and in mowed areas of parks, provides nearly $4.6 million in benefits each year.

Learn more in the Urban and Community Forest Management plan (/departments/forestry/Documents/UCFMP_FINAL_022515.pdf) (PDF).

## Tree inventory

Ann Arbor takes advantage of an online mapping tool (/AnnArborTrees) that allows staff and residents alike to see the location and species of each city maintained tree within the City of Ann Arbor. Users can see this map on any computer or mobile device with internet access.

## Cool calculator

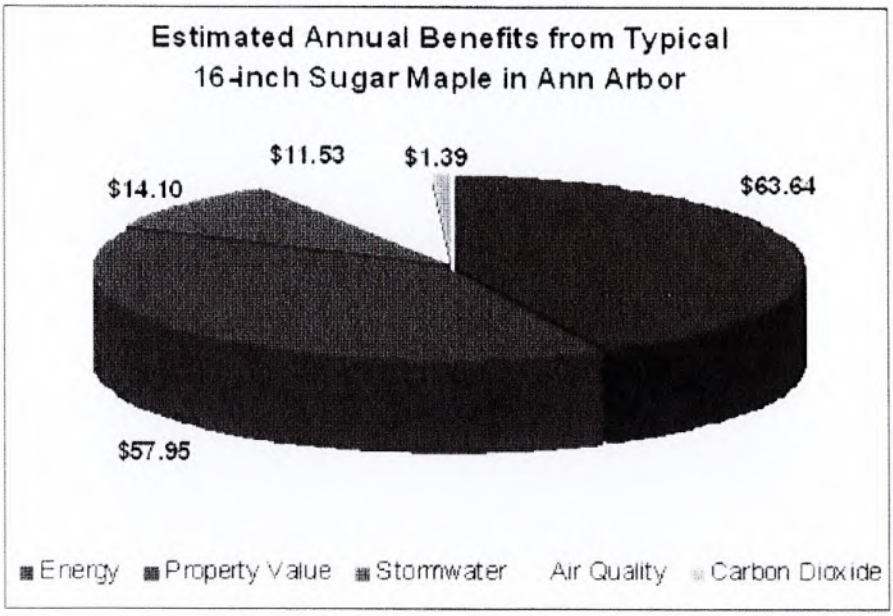
Estimate the benefits of trees around your home using the National Tree Benefit Calculator (http://www.treebenefits.com/calculator/) -- type in your zip code, tree species and tree diameter.

## iTree Eco analysis

In 2012, the city partnered with Davey Resource Group and the Michigan Department of Natural Resources with funding from the USDA Forest Service Urban and Community Forestry program to conduct an i-Tree Eco Analysis in Ann Arbor. The iTree Eco Analysis (/departments/forestry/Documents/AnnArbor_iTreeEcoReport.pdf) (1.45MB PDF) calculated the benefits that Ann Arbor's urban forest, both public and private trees, provides to the City. The analysis estimates that Ann Arbor has over 1.45 million trees; these trees remove 405/tons of pollution per year which is equivalent to the pollution produced by 358,000 automobiles annually.

## How much does the community benefit from one tree?

To demonstrate the value trees provide to our community, consider the benefits generated by a typical tree in Ann Arbor. A 16-inch diameter sugar maple planted on a single family residential lot provides $149 in benefits every year (National Tree Benefit Calculator (http://www.treebenefits.com/calculator/)).




## Lower energy costs

### Value of one tree: $63.64

### Value of all Ann Arbor Public Trees: $2,252,055

An individual sugar maple tree conserves 98 kilowatt-hours of electricity for cooling and reduces consumption of natural gas by 35 therms. Trees modify and conserve building energy use in three principle ways:

- Shading reduces the amount of heat absorbed and stored by buildings.
- Evapotranspiration converts liquid water to water vapor and cools the air by using solar energy that would otherwise result in heating of the air.
- Tree canopies slow down winds thereby reducing the amount of heat lost from a home, especially where conductivity is high (e.g., glass windows).

Strategically placed trees can increase home energy efficiency. In summer, trees shading east and west walls keep buildings cooler. In winter, allowing the sun to strike the southern side of a building can warm interior spaces. If southern walls are shaded by dense evergreen trees there may be a resultant increase in winter heating costs.

## Higher property values

### Value of one tree: $57.95

### Value of all Ann Arbor Public Trees: $1,368,302

Research shows homebuyers will pay more for a property with mature trees than for a property with few or no trees. This analysis is based on the tree's leaf surface area, and the property value benefit will increase as the tree grows.

## Cleaner water

### Value of one tree: $14.10

### Value of all Ann Arbor Public Trees: $519,895

Stormwater run-off is the most prevalent water quality problem in the nation. One sugar maple tree can intercept 1763 gallons of stormwater run-off each year. Together, Ann Arbor's public trees intercept 65 million gallons of stormwater. Trees in the urban environment decrease the quantity of stormwater run-off and improve the quality of run-off that eventually reaches local lakes, streams, and reservoirs.

- The urban forest canopy, along with tree branches, bark, and mosses, captures and stores precipitation, delaying the onset of peak flows and reducing the total amount of run-off that reaches urban waterways via the storm drain system.
- Trees slow down stormwater run-off and promote groundwater infiltration.
- Trees take up water through their root systems and release it to the atmosphere through evapotranspiration, facilitating greater water storage potential in soils and increasing the amount of time before rainfall becomes run-off.
- Tree roots take up nutrients and potentially harmful chemicals from stormwater run-off. Pollutants are filtered out as water moves through the ground.

## Healthier air

### Value of one tree: $11.53

### Value of all Ann Arbor Public Trees: $477,402

Air pollution is a serious health threat that causes asthma, coughing, headaches, respiratory and heart disease, and cancer. The urban forest mitigates the health effects of pollution by:

- Absorbing pollutants like ozone, nitrogen dioxide and sulfur dioxide through leaves
- Intercepting particulate matter like dust, ash and smoke
- Releasing oxygen through photosynthesis
- Lowering air temperatures, reducing the production of ozone
- Reducing energy use and subsequent pollutant emissions from power plants

## Reduced carbon dioxide levels

## Value of one tree: $1.39

## Value of all Ann Arbor Public Trees: $52,450

One sugar maple reduces atmospheric carbon dioxide (CO2) levels by 502 pounds per year. Collectively, Ann Arbor's public tree resource reduces CO2 by 7,851 tones per year.

- Trees sequester, or lock up, carbon in roots, trunks, branches, and leaves while growing, and in wood products after harvest.
- Trees near buildings can reduce heating and air conditioning demands, thereby reducing emissions associated with power production.

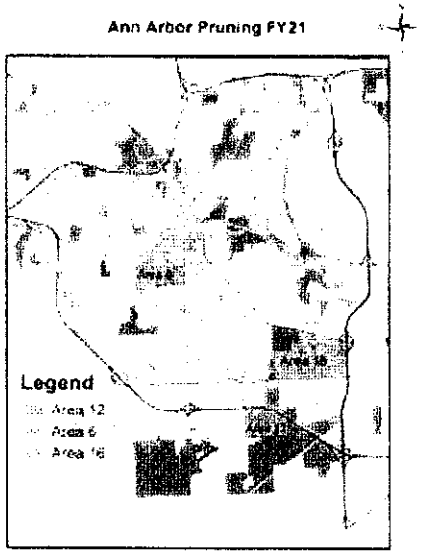
Forestry Public Works
Wheeler Service Center
4251 Stone School Road
734.794.6320
customerservice@a2gov.org (mailto:customerservice@a2gov.org)

# EXHIBIT - 17

# Routine Street Tree Pruning

The fourth year of the city's routine street tree pruning program will begin in late summer/early fall 2020 and will be completed by the end of June 2021. This program is funded through the stormwater utility.

The map to the right shows the areas that will be part of the pruning (/departments/forestry/Documents/FY21%20Pruning%20Map%20(Year%204).pdf) program. Please note these areas are subject to change. Based on current resources, it will take approximately 10 years to prune all city street trees.




Pruning will be done by professionals, in accordance with city specifications. Most street trees have not been pruned in over 15 years; and some may require extensive pruning to ensure safety and to improve the health of the tree.

City staff and the city's tree care contractor will make every effort to keep driveways clear and roads accessible during work. Streets will be posted "No Parking", when necessary.

## What are the benefits of a routine street tree pruning?

Trees pruned on a routine basis develop proper form and structure leading to a variety of benefits, including:

- Lower cost per tree trimmed compared to reactive pruning done in response to storm damage, sight clearance or immediate hazards
- Healthier tree canopy as a result of removing dead, dying or diseased limbs, earlier identification and correction of insect/disease problems
- Reduction in storm related tree damage
- Better clearance and less obstructions in the public right-of-way as well as better sight lines for signs, signals and intersections
- Lower future maintenance costs
- Improvement of tree's structure to better withstand stresses from wind, ice and rain.

## Reminders

- At this time, we are unable to provide a schedule of when a street will be pruned.
- No requests will be accepted to exempt a street tree from the program.
- Some tree species require pruning during the dormant season to prevent the spread of diseases. These tree species will be pruned first. Pruning crews will return to prune the remaining trees at a later date.
- Debris created during the pruning program will be removed.

# EXHIBIT - 18

**In The Matter Of:**

*Ann Arbor City Council Meeting*

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*Hearing*

*October 19, 2020*

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Judy Jettke & Associates

COURT REPORTING AND VIDEO

*Original File CCHEARING201019.txt*

***Min-U-Script® with Word Index***

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MAYOR TAYLOR: CA-1 resolution to award a contract to Davey Tree Expert Company for routine street pruning in the amount of $674,020 moved by council member Eaton, seconded by council member Ramlawi. Discussion please on CA-1, council member Eaton.

COUNCILMAN EATON: Thank you. In light of the Hahn versus Ann Arbor litigation that's pending right now, I can't support spending stormwater funds in this quantity for a purpose not directly related to stormwater services. I realize there's this extenuated relationship between trees and stormwater, but I don't feel that it falls within the Bolt v. Lansing definition of a fee, and so I won't be supporting this. I think this is a lot of money to be pulling out of a stormwater fund for a matter that just kind of relates to the subject matter.

This amount of money is actually even more than the repeated amendments that we've funded our outside council with water supply funds with. That's only accumulated to about $475,000. This is 674,000. This is an incredible amount of money all at once. And so I will be opposing this resolution. Thank you.

MAYOR TAYLOR: Counsel member Ackerman.

COUNCILMAN ACKERMAN: Mr. Mayor, I will be

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glad to support this. Our street trees, while they beautify our neighborhoods and are a defining characteristic in our community, they're also our first line of defense against flooded basements in increased rainfall as our climate changes. If (inaudible) are uncertain and unclear about the connection between street trees and the impact on keeping our homes safe, I'll refer them to the EPA's manual and guide on stormwater to street trees. It's a really useful 31-page document that directly draws the link from experts in a number of fields between exactly how this infrastructure keeps us safe and uses these dollars to their truest and fullest extent.

MAYOR TAYLOR: Council member Griswold.

COUNCILWOMAN GRISWOLD: I agree with counsel member Ackerman. I fully support maintenance of our street trees, and they were not maintained as they should have been for many years. However, I think that it is taking the conservative route to fund that activity from the general fund until such time as this lawsuit is decided. Thank you.

MAYOR TAYLOR: Further discussion. I've got counsel member Hayner.

COUNCILMAN HAYNER: Thanks, Mr. Mayor. This rarely comes up, an opportunity to discuss this,

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but I appreciate you pulling it off. I understand, I obviously looked through the EPA manual on the tree trees, the paper. I get where it's coming from, but at the same time, we have the situation here in the city where we also, for other reasons that aren't completely clear, we really look down on folks who do large gardening near the stormwaters and the sidewalks and the easements, and over the years I've had to dramatically reduce the amount of plantings on my easement, even after my street tree was gone, or especially after, I should say, because as soon as that street tree was gone, everything got like eight feet tall out there and now it's exposed to the sun again.

And so every spring I go out there and I remove -- and I finally got rid of most of them last year -- I took almost 900 pounds of materials out of there last year and that was just that sprouted, and I tell you what, if you want to talk about holding water back, take a look at -- pull out some, dig out some day lilies, or native grasses or things like that, and the roots on those things and tubers and so one, it's incredible how much water plants retain, and so I have no doubt that street trees do the same thing. But I do have doubts about paying for it from the

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stormwater. And so I certainly understand where council member Eaton is coming from, and I'm going to go along with him in this case and suggest that maybe this come back and be paid for from another place until we sort all this out. Thank you.

MAYOR TAYLOR: Council member Ramlawi.

COUNCILMAN RAMLAWI: Thank you. Hopefully my audio is working today. I appreciate the acknowledgment on that. I appreciated council member Eaton pulling this up for discussion and the concern he has about the litigation that will be coming forth with the stormwater and sewer water and water rates. But I think it's premature to start pulling the plug on programs and funding sources in light of that. I don't believe, for me, at least, that the concern of that being challenged when it comes to stormwater and its connection to controlling rain events and using our stormwater monies to protect the infrastructure and the environment in the way we have. We are behind schedule with our maintenance, which will lead to bigger problems if we don't do the preventative maintenance that's already behind schedule. I'll just say that I appreciate the concern but it hasn't risen to the level where I would decide to pull the plug on this program or shift the funding sources. In fact, I

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applaud the progressive thought of using the stormwater money on programs like this rather than general fund dollars, because we are challenged with a lot of priorities and not enough resources. So I think it's, in fact, a good way to redirect the resources that we have to prescribe programs as such.

MAYOR TAYLOR: Council member Ackerman.

COUNCILMAN ACKERMAN: Thanks, Mr. Mayor. Exactly what counsel member Ramlawi said. I will just add that at any given time, we're defending dozens of different lawsuits, and if we stopped doing public service in response to every single one of those and started questioning our experts and our attorneys about the right and fair way to do that, we would shut down as a city hall. We wouldn't have a fire department, we wouldn't issue liquor licenses, we wouldn't balance our budget. The city would come to a screeching halt. And so we should let the lawsuit run its course in the judicial system, in the court system, and we should carry on with the advice of our professionals and our attorneys.

MAYOR TAYLOR: Counsel member Grand.

COUNCILWOMAN GRAND: Thank you. Much of what I wanted to say has just been said by the prior couple of speakers. I would also like to point out

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that I don't know where we're going to find $674,000 in our general fund and what would you not pay for instead, if you're going to pay for this with $674,000 in our general fund. So I don't see the trade-off (inaudible), and I won't comment on the lawsuit, but we definitely shouldn't be changing policy as a result of it. Thanks.

MAYOR TAYLOR: Council member Bannister.

COUNCILWOMAN BANNISTER: Thank you. I see that Molly has joined us here at the meeting tonight, and I was wondering if she had any thoughts about this, particularly I'm wondering is there any way to minimize the 674,000, and are there any other sources of funds besides this stormwater fund that is currently being subject of the lawsuit.

MS. MACIEJEWSKI: I would say the only way that we could minimize or bring down the cost would be to do less pruning, and the city's goal is to prune 10 percent of the trees each year. This is consistent with industry standards and what we would want to see to keep our healthy urban forest. So if we do that, we are not going to be maintaining our trees as we should and as council member Griswold had talked about that we have been trying so hard to get back on track with. As far as alternate funding sources, we have

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not looked at that.

MAYOR TAYLOR: Council member Ramlawi.

COUNCILMAN RAMLAWI: Thank you for the opportunity a second time. I would just say as we go further along and kind of enhance our community and the services that we provide, this is an ongoing program, we are just in year five of a ten year cycle, I'm sure we're going to have to repeat this cycle every ten years. And I would just try to advocate for bringing this back inhouse so we're not constantly outsourcing this. This adds up, and I think when we start talking about democratic values of good working, good paying jobs, people living in the city, working in the city, I think this is a job that should be honestly inhouse. It's ongoing, it's not a one off, it's not seasonal, it's not like peaking like it does in the construction department, permitting kind of thing when I speak of seasonal. I feel like this is something, if we have a dedicated source of funding, a reliable source of funding as we identified here with the stormwater, that we should really be looking at having this kind of activity done with city employees on an ongoing basis. I just find it hard to think that a for-profit company would be able to provide a better service for a better price than if we did it

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ourselves.

MAYOR TAYLOR: Counsel member Lumm.

COUNCILWOMAN LUMM: I will follow counsel member Eaton. You called on us in the right order. I just want to defer to him first.

MAYOR TAYLOR: Counsel member Eaton.

COUNCILMAN EATON: Thank you. I want to remind council that this is an essential service, but its relationship to the stormwater fee is marginal at best. In the Bolt v Lansing case, the City of Lansing tried to use its stormwater fees to finance the separation of its sewer system, stormwater and wastewater systems that had been mandated by a regulatory agency. So it was required to do that, and nonetheless, because the benefit being conferred was a benefit that was generalized throughout the community and wasn't particularized to the fee payer based on the amount they were paying, it was considered to be more appropriate for a tax than for a fee. Similarly, with this, if a tree is planted in my front yard, it doesn't benefit somebody in the second ward and there's nobody that person in the second ward can do to minimize their cost for tree planting elsewhere in the city. It's so general that it should be funded by a tax, not by a user fee. The user fee should be for

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the cost of providing the actual service.
Another factor in this kind of case is when the service was previously funded from the general fund and then it shifted into this kind of fund. Historically, our forestry department was funded from the general fund, and it was just a number of years ago that it was shifted into our stormwater funding. And that is not going to help us in this litigation, I believe. So I understand that the next council might want to take this risk, I'm just not willing to impose this risk on them on my way out the door. So if you want to vote in favor of this, I understand, this is an essential service, it's just not appropriately funded with this fee. So I will be voting against it. If the plaintiff in the Hahn case prevails, we'll have to come up with the $674,000 somewhere anyways to repay it. So I just think you need to be more cautious with how you use fee revenue in this kind of general operational sense.
MAYOR TAYLOR: Thank you. Counsel member Lumm.
COUNCILWOMAN LUMM: Thank you. I'm glad you spoke councilman Eaton. Thank you for that value add. I think that's critical information for us to consider. One of my questions is going to be, how do

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other communities fund this type of tree pruning, tree maintenance, three programs, and I do not question at all that this is important work or that Molly -- Miss Maciejewski's department needs this money. It is a lot of money, but again -- we just have not kept up with the work out there that needs to be done. And so my only concern here is the funding source, and I hope that going forward, if this doesn't past -- I just think it's prudent to identify another funding source to do this work. I know that's a challenge (inaudible) but I think it's in the city's best interest to do that. Thank you.
MAYOR TAYLOR: Further discussion? For my part, I will just state that I unequivocally reject the suggestion that our practice is without basis in law. I think it is consistent with, certainly with the legal advice we've received but also consistent with Michigan law. The connection between street trees and stormwater is undeniable. The street tree -- our street trees are a critical component of our stormwater system and they have played in obvious other benefits -- other benefits as well. But that is ancillary, ancillary to their demonstrated and scientifically proven stormwater benefit. Further discussion? Roll call vote please.

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CLERK BEAUDRY: Council member Nelson.
COUNCILWOMAN NELSON: Yes.
CLERK BEAUDRY: Council member Smith.
COUNCILMAN SMITH: Yes.
CLERK BEAUDRY: Council member Ramlawi.
COUNCILMAN RAMLAWI: Yes.
CLERK BEAUDRY: Council member Hayner.
COUNCILMAN HAYNER: No.
CLERK BEAUDRY: Counsel member Bannister.
COUNCILWOMAN BANNISTER: No.
CLERK BEAUDRY: Counsel member Griswold.
COUNCILWOMAN GRISWOLD: No.
CLERK BEAUDRY: Counsel member Lumm.
COUNCILWOMAN LUMM: No.
CLERK BEAUDRY: Counsel member Grand.
COUNCILWOMAN GRAND: Yes.
CLERK BEAUDRY: Counsel member Ackerman.
COUNCILMAN ACKERMAN: Yes.
CLERK BEAUDRY: Mayor Taylor.
MAYOR TAYLOR: Yes.
CLERK BEAUDRY: Counsel member Eaton.
COUNCILMAN EATON: No.
CLERK BEAUDRY: Motion carries.

# EXHIBIT - 19

| | |
|---|---|
| Journal Type | Journal Entry |
| Organization Set.Organization | 0010 General |
| Base And Detail Account With Both Descriptions | 2710.0069 - Operating Transfers, 0069 |
| Fiscal Year | Fiscal Calendar 2014 |
| Process Status | Posted |

| Row Labels | Actual Amount | |
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| **2014-00000044** | **(7,083.33)** | |
| **July 2013 Transfers** | **(7,083.33)** | |
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| **2014-00000384** | **(7,083.33)** | |
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| **2014-00001059** | **(7,083.33)** | Parks - Stormwater Education |
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| **JUNE 2014 Transfers** | **(7,083.33)** | |
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| Row Labels | Actual Amount | |
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| **July 2014 Transfers** | **(7,083.33)** | |
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| **Grand Total** | **(84,999.96)** | |

| Row Labels | Actual Amount |
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| **2016-00000159** | **(7,083.00)** |
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| **2016-00001042** | **(7,083.00)** |
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| **2016-00001150** | **7,083.00** |
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| **2016-00004367** | **(7,083.00)** |
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| **February 2016 Transfers** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2016-00005735** | **(7,083.00)** |
| **March 2016 Transfers** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2016-00006420** | **(7,083.00)** |
| **APRIL 2016 Transfers** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2016-00007150** | **(7,083.00)** |
| **May 2016 Transfers** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2016-00007500** | **(7,083.00)** |
| **June 2016 Transfers** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **Grand Total** | **(84,996.00)** |

| | |
|---|---|
| Journal Type | (Multiple Items) |
| Organization Set.Organization | 0010 General |
| Base And Detail Account With Both Descriptions | 2710.0069 - Operating Transfers, 0069 |
| Fiscal Year | Fiscal Calendar 2017 |
| Process Status | Posted |

| Row Labels | Actual Amount |
|---|---|
| **2017-00000057** | **(7,666.00)** |
| **July 2016 Transfers** | **(7,666.00)** |
| 0010-014-1000-0000-2710.0069 | (583.00) |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2017-00000873** | **(7,666.00)** |
| **August 2016 Transfers** | **(7,666.00)** |
| 0010-014-1000-0000-2710.0069 | (583.00) |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2017-00001581** | **(7,666.00)** |
| **September 2016 Transfers** | **(7,666.00)** |
| 0010-014-1000-0000-2710.0069 | (583.00) |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2017-00002303** | **(7,666.00)** |
| **October 2016 Transfers** | **(7,666.00)** |
| 0010-014-1000-0000-2710.0069 | (583.00) |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2017-00002916** | **(7,666.00)** |
| **November 2016 Transfers** | **(7,666.00)** |
| 0010-014-1000-0000-2710.0069 | (583.00) |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2017-00003603** | **(7,666.00)** |
| **December 2016 Transfers** | **(7,666.00)** |
| 0010-014-1000-0000-2710.0069 | (583.00) |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2017-00004196** | **(7,666.00)** |
| **Janaury 2017 Transfers** | **(7,666.00)** |
| 0010-014-1000-0000-2710.0069 | (583.00) |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2017-00004915** | **(7,666.00)** |
| **February 2017 Transfers** | **(7,666.00)** |
| 0010-014-1000-0000-2710.0069 | (583.00) |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2017-00005600** | **(7,666.00)** |
| **March 2017 Transfers** | **(7,666.00)** |
| 0010-014-1000-0000-2710.0069 | (583.00) |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2017-00006430** | **(7,666.00)** |
| **April 2017 Transfers** | **(7,666.00)** |
| 0010-014-1000-0000-2710.0069 | (583.00) |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2017-00007045** | **(7,666.00)** |
| **April 2017 Transfers** | **(7,666.00)** |
| 0010-014-1000-0000-2710.0069 | (583.00) |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2017-00007272** | **7,666.00** |
| **April 2017 Transfers** | **7,666.00** |
| 0010-014-1000-0000-2710.0069 | 583.00 |
| 0010-060-1000-1000-0000-2710.0069 | 7,083.00 |
| **2017-00007273** | **(7,666.00)** |
| **May 2017 Transfers** | **(7,666.00)** |
| 0010-014-1000-0000-2710.0069 | (583.00) |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2017-00007688** | **(7,666.00)** |
| **June 2017 Transfers** | **(7,666.00)** |
| 0010-014-1000-0000-2710.0069 | (583.00) |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **Grand Total** | **(91,992.00)** |

| Stormwater Education/Outreach | Annual | Monthly |
|---|---|---|
| Trasnfer to Parks | $ 85,000 | $ 7,083 |
| Supplemental Attorney Costs | $ 7,000 | $ 583 |
| | **$ 91,992** | **$ 7,667** |

City of Ann Arbor

# BUDGET IMPACT ANALYSIS

**SERVICE AREA:** **City Attorney**
**SERVICE UNIT:**

| SERVICE ACTIVITY | Recurring/Non-recurring | FUND | CHANGES FROM EXISTING SERVICE LEVELS | FY 17 Planned Impact | | FY 17 Actual Impact |
|---|---|---|---|---|---|---|
| General Administration | Recurring | 0010 | **New City Attorney Position-.5 FTE additional** | | | $ 95,852 |
| | | | * $35,000.00 of this salary will be provided by the Public Services Area per Craig Hupy as part of long term succession planning and work for the Public Service Area | | | (35,000) |
| | | | * $42,000.00 will be from a .5 position savings | | | (42,000) |
| | | | *$12,000.00 from our temp fund | | | (12,000) |
| | | | **TOTAL DOLLARS ($) IDENTIFIED** | **$** | **-** | **$ 6,852** |
| | | | **Net New Impact for FY17** | | | **$ 6,852** |



AA Resp. 5160

| | |
|---|---|
| Journal Type | (Multiple Items) |
| Organization Set.Organization | 0010 General |
| Base And Detail Account With Both Descriptions | (Multiple Items) |
| Fiscal Year | Fiscal Calendar 2018 |
| Process Status | Posted |

| Row Labels | Actual Amount |
|---|---|
| **2018-00000066** | **(7,083.00)** |
| **JULY 2017 TRANSFERS** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2018-00000753** | **(7,083.00)** |
| **AUGUST 2017 TRANSFERS** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2018-00001724** | **(7,083.00)** |
| **September 2017 Transfers** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2018-00002420** | **(7,083.00)** |
| **OCTOBER 2017 TRANSFERS** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2018-00002945** | **(7,083.00)** |
| **NOVEMBER 2017 TRANSFERS** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2018-00003821** | **(7,083.00)** |
| **DECEMBER 2017 TRANSFERS** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2018-00004412** | **(7,083.00)** |
| **JANUARY 2018 TRANSFERS** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2018-00005157** | **(7,083.00)** |
| **FEBRUARY 2018 TRANSFERS** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2018-00006078** | **(7,083.00)** |
| **March 2018 Transfers** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2018-00006719** | **(7,083.00)** |
| **APRIL 2018 TRANSFERS** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2018-00007614** | **(7,083.00)** |
| **MAY 2018 TRANSFERS** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **2018-00009019** | **(7,083.00)** |
| **June 2018 Transfers** | **(7,083.00)** |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) |
| **Grand Total** | **(84,996.00)** |

| | | |
|---|---|---|
| Stormwater Education/Outreach | | |
| Trasnfer to Parks | $ | 85,000 |

| | |
|---|---|
| Journal Type | (Multiple Items) |
| Organization Set.Organization | 0010 General |
| Base And Detail Account With Both Descriptions | 2710.0069 - Operating Transfers, 0069 |
| Fiscal Year | Fiscal Calendar 2019 |
| Process Status | Posted |

| Row Labels | Actual Amount | |
|---|---|---|
| **2019-00000019** | **(7,083.00)** | |
| **July 2018 Transfers** | **(7,083.00)** | |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) | |
| **2019-00000508** | **(7,083.00)** | Stormwater Education Transfer to Parks |
| **August 2018 Transfers** | **(7,083.00)** | Leslie Science Center |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) | |
| **2019-00001669** | **(7,083.00)** | |
| **September 2018 Transfers** | **(7,083.00)** | |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) | |
| **2019-00002480** | **(7,083.00)** | |
| **October 2018 Transfers** | **(7,083.00)** | |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) | |
| **2019-00003488** | **(7,083.00)** | |
| **November 2018 Transfers** | **(7,083.00)** | |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) | |
| **2019-00004188** | **(7,083.00)** | |
| **December 2018 Transfers** | **(7,083.00)** | |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) | |
| **2019-00004762** | **(7,083.00)** | |
| **January 2019 Transfers** | **(7,083.00)** | |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) | |
| **2019-00005961** | **(7,083.00)** | |
| **February 2019 Transfers** | **(7,083.00)** | |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) | |
| **2019-00006958** | **(7,083.00)** | |
| **March 2019 Transfers** | **(7,083.00)** | |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) | |
| **2019-00007610** | **(7,083.00)** | |
| **March 2019 Transfers** | **(7,083.00)** | |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) | |
| **2019-00008021** | **7,083.00** | |
| **March 2019 Transfers** | **7,083.00** | |
| 0010-060-1000-1000-0000-2710.0069 | 7,083.00 | |
| **2019-00008023** | **(7,083.00)** | |
| **April 2019 Transfers** | **(7,083.00)** | |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) | |
| **2019-00008629** | **(7,083.00)** | |
| **May 2019 Transfers** | **(7,083.00)** | |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) | |
| **2019-00009410** | **(7,083.00)** | |
| **JUNE 2019 TRANSFERS** | **(7,083.00)** | |
| 0010-060-1000-1000-0000-2710.0069 | (7,083.00) | |
| **Grand Total** | **(84,996.00)** | |

| | | | |
|---|---|---|---|
| **TOTAL Transfer from Stormwater Fund to Parks** | | **$** | **85,000.00** |
| | | $ | 85,000.00 |
| **Outdoor Educational Signage** | | **$** | **25,000.00** |
| The following locations have stormwater educational signage: | | | |
| Buhr Park | Wet Meadow/Rain Garden Project | $ | 1,250.00 |
| Gallup | Rain Garden by playground | $ | 1,250.00 |
| Leslie Science Center | | $ | 1,250.00 |
| Bandemer | | $ | 1,250.00 |
| Mary Beth Doyle Park | | $ | 1,250.00 |
| Argo | Rain Garden | $ | 1,250.00 |
| Olsen | Rain Garden/Stormwater Features | $ | 1,250.00 |
| West Park | | $ | 1,250.00 |
| Furstenberg | | $ | 1,250.00 |
| Farmer's Market | | $ | 1,250.00 |
| Stapp Natural Area | | $ | 1,250.00 |
| Leslie Park Golf Course | | $ | 1,250.00 |
| Vets Park | Skate Park | $ | 1,250.00 |
| Vets Park | Ice Rink | $ | 1,250.00 |
| Vets Park | Rain Garden at Jackson Road | $ | 1,250.00 |
| Vets Park | Rain Garden at Dexter Road | $ | 1,250.00 |
| Arbor Oaks | | $ | 1,250.00 |
| Burns Park | | $ | 1,250.00 |
| Miller Nature Area | | $ | 1,250.00 |
| Huron Hills | Rain Garden near Maintenance Barn | $ | 1,250.00 |
| **Educational Program - Parks and Recreations** | | **$** | **40,000.00** |
| The following are existing environmental education programs conducted through Parks and Rec. | | | |
| Stormwater Issues will be integrated where appropriate. | | | |
| Educational tools to be used will include, but are not limited to: brochures, presentations, social media, posters/banners | | | |
| Educational Programming: NAP | Volunteer Workdays (~70 annual) | $ | 769.23 |
| Educational Programming: NAP | Nature Walks (~6 annual) | $ | 769.23 |
| Educational Programming: NAP | Displays at events (NEED DETAIL) | $ | 769.23 |
| Educational Programming: NAP | Outreach to schools (NEED DETAIL) | $ | 769.23 |
| Educational Programming: NAP | Adopt a Park | $ | 769.23 |
| Educational Programming: NAP | Adopt a Rain Garden | $ | 769.23 |
| Educational Programming: NAP | Newsletters (Quarterly - sent to 2000 ppl) *NEED TO VERIFY TOPICS | $ | 769.23 |
| Educational Programming: NAP | Interpretive Brochures | $ | 769.23 |
| Educational Programming: NAP | Rain Garden Workshops (#?) | $ | 769.23 |
| Educational Programming: NAP | Frog and Toad Survey | $ | 769.23 |
| Educational Programming: NAP | Salamander Survey | $ | 769.23 |
| Educational Programming: NAP | Wetland Bird Survey | $ | 769.23 |
| Educational Programming: NAP | Native Planting Workshops | $ | 769.23 |
| Educational Programming: NAP | Site Plan Reviews (NEED TO DISCUSS) | $ | 769.23 |
| Educational Programming: P&R | Buhr Park Day Camp | $ | 769.23 |
| Educational Programming: P&R | Buhr Park Wet Meadow | $ | 769.23 |
| Educational Programming: P&R | Ann Arbor Canoe Liveries - River Connections | $ | 769.23 |
| Educational Programming: P&R | Ann Arbor Canoe Liveries - Preschool Programs | $ | 769.23 |
| Educational Programming: P&R | Ann Arbor Canoe Liveries - Boy Scouts and Girl Scouts | $ | 769.23 |
| Educational Programming: P&R | Ann Arbor Canoe Liveries - Physical Education Programs | $ | 769.23 |
| Educational Programming: P&R | Ann Arbor Canoe Liveries - River Day Camps | $ | 769.23 |
| Educational Programming: P&R | Ann Arbor Canoe Liveries - Public Programs (Wetlands by Canoe) | $ | 769.23 |
| Educational Programming: P&R | Ann Arbor Canoe Liveries - Public Programs (Birdwatching Paddles) | $ | 769.23 |
| Educational Programming: P&R | Ann Arbor Canoe Liveries - Public Programs (Turtle Paddles) | $ | 769.23 |
| Educational Programming: P&R | Ann Arbor Canoe Liveries - Public Programs (Moonlight Paddlese) | $ | 769.23 |
| Educational Programming: P&R | Huron River Cleanup Day | $ | 769.23 |
| **Brochure Racks** | | **$** | **20,000.00** |
| Indoor brochure racks will be provided at the following facilities: | | | |
| What will be handed out? What will be distributed? Stormwater Focused**** | | | |
| Vets Pool - Outdoor | 26,000 visitors | $ | 1,428.57 |
| Vets Pool - Indoor | 60,000 visitors | $ | 1,428.57 |
| Gallup/Argo Canoe Liveries | 42,000 visitors | $ | 1,428.57 |
| Buhr Park Pool | | $ | 1,428.57 |
| Buhr Park Ice Rink | 34,000 visitors | $ | 1,428.57 |

| | | |
|---|---|---|
| Fuller Pool | $ | 1,428.57 |
| Mack Pool | $ | 1,428.57 |
| Senior Center | $ | 1,428.57 |
| Cobblestone Farm | $ | 1,428.57 |
| Farmers Market | $ | 1,428.57 |
| Leslie Park GC | $ | 1,428.57 |
| Huron Hills GC | $ | 1,428.57 |
| Bryant Community Center | $ | 1,428.57 |
| Leslie Park Nature Center | $ | 1,428.57 |

# EXHIBIT – 20


# FY 2020
# Adopted Budget

Christopher Taylor
Mayor

Council Members

Zachary Ackerman
Jack Eaton
Kathy Griswold
Jane Lumm
Ali Ramlawi
Anne Bannister
Julie Grand
Jeff Hayner
Elizabeth Nelson
Chip Smith

**Howard Lazarus**
**City Administrator**

8.2.d A project may be financed when the analysis shows the impact to the organization is in the best interest of the City for the long-term.

9. **Revenue Bonded Debt**

9.1 It will be a long-term goal that each utility or enterprise will ensure future capital financing needs are met by using a combination of current operating revenues and revenue bond financing. Therefore a goal is established that 15% of total project costs should come from operating funds of the utility or enterprise.

9.2 It is City policy that each utility or enterprise should provide adequate debt service coverage. A specific factor is established by City Council that projected operating revenues in excess of operating expenses less capital expenditures, depreciation and amortization in the operating fund should be at least 1.25 times the annual debt service costs. An example of the debt coverage calculation is below.

| Debt Coverage Example: | |
|---|---|
| Operating Revenues | $19,897,796 |
| Operating Investment Income | 488,768 |
| Total Operating Revenue | $20,386,564 |
| | |
| Operating Expenses | $15,043,747 |
| Less: Depreciation and Amortization | 2,602,875 |
| Net Expenses | $12,440,872 |
| | |
| Net Revenue Available for Debt Service | $ 7,945,692 (1*) |
| | |
| Principal | $ 3,850,000 |
| Interest | 1,890,994 |
| Total Debt Service | $ 5,740,994 (2*) |
| | |
| Debt Coverage Ratio (1* divided by 2*) | 1.38 |

10. **Short Term Financing/Capital Lease Debt**

10.1 Short-term financing or capital lease debt will be considered to finance certain equipment and rolling stock purchases when the aggregate cost of equipment to be purchased exceeds $25,000. Adequate funds for the repayment of principal and interest must be included in the requesting service area's approved budget.

10.2 The term of short-term financing will be limited to the usual useful life period of the vehicle or equipment, but in no case will exceed fifteen years.

10.3 Service areas requesting capital financing must have an approved budget appropriation. Service areas shall submit documentation for approved purchases to the Financial Services area each year within 60 days after the annual budget is adopted. The Financial Services area will consolidate all requests and may

# EXHIBIT – 21

## Statement of Net Position
Proprietary Funds
June 30, 2016

| | Business-type Activities - Enterprise Funds | | | | |
|---|---|---|---|---|---|
| | Water Supply System | Sewage Disposal System | Parking System | Airport | Stormwater Sewer System |
| **Assets** | | | | | |
| Current assets: | | | | | |
| Cash | $ 3,526,111 | $ 10,394,335 | $ - | $ 30 | $ - |
| Equity in pooled cash and investments | 28,123,400 | 29,983,284 | 1,842,476 | 955,876 | 10,102,040 |
| Receivables: | | | | | |
| Accounts, net | 4,870,181 | 6,738,925 | - | 91,800 | 2,126,281 |
| Special assessments | 13,540 | 25,148 | - | - | - |
| Improvement charges | 16,626 | 25,217 | - | - | 801 |
| Taxes receivable | 26,829 | - | - | - | - |
| Due from other governments | 4,381,416 | 3,369,950 | 1,200 | - | - |
| Prepaid items | 7,724 | 3,298,791 | - | - | 32,807 |
| Inventories, at cost | 729,760 | 93,321 | - | - | - |
| Total current assets | 41,695,587 | 53,928,971 | 1,843,676 | 1,047,706 | 12,261,929 |
| Noncurrent assets: | | | | | |
| Receivables: | | | | | |
| Special assessments | 33,298 | 53,631 | - | - | - |
| Improvement charges | 98,563 | 111,507 | - | - | 1,138 |
| Capital assets not depreciated | 21,135,878 | 112,024,349 | 3,934,897 | 708,927 | 280,078 |
| Capital assets being depreciated, net | 86,430,737 | 107,128,478 | 32,654,403 | 1,384,463 | 19,793,665 |
| Total noncurrent assets | 107,698,476 | 219,317,965 | 36,589,300 | 2,093,390 | 20,074,881 |
| **Total assets** | 149,394,063 | 273,246,936 | 38,432,976 | 3,141,096 | 32,336,810 |
| **Deferred outflows of resources** | | | | | |
| Deferred charge on refunding | 1,028,152 | 1,724,488 | 275,192 | - | - |
| Deferred pension amounts | 6,120,811 | 5,883,022 | - | - | 2,086,405 |
| **Total deferred outflows of resources** | 7,148,963 | 7,607,510 | 275,192 | - | 2,086,405 |
| **Liabilities** | | | | | |
| Current liabilities: | | | | | |
| Accounts payable | 2,331,069 | 9,411,614 | - | 45,307 | 230,591 |
| Accrued liabilities | 296,503 | 229,847 | - | - | 92,886 |
| Due to other funds | - | - | - | 77,050 | - |
| Accrued interest payable | 207,372 | 1,161,966 | 64,167 | 2,255 | 69,085 |
| Deposits | 157,069 | - | - | - | - |
| Bonds payable, current | 2,955,000 | 2,635,000 | 2,450,000 | - | 709,742 |
| Estimated claims payable, current | - | - | - | - | - |
| Compensated absences, current | 367,284 | 326,406 | - | - | 114,557 |
| Capital lease payable, current | - | - | - | - | - |
| Total current liabilities | 6,314,297 | 13,764,833 | 2,514,167 | 124,612 | 1,216,861 |
| Noncurrent liabilities: | | | | | |
| Advance from other funds | - | - | - | 584,586 | - |
| Bonds payable, net | 41,108,278 | 131,302,476 | 7,675,680 | - | 14,011,890 |
| Estimated claims payable, net | - | - | - | - | - |
| Compensated absences, net | 670,838 | 388,422 | - | - | 48,164 |
| Capital lease payable, net | - | - | - | - | - |
| Net pension liability | 9,497,876 | 9,129,327 | - | - | 3,237,716 |
| Total noncurrent liabilities | 51,276,992 | 140,820,225 | 7,675,680 | 584,586 | 17,297,770 |
| **Total liabilities** | 57,591,289 | 154,585,058 | 10,189,847 | 709,198 | 18,514,631 |
| **Deferred inflows of resources** | | | | | |
| Deferred charge on refunding | 280,400 | 269,520 | - | - | 95,586 |
| **Net position** | | | | | |
| Net investment in capital assets | 64,531,489 | 86,939,839 | 26,738,812 | 2,093,390 | 5,352,111 |
| Restricted for debt service | 3,525,661 | 10,394,335 | - | - | - |
| Restricted for equipment replacement | 10,912,529 | 8,701,764 | - | - | - |
| Restricted for landfill | - | - | - | - | - |
| Unrestricted | 19,701,658 | 19,963,930 | 1,779,509 | 338,508 | 10,460,887 |
| **Total net position** | $ 98,671,337 | $ 125,999,868 | $ 28,518,321 | $ 2,431,898 | $ 15,812,998 |

continued...

## Statement of Net Position
Proprietary Funds
June 30, 2016

| | Business-type Activities - Enterprise Funds | | Governmental Activities |
|---|---|---|---|
| | Solid Waste | Total | Internal Service Funds |
| **Assets** | | | |
| Current assets: | | | |
| Cash | $ 180,993 | $ 14,101,469 | $ 200 |
| Equity in pooled cash and investments | 22,242,004 | 93,249,080 | 28,976,693 |
| Receivables: | | | |
| Accounts, net | 716,749 | 14,543,936 | 22,458 |
| Special assessments | - | 38,688 | - |
| Improvement charges | - | 42,644 | - |
| Taxes receivable | 7,485 | 34,314 | - |
| Due from other governments | - | 7,752,566 | - |
| Prepaid items | - | 3,339,322 | 2,611,707 |
| Inventories, at cost | - | 823,081 | 945,843 |
| Total current assets | 23,147,231 | 133,925,100 | 32,556,901 |
| Noncurrent assets: | | | |
| Receivables: | | | |
| Special assessments | - | 86,929 | - |
| Improvement charges | - | 211,208 | - |
| Capital assets not depreciated | 1,892,735 | 139,976,864 | 150,240 |
| Capital assets being depreciated, net | 11,432,618 | 258,824,364 | 7,499,797 |
| Total noncurrent assets | 13,325,353 | 399,099,365 | 7,650,037 |
| **Total assets** | 36,472,584 | 533,024,465 | 40,206,938 |
| **Deferred outflows of resources** | | | |
| Deferred charge on refunding | - | 3,027,832 | - |
| Deferred pension amounts | 2,860,470 | 16,950,708 | - |
| **Total deferred outflows of resources** | 2,860,470 | 19,978,540 | - |
| **Liabilities** | | | |
| Current liabilities: | | | |
| Accounts payable | 911,506 | 12,930,087 | 1,907,379 |
| Accrued liabilities | 111,138 | 730,374 | 1,562 |
| Due to other funds | - | 77,050 | - |
| Accrued interest payable | - | 1,504,845 | - |
| Deposits | - | 157,069 | - |
| Bonds payable, current | - | 8,749,742 | - |
| Estimated claims payable, current | 245,151 | 245,151 | 1,569,930 |
| Compensated absences, current | 124,588 | 932,835 | - |
| Capital lease payable, current | 42,305 | 42,305 | - |
| Total current liabilities | 1,434,688 | 25,369,458 | 3,478,871 |
| Noncurrent liabilities: | | | |
| Advance from other funds | - | 584,586 | - |
| Bonds payable, net | - | 194,098,324 | - |
| Estimated claims payable, net | 6,880,643 | 6,880,643 | 1,282,620 |
| Compensated absences, net | 219,172 | 1,326,596 | - |
| Capital lease payable, net | 21,154 | 21,154 | - |
| Net pension liability | 4,438,083 | 26,303,002 | - |
| Total noncurrent liabilities | 11,559,052 | 229,214,305 | 1,282,620 |
| **Total liabilities** | 12,993,740 | 254,583,763 | 4,761,491 |
| **Deferred inflows of resources** | | | |
| Deferred charge on refunding | 131,023 | 776,529 | - |
| **Net position** | | | |
| Net investment in capital assets | 13,261,894 | 198,917,535 | 7,650,037 |
| Restricted for debt service | - | 13,919,996 | - |
| Restricted for equipment replacement | - | 19,614,293 | - |
| Restricted for landfill | 180,991 | 180,991 | - |
| Unrestricted | 12,765,406 | 65,009,898 | 27,795,410 |
| **Total net position** | $ 26,208,291 | $ 297,642,713 | $ 35,445,447 |

concluded.

The accompanying notes are an integral part of the financial statements.

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# CITY OF ANN ARBOR, MICHIGAN

## Reconciliation

Net Position of Enterprise Funds
to Net Position of Business-type Activities
June 30, 2016

| | |
|---|---|
| **Net position of enterprise funds** | $ 297,642,713 |
| Amounts reported for *business-type activities* in the statement of net position are different because: | |
| Internal service funds are used by management to charge the costs of certain activities, such as equipment management and self-insurance, to individual funds. A portion of the net position of the internal service funds is allocated to the enterprise funds and reported in the statement of net position. | |
| Net position of business-type activities accounted for in governmental-type internal service funds | 1,331,864 |
| **Net position of business-type activities** | $ 298,974,577 |

The accompanying notes are an integral part of the financial statements.

## Statement of Revenues, Expenses and Changes in Fund Net Position

Proprietary Funds
For the Year Ended June 30, 2016

| | Business-type Activities - Enterprise Funds | | | | |
|---|---|---|---|---|---|
| | Water Supply System | Sewage Disposal System | Parking System | Airport | Stormwater Sewer System |
| **Operating revenues** | | | | | |
| Charges for services | $ 24,053,723 | $ 23,926,479 | $ 2,732,541 | $ 924,141 | $ 6,915,370 |
| **Operating expenses** | | | | | |
| Personal services | 7,395,206 | 6,774,904 | - | 283,015 | 2,381,739 |
| Municipal service charge | 396,012 | 521,436 | - | 28,752 | 208,296 |
| Information technology charge | 841,810 | 303,379 | - | 11,796 | 119,616 |
| Other operating costs | 6,154,468 | 4,831,673 | 83,057 | 255,085 | 2,123,880 |
| Depreciation | 3,686,594 | 2,300,058 | 1,687,836 | 62,433 | 657,248 |
| **Total operating expenses** | 18,474,090 | 14,731,450 | 1,770,893 | 641,081 | 5,490,779 |
| Operating income (loss) | 5,579,633 | 9,195,029 | 961,648 | 283,060 | 1,424,591 |
| **Nonoperating revenues (expenses)** | | | | | |
| Interest income | 285,177 | 1,098,577 | 15,844 | 8,871 | 107,169 |
| Gain (loss) on sale of capital assets | 21,650 | (173,884) | - | 8,000 | 3,000 |
| Interest and fiscal charges | (917,596) | (3,175,100) | (277,551) | (29,086) | (300,736) |
| Property taxes | - | - | - | - | - |
| **Total nonoperating revenues (expenses)** | (610,769) | (2,250,407) | (261,707) | (12,215) | (190,567) |
| Income (loss) before contributions and transfers | 4,968,864 | 6,944,622 | 699,941 | 270,845 | 1,234,024 |
| **Capital contributions** | 8,141 | 9,503 | - | 20,400 | 562,901 |
| **Transfers in** | 3,942,174 | 633,700 | - | 20,772 | 680,154 |
| **Transfers out** | (2,629,512) | (1,300,446) | - | (7,884) | (2,444,878) |
| **Changes in net position** | 6,289,667 | 6,287,379 | 699,941 | 304,133 | 32,201 |
| Net position, beginning of year | 92,381,670 | 119,712,489 | 27,818,380 | 2,127,765 | 15,780,797 |
| **Net position, end of year** | $ 98,671,337 | $ 125,999,868 | $ 28,518,321 | $ 2,431,898 | $ 15,812,998 |

continued...

## Statement of Revenues, Expenses and Changes in Fund Net Position

Proprietary Funds

For the Year Ended June 30, 2016

| | Business-type Activities - Enterprise Funds | | Governmental Activities |
|---|---|---|---|
| | Solid Waste | Total | Internal Service Funds |
| **Operating revenues** | | | |
| Charges for services | $ 2,965,288 | $ 61,517,542 | $ 46,664,312 |
| **Operating expenses** | | | |
| Personal services | 3,520,484 | 20,355,348 | 8,138,195 |
| Municipal service charge | 295,560 | 1,450,056 | 1,384,092 |
| Information technology charge | 225,566 | 1,502,167 | 704,025 |
| Other operating costs | 14,152,773 | 27,600,936 | 30,399,383 |
| Depreciation | 838,488 | 9,232,657 | 2,678,507 |
| **Total operating expenses** | 19,032,871 | 60,141,164 | 43,304,202 |
| Operating income (loss) | (16,067,583) | 1,376,378 | 3,360,110 |
| **Nonoperating revenues (expenses)** | | | |
| Interest income | 259,098 | 1,774,736 | 367,779 |
| Gain (loss) on sale of capital assets | 5,000 | (136,234) | 290,724 |
| Interest and fiscal charges | - | (4,700,069) | - |
| Property taxes | 12,072,979 | 12,072,979 | - |
| **Total nonoperating revenues (expenses)** | 12,337,077 | 9,011,412 | 658,503 |
| Income (loss) before contributions and transfers | (3,730,506) | 10,387,790 | 4,018,613 |
| **Capital contributions** | - | 600,945 | 589,813 |
| **Transfers in** | 1,086,720 | 6,363,520 | 399,972 |
| **Transfers out** | (441,682) | (6,824,402) | (12,274,942) |
| **Changes in net position** | (3,085,468) | 10,527,853 | (7,266,544) |
| Net position, beginning of year | 29,293,759 | 287,114,860 | 42,711,991 |
| **Net position, end of year** | $ 26,208,291 | $ 297,642,713 | $ 35,445,447 |

concluded.

The accompanying notes are an integral part of the financial statements.

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## Reconciliation

Net Changes in Net Position of Enterprise Funds
to Changes in Net Position of Business-type Activities
For the Year Ended June 30, 2016

| | |
|---|---|
| **Net change in net position - total enterprise funds** | $ 10,527,853 |
| Amounts reported for *business-type activities* in the statement of activities differs from the amounts reported in the statement of revenues, expenses, and changes in fund net position because: | |
| Internal service funds are used by management to charge the costs of certain activities, such as equipment management and self-insurance, to individual funds. A portion of the operating income (loss) of the internal service funds is allocated to the enterprise funds and reported in the statement of activities. | |
| Net operating income from business-type activities accounted for in governmental-type internal service funds | 1,331,864 |
| **Change in net position of business-type activities** | $ 11,859,717 |

The accompanying notes are an integral part of the financial statements.

## Statement of Cash Flows

Proprietary Funds
For the Year Ended June 30, 2016

| | Business-type Activities - Enterprise Funds | | | | |
|---|---|---|---|---|---|
| | Water System | Sewage Disposal System | Parking System | Airport | Stormwater Sewer System |
| **Cash flow from operating activities** | | | | | |
| Receipts from customers | $ 24,861,157 | $ 19,910,403 | $ 2,731,341 | $ 935,471 | $ 6,781,632 |
| Payments to suppliers | (6,299,770) | (5,237,362) | (83,056) | (236,421) | (2,084,098) |
| Payments on behalf of employees | (6,861,909) | (6,170,226) | - | (283,015) | (2,198,934) |
| Payments received for interfund services | - | - | - | - | - |
| Payments made for interfund services | (1,316,303) | (731,772) | - | (46,709) | (698,078) |
| **Net cash provided by (used in) operating activities** | 10,383,175 | 7,771,043 | 2,648,285 | 369,326 | 1,800,522 |
| **Cash flows from noncapital financing activities** | | | | | |
| Transfers in | 3,942,174 | 633,700 | - | 20,772 | 680,154 |
| Transfers out | (2,629,512) | (1,300,446) | - | (7,884) | (2,444,878) |
| Property taxes | - | - | - | - | - |
| Repayment of advance | - | - | - | (73,993) | - |
| **Net cash provided by (used in) noncapital financing activities** | 1,312,662 | (666,746) | - | (61,105) | (1,764,724) |
| **Cash flows from capital and related financing activities** | | | | | |
| Proceeds from sales of bonds and notes | 945,279 | 21,457,029 | - | - | 1,208,499 |
| Capital contributions | 8,141 | 9,503 | - | - | 562,901 |
| Acquisition and construction of capital assets [1] | (6,204,710) | (22,311,474) | - | (48,723) | (277,167) |
| Principal paid on revenue bonds, maturities, capital leases and notes | (3,521,867) | (3,153,872) | (2,323,294) | - | (474,045) |
| Interest paid on bonds, notes, and capital leases | (1,257,924) | (3,145,864) | (347,540) | (29,339) | (303,017) |
| Proceeds from sale of equipment | 21,650 | 22,000 | - | 8,000 | 3,000 |
| **Net cash provided by (used in) capital and related financing activities** | (10,009,431) | (7,122,678) | (2,670,834) | (70,062) | 720,171 |
| **Cash flows from investing activities** | | | | | |
| Interest and dividends on investments | 285,177 | 1,098,577 | 15,844 | 8,871 | 107,169 |
| **Net change in cash and cash equivalents** | 1,971,583 | 1,080,196 | (6,705) | 247,030 | 863,138 |
| Cash and cash equivalents, beginning of the year | 29,677,928 | 39,297,423 | 1,849,181 | 708,876 | 9,238,902 |
| **Cash and cash equivalents, end of the year** | $ 31,649,511 | $ 40,377,619 | $ 1,842,476 | $ 955,906 | $ 10,102,040 |
| **Reconciliation to statement of net position** | | | | | |
| Cash | $ 3,526,111 | $ 10,394,335 | $ - | $ 30 | $ - |
| Equity in pooled cash and investments | 28,123,400 | 29,983,284 | 1,842,476 | 955,876 | 10,102,040 |
| **Cash and cash equivalent, end of year** | $ 31,649,511 | $ 40,377,619 | $ 1,842,476 | $ 955,906 | $ 10,102,040 |

continued...

## Statement of Cash Flows

Proprietary Funds
For the Year Ended June 30, 2016

| | Business-type Activities - Enterprise Funds | | Governmental Activities |
|---|---|---|---|
| | Solid Waste | Total | Internal Service Funds |
| **Cash flow from operating activities** | | | |
| Receipts from customers | $ 2,939,863 | $ 58,159,867 | $ - |
| Payments to suppliers | (6,942,225) | (20,882,932) | (33,636,580) |
| Payments on behalf of employees | (3,176,188) | (18,690,272) | (8,136,635) |
| Payments received for interfund services | - | - | 46,691,123 |
| Payments made for interfund services | (2,797,644) | (5,590,506) | - |
| **Net cash provided by (used in) operating activities** | (9,976,194) | 12,996,157 | 4,917,908 |
| **Cash flows from noncapital financing activities** | | | |
| Transfers in | 1,086,720 | 6,363,520 | 399,972 |
| Transfers out | (441,682) | (6,824,402) | (12,274,942) |
| Property taxes | 12,072,979 | 12,072,979 | - |
| Repayment of advance | - | (73,993) | - |
| **Net cash provided by (used in) noncapital financing activities** | 12,718,017 | 11,538,104 | (11,874,970) |
| **Cash flows from capital and related financing activities** | | | |
| Proceeds from sales of bonds and notes | - | 23,610,807 | - |
| Capital contributions | - | 580,545 | - |
| Acquisition and construction of capital assets [1] | (88,354) | (28,930,428) | (2,446,504) |
| Principal paid on revenue bonds, maturities, capital leases and notes | (42,307) | (9,515,385) | - |
| Interest paid on bonds, notes, and capital leases | - | (5,083,684) | - |
| Proceeds from sale of equipment | 5,000 | 59,650 | 396,255 |
| **Net cash provided by (used in) capital and related financing activities** | (125,661) | (19,278,495) | (2,050,249) |
| **Cash flows from investing activities** | | | |
| Interest and dividends on investments | 259,100 | 1,774,738 | 367,779 |
| **Net change in cash and cash equivalents** | 2,875,262 | 7,030,504 | (8,639,532) |
| Cash and cash equivalents, beginning of the year | 19,547,735 | 100,320,045 | 37,616,425 |
| **Cash and cash equivalents, end of the year** | $ 22,422,997 | $ 107,350,549 | $ 28,976,893 |
| **Reconciliation to statement of net position** | | | |
| Cash | $ 180,993 | $ 14,101,469 | $ 200 |
| Equity in pooled cash and investments | 22,242,004 | 93,249,080 | 28,976,693 |
| **Cash and cash equivalent, end of year** | $ 22,422,997 | $ 107,350,549 | $ 28,976,893 |

continued...

## Statement of Cash Flows
Proprietary Funds
For the Year Ended June 30, 2016

| | Business-type Activities - Enterprise Funds | | | | |
|---|---|---|---|---|---|
| | Water System | Sewage Disposal System | Parking System | Airport | Stormwater Sewer System |
| **Reconciliation of operating income (loss) to net cash provided by (used in) operating activities** | | | | | |
| Operating income (loss) | $ 5,579,633 | $ 9,195,029 | $ 961,648 | $ 283,060 | $ 1,424,591 |
| Adjustments to reconcile operating income (loss) to net cash provided by (used in) operating activities: | | | | | |
| Depreciation and amortization | 3,686,594 | 2,300,058 | 1,687,836 | 62,433 | 657,248 |
| Changes in assets and liabilities: | | | | | |
| Receivables | (541,251) | (2,117,213) | - | 15,102 | (292,374) |
| Allowance for uncollectible accounts | 1,451 | 3,101 | - | (3,771) | (1,194) |
| Due from other governments | 1,347,235 | (1,901,967) | (1,199) | - | 159,829 |
| Prepaid items | (7,724) | (43,375) | - | - | (32,807) |
| Inventories | (4,172) | (5,278) | - | - | - |
| Accounts payable | (204,262) | (263,987) | - | 12,502 | (297,576) |
| Accrued liabilities | 60,125 | 21,218 | - | - | 6,822 |
| Deposits | (7,622) | - | - | - | - |
| Estimated claims payable | - | - | - | - | - |
| Accrued compensated absences | (33,478) | 96,470 | - | - | 3,273 |
| Net pension liability | 506,646 | 486,987 | - | - | 172,710 |
| **Net cash provided by (used in) operating activities** | $ 10,383,175 | $ 7,771,043 | $ 2,648,285 | $ 369,326 | $ 1,800,522 |

continued...

[1] This includes a non-cash transaction in the amount of $20,400 for an asset received from the Federal Aviation Administration in the airport fund.

## Statement of Cash Flows

Proprietary Funds
For the Year Ended June 30, 2016

| | Business-type Activities - Enterprise Funds | | Governmental Activities |
|---|---|---|---|
| | Solid Waste | Total | Internal Service Funds |
| **Reconciliation of operating income (loss) to net cash provided by (used in) operating activities** | | | |
| Operating income (loss) | $ (16,067,583) | $ 1,376,378 | $ 3,360,110 |
| Adjustments to reconcile operating income (loss) to net cash provided by (used in) operating activities: | | | |
| Depreciation and amortization | 838,488 | 9,232,657 | 2,678,507 |
| Changes in assets and liabilities: | | | |
| Receivables | (33,401) | (2,969,137) | 29,271 |
| Allowance for uncollectible accounts | 7,976 | 7,563 | (2,462) |
| Due from other governments | - | (396,102) | - |
| Prepaid items | - | (83,906) | (350,066) |
| Inventories | - | (9,450) | 117,554 |
| Accounts payable | 28,902 | (724,421) | 511,865 |
| Accrued liabilities | 16,592 | 104,757 | 1,561 |
| Deposits | - | (7,622) | - |
| Estimated claims payable | 4,905,142 | 4,905,142 | (1,428,432) |
| Accrued compensated absences | 90,949 | 157,214 | - |
| Net pension liability | 236,741 | 1,403,084 | - |
| **Net cash provided by (used in) operating activities** | $ (9,976,194) | $ 12,996,157 | $ 4,917,908 |

concluded.

The accompanying notes are an integral part of the financial statements.

# EXHIBIT – 22

dealings shall require a concurring vote of at least eight members of the Council, not including any member disqualified under Section 4.4 of this charter. Any business dealing made in violation of this section shall be void.

## CHAPTER 15
## PUBLIC UTILITY SERVICES

### General Powers Respecting Municipal Utilities

SECTION 15.1.

(a) The City shall have all the powers granted by law to acquire, construct, own, operate, improve, enlarge, extend, repair, and maintain public utilities, either within or without its corporate limits and either within or without the corporate limits of Washtenaw County, including, but not by way of limitation, public utilities for supplying water and water treatment, sewage disposal and treatment, electric light and power, gas, public transportation, or any of them, to the municipality and the inhabitants thereof; and also to sell water, electricity, gas, transportation, and other utility services beyond its corporate limits as authorized by law.

(b) The Council may provide by ordinance for the establishment of a public utility, but an ordinance providing for a newly owned and operated utility shall be enacted only after such hearings and procedure as required by law.

### Financing and Acquisition of Municipal Utilities

SECTION 15.2. The City may finance the acquisition of privately-owned utility properties, the purchase of land, and the cost of all construction and property installation for utility purposes by borrowing in accordance with the provisions of Chapter 8 of this charter.

### Disposal of Municipal Utility Plants and Property

SECTION 15.3. Unless approved by the affirmative vote of three-fifths of the electors voting thereon at a regular or special election, the City shall not sell, exchange, lease, or in any way dispose of any property, easement, equipment, privilege, or asset needed to continue the operation of any municipal utility furnishing water, gas, electric power, or transportation service. All contracts, grants, leases, or other forms of transfer in violation of this section shall be void and of no effect as against the City. The restrictions of this section shall not apply to the sale or exchange of articles of machinery or equipment of any municipally owned public utility, which are no longer useful or which are replaced by new machinery or equipment, or to the leasing of property not necessary for the operation of the utility, or to the exchange of property or easements for other needed property or easements.

## Rates

SECTION 15.4.

(a) The Council shall fix just and reasonable rates and such other charges as may be deemed advisable for supplying municipal utility services to the inhabitants of the City and others. Discrimination in rates within any classification of users shall not be permitted, nor shall free service be permitted. Increased rates shall be charged for service outside the corporate limits of the City.

(b) The rates and charges for any municipal utility shall be fixed on a basis at least adequate to compensate the City for the cost of such service. Transactions pertaining to the ownership and operation of each municipal utility shall be recorded in a separate group of accounts, which shall be classified in accordance with generally acceptable utility accounting practices. Charges for all service furnished to, or rendered by, other city departments or administrative units shall be recorded. An annual report shall be prepared to show the financial position of each utility and the results of its operation. A copy of such report shall be available for inspection at the office of the Clerk.

## Collection of Municipal Utilities Rates and Charges

SECTION 15.5.

(a) The Council shall provide by ordinance for the collection of rates and charges for public utility services furnished by the City. When any person fails or refuses to pay to the City any sums due on utility bills, the service upon which such delinquency exists may be discontinued and suit may be brought for the collection thereof.

(b) Except as otherwise provided by law, the City shall have as security for the collection of all charges for utility services furnished by it a lien upon the premises to which such utility services were supplied and, for such purposes, shall have all the powers granted to cities by law. Such lien shall become effective immediately on the distribution or supplying of such utility services to such premises.

(c) Except as otherwise provided by law, all unpaid charges for utility services furnished to any such premises, which, on the thirty-first day of March of each year, have remained unpaid for a period of three months or more, shall be reported by the Controller to the Council at the first meeting thereof in the month of April. The Council thereupon shall order the publication in a newspaper of general circulation in the City of notice that all such unpaid utility charges not paid by the thirtieth day of April will be assessed upon the

City's tax roll against the premises to which such utility services were supplied or furnished, and such charges shall then be spread upon the City's tax roll and shall be collected in the same manner as the city taxes.

(d) As further security for the payment of charges for utility services, the Council may require meter deposits of occupants of premises to which such services are supplied.

**Public Utility Franchises**

SECTION 15.6. The City may grant a franchise to any person for the use of the streets and other public places of the City for the furnishing of any public utility service to the City and its inhabitants, franchises and renewals, amendments, and extensions thereof shall be granted only by ordinance. Public utility franchises shall include provisions for fixing rates and charges, and may provide for readjustments thereof at periodic intervals. The City may, with respect to any public utility franchise granted after the effective date of this charter, whether or not so provided in the granting ordinance:

(1) Repeal the same for the violation of any of its provisions, for the misuse or non-use thereof, or for failure to comply with any provision thereof, or for failure to comply with any regulation imposed under authority of this section;

(2) Require proper and adequate extension of plant and the maintenance thereof at the highest practicable standard of efficiency;

(3) Establish reasonable standards of service and quality of products, and prevent unjust discrimination in service or rates;

(4) Require continuous and uninterrupted service to the public in accordance with the terms of the franchise throughout the entire period thereof;

(5) Impose other regulations determined by the Council to be conducive to the health, safety, welfare, and convenience of the public.

(6) Require the public utility to permit joint use of its property and appurtenances located in the streets, alleys, and public places of the City, by the City and other utilities, insofar as such joint use may be reasonably practicable and upon payment of reasonable rental therefor, and, in the absence of agreement, upon application by the public utility, provide for arbitration of the terms and conditions of such joint use and the compensation to be paid therefor;

(7) Require the public utility to pay any part of the cost of improvement or maintenance of the streets, alleys, bridges, and public places of the City, that arises from its use thereof, and to protect and save the City harmless from all damages arising from such use.

(8) Require the public utility to file with the Clerk a true copy of each financial report which is filed by it with any agency of the State or the United States and such other reports concerning the public utility and its financial operation and status as the Council may request.

**Limitations on the Granting of Franchises**

SECTION 15.7. No franchise shall be granted by the City for a term exceeding thirty years and no exclusive franchise shall ever be granted. Each franchise shall include a provision requiring the franchise to take effect within one year after the adoption of the ordinance granting it, except in the case of grants to take effect at the end of an existing franchise. An irrevocable franchise and any extension or amendment of such franchise may not be granted by the City, unless it has first received the affirmative vote of at least three-fifths of the electors of the City voting thereon at a regular or special election. A franchise ordinance may be approved by the Council, for referral to the electorate, only after a public hearing has been held thereon and after the grantee named therein has filed with the Clerk the franchisee's unconditional acceptance of all the terms of the franchise. No special election for such purpose may be ordered by the Council, unless the expense of holding such election, as determined by the Council, has first been paid to the Treasurer by the grantee.

**Procedure for Granting Franchises**

SECTION 15.8. Every ordinance granting a franchise, license, or right to occupy or use the streets, highways, bridges, or public places in the City shall remain on file with the Clerk for public inspection in its final form for at least thirty days before the final adoption thereof, or the approval thereof for referral to the electorate.

**Sale or Assignment of Franchises**

SECTION 15.9. The grantee of a franchise may not sell, assign, sublet, or allow another to use the same, unless the Council gives its consent: Provided, That, nothing in this section shall limit the right of the grantee of any public utility franchise to mortgage its property or franchise, or shall restrict the rights of the purchaser, upon foreclosure sale, to operate the same, except that such mortgagee or purchaser shall be subject to the terms of the franchise and provisions of this chapter.

## CHAPTER 16
## CONTROLLED SUBSTANCES

**Restrictions on Alcoholic Beverages**

SECTION 16.1. The City Council, in addition to the powers and duties specially conferred upon them by this Charter and law, shall have power, within said city, to enact,

# EXHIBIT – 23

# Lewiston Indep. Sch. Dist. #1 v. City of Lewiston

Supreme Court of Idaho

November 7, 2011, Filed

Docket No. 38116, 2011 Opinion No. 113

**Reporter**
151 Idaho 800 *; 264 P.3d 907 **; 2011 Ida. LEXIS 148 ***

LEWISTON INDEPENDENT SCHOOL DISTRICT #1, an Idaho body politic and corporate; LEWIS-CLARK STATE COLLEGE, an Idaho body politic and corporate; NEZ PERCE COUNTY, a legal subdivision of the State of Idaho; PORT OF LEWISTON, a publicly created port district within Nez Perce County, Idaho; and LEWISTON ORCHARDS IRRIGATION DISTRICT, a duly organized irrigation district within Nez Perce County, Idaho, Plaintiffs-Respondents, v. CITY OF LEWISTON, an Idaho municipal corporation, Defendant-Appellant

**Subsequent History:** Released for Publication November 29, 2011.

**Prior History: [***1]** Appeal from the District Court of the Second Judicial District of the State of Idaho, Nez Perce County. Hon. John H. Bradbury, District Judge.

**Disposition:** The judgment of the district court is affirmed. Costs are awarded to respondents. No attorney's fees are awarded.

## Core Terms

stormwater, Ordinance, Street, Entities, summary judgment, police power, municipal, authorization, regulation, surfaces, district court, Revenue Bond Act, impervious, residential, pollutant, funding, cross-motion, unauthorized, provisions, collected, grant summary judgment, reasonably related, regulatory purpose, non-residential, disposal, budget

## Case Summary

**Procedural Posture**
Appellant city sought review of a summary judgment from the District Court of the Second Judicial District, Nez Perce County (Idaho), which granted a declaratory judgment to respondent government entities that the city's stormwater fee was an unconstitutional tax.

**Overview**

The city enacted an ordinance that created a stormwater utility and imposed a stormwater fee for the operation and maintenance of the stormwater system. Some property owners whose runoff did not enter the city's stormwater drain were subject to the fee. The ordinance contained no pollution control restrictions or other provisions relating to stormwater regulation. The activities funded by the fee included some street maintenance work, and the revenues were not kept segregated from other city funds. The court concluded that the stormwater fee was an unauthorized tax that served the non-regulatory purpose of raising revenue for cleaning, maintaining, and expanding the city's streets and stormwater infrastructure. The benefits provided were a pollutant-free stormwater system and clean streets, which were shared by the general public and were not direct services. The stormwater charge was not a fee incidental to regulation and enacted pursuant to the city's police powers under *Idaho Const. art. XII, § 2*. As such, it required legislative authorization pursuant to *Idaho Const. art. VII, § 6*, and its imposition on other governmental entities was prohibited by *Idaho Const. art. VII, § 4*.

**Outcome**
The court affirmed the judgment of the district court.

## LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

*HN1*[] **Summary Judgment Review, Standards of Review**

When an appellate court reviews a district court's grant of summary judgment, it uses the same standard properly employed by the district court originally ruling on the motion.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

**HN2** **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Idaho R. Civ. P. 56(c). The movant has the burden of showing that no genuine issues of material fact exist.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

**HN3** **Summary Judgment, Evidentiary Considerations**

An appellate court liberally construes the summary judgment record in a light most favorable to the party opposing the motion, drawing all reasonable inferences in favor of that party. If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which the appellate court exercises free review. If the record contains conflicting inferences or if reasonable minds might reach different conclusions, then the district court's order granting summary judgment must be reversed. The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and the appellate court must evaluate each party's motion on its own merits.

Governments > Local Governments > Police Power

**HN4** **Local Governments, Police Power**

See Idaho Const. art. XII, § 2.

Governments > Local Governments > Finance

Governments > Local Governments > Police Power

**HN5** **Local Governments, Finance**

Police powers consist of government conduct that has for its object the public health, safety, morality or welfare. A municipality may collect fees considered incidental to regulation and enacted pursuant to the municipality's police powers. A fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs. A fee's purpose is regulation, while taxes are primarily revenue raising measures. If municipal regulations are to be held validly enacted under the police power, funds generated thereby must bear some reasonable relationship to the cost of enforcing the regulation. Legislative authorization is required for a municipal corporation's taxes on the general public. Idaho Const. art. VII, § 6. The Idaho Constitution prohibits a municipality from imposing a tax on other governmental entities. Idaho Const. art. VII, § 4.

Evidence > Burdens of Proof > Allocation

Governments > Local Governments > Finance

Governments > Local Governments > Police Power

**HN6** **Burdens of Proof, Allocation**

A two-part test determines whether a fee by a municipal corporation is a disguised tax, not reasonably related to a regulatory purpose. First, the court must determine whether the fee constitutes an impermissible tax. Secondly, the court must determine whether the fee is appropriately and reasonably assessed. Under the first step of the analysis, the court must consider whether, on its face, the fee is a tax or a regulation. If it at least appears to be a regulation, the court then reaches the question of whether or not it is reasonably related to the regulated activity. If it is not reasonably related to the regulation, then it is purely a revenue raising assessment, and once again is not permissible without

a specific legislative enactment. The burden falls on the party challenging the exercise of a police power to show that it is in conflict with the general laws of the state or clearly unreasonable or arbitrary.

Governments > Local Governments > Finance

HN7 **Local Governments, Finance**

A fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs.

Civil Procedure > Appeals > Summary Judgment Review > Appealability

HN8 **Summary Judgment Review, Appealability**

An appellate court does not review denials of summary judgment after a judgment is made on the merits. An order denying a motion for summary judgment is not an appealable order itself, nor is it reviewable on appeal from a final judgment.

Civil Procedure > Appeals > Appellate Briefs

HN9 **Appeals, Appellate Briefs**

A failure to support an alleged error with argument and authority is deemed a waiver of the issue. An appellate court will not consider an issue that is not supported by argument and authority in the opening brief.

**Counsel:** Lewiston City Attorney, Lewiston, for appellant. Jamie C. Shropshire argued.

Creason, Moore, Dokken & Geidle, PLLC, Lewiston, for respondents. Theodore O. Creason and Todd D. Geidl argued.

**Judges:** W. JONES, Justice. Chief Justice BURDICK, Justices EISMANN, J. JONES and HORTON CONCUR.

**Opinion by:** W. JONES

## Opinion

**[*801] [**908]** W. JONES, Justice

### I. Nature of the Case

The City of Lewiston ("City") enacted Ordinance No. 4512, creating a stormwater utility and stormwater fee for the operation and maintenance of the City's stormwater system. Five government entities[1] ("Entities") subject to the stormwater fee brought suit seeking a declaratory judgment that the fee was an unconstitutional tax requiring authorization by the Legislature. The Entities thereafter filed their motion for summary judgment. The City filed its cross-motion for summary judgment asserting that the stormwater fee was authorized pursuant to the City's police powers, the Revenue Bond Act, the Local Improvement District **[***2]** Code, and various other provisions of the Idaho Code. Relying primarily on *Brewster v. City of Pocatello, 115 Idaho 502, 768 P.2d 765 (1988)*, and finding no legislative authorization for the stormwater fee,[2] the district **[*802]** **[**909]** court granted summary judgment in favor of the Entities holding that the stormwater fee was an unconstitutional tax requiring authorization by the Legislature. In rendering its decision, the district court never addressed the Entities' assertion of immunity. The City filed an appeal of the district court's decision granting summary judgment in favor of the Entities. Because the stormwater fee is an unauthorized tax, the district court did not err in granting summary judgment in favor of the Entities.

### II. Factual and Procedural Background

The City's stormwater system consists of stormwater pipes, curbs, gutters, drainage ditches, detention ponds, and stormwater treatment facilities. In order to eliminate non-stormwater and pollutant discharge, the Clean Water Act, *33 U.S.C. § 1342(p)(1)-(6) (2008)* requires municipalities discharging stormwater into the receiving waters of the United States to obtain a National

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[1] The five government entities who brought suit are Lewiston Independent School District # 1, Lewis-Clark State College, Nez Perce County, Port of Lewiston, and Lewiston Orchards Irrigation District.

[2] In regard to the City's cross-motion for summary judgment, the district court held that there was no express or implied statutory or constitutional authority granting the City the power to tax in this context. The district court held that the City may only exercise those powers **[***3]** granted to it by statute or the Idaho Constitution. *See Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980)*.

Pollutant Discharge Elimination System permit ("NPDES permit"). The City's NPDES draft permit required it to undertake comprehensive management of its stormwater system to reduce pollutant loads from entering the receiving waters of the United States.

In response to these regulatory mandates, on August 11, 2008, the Lewiston City Council ("Council") enacted Ordinance No. 4512 ("Ordinance") creating the City's Stormwater Utility ("Stormwater Utility") and authorizing the imposition of a Stormwater Utility fee ("stormwater fee") to fund the Stormwater Utility's functions. Citing its police powers,[3] the Ordinance asserts that the purposes of the Stormwater Utility and the **[***4]** stormwater fee were to reduce the effects of stormwater runoff from impervious surfaces in the City, including reducing property damage, preventing the flow of pollutants, and preserving the integrity of streets. The Ordinance also permitted the City to free-up $700,000 from its Street Maintenance Program[4] by rolling part of its street sweeping and stormwater maintenance budget into the Stormwater Utility.

Recognizing that owners and possessors of property with impervious surfaces contribute to the total run-off, the Ordinance provides that "[t]he owner, agent, occupant, lessee, tenant, contract purchaser, or other person having possession or control of property or supervision of an improvement on the property" ("owners") are responsible for the stormwater fee. The rates provided in the Ordinance **[***5]** vary according to whether the property is classified as residential or non-residential. Residential property owners pay the same rate based on the number of "equivalent residential units" ("ERUs") that they own. An ERU is residential property with an impervious surface area of 4,000 square feet. Non-residential property owners' fees vary according to a sliding scale in which the number of ERUs is calculated based on a site-specific quantification of impervious surfaces utilizing aerial photography or personal observation.

As a result of the rate structures applying to all owners of property, there are many properties with impervious surfaces whose owners are charged by the Stormwater Utility, but whose runoff does not enter the stormwater drain because they have their own stormwater systems or because their neighborhoods are not connected to the stormwater system.[5] The only exemptions from the stormwater fee are if the property is less than 2000 square feet as identified in the Nez Perce County property database, the **[**910]** **[*803]** property is classified as undeveloped, or the owner qualifies for "circuit breaker" status.[6]

In addition to the rates, the Ordinance provides an organization structure[7] for the Stormwater Utility and an appeal process by which a landowner may challenge a fee as unwarranted or based on improper calculation of impervious surfaces or other aspect of the rate structure. The Ordinance also provides an enterprise fund in which all fees would be collected and separated from the general revenue. The revenues collected for the enterprise fund are to be used only for payment of the costs of "maintenance, operation, upkeep and repair and capital outlay of the stormwater system, including the payment of bonds issued to **[***7]** finance such capital outlay."[8]

To implement the Ordinance, the Council adopted Resolution No. 2008-55 on October 27, 2008. Resolution 2008-55 set the base rate charge per ERU at $6 and assigned all residential parcels a value of one ERU to be paid at 100% of the base rate. The Resolution also phased-in the charge over a three year

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[3] Ordinance 4512 also cites "*I.C. 50-1027 et seq.*, *I.C. 50-304*, *I.C. 50-315*, *I.C. 50-332*, and *I.C. 50-333*" as authority in establishing the Stormwater Utility.

[4] Thomas Dechert, Stormwater Program Coordinator, uses the term "street division" and "transportation division" interchangeably in describing the Street Program, Street Maintenance Department, and the Street Maintenance Department's budget.

[5] The Stormwater Business Plan composed by the City indicates "that the number **[***6]** of ERUs actually discharging to the City's stormwater system is probably at least 30% less than the totals given" and that "as much as 20% of the non-residential ERUs might be public or institutional property that could be exempted from fees."

[6] Circuit breaker status refers to a term used by the Idaho State Tax Commission for its Property Tax Reduction Program, which reduces property taxes for qualified applicants based on age and income, among other factors. *2011 Property Tax Reduction Program*, Idaho Tax Commission, 2011, *http://tax.idaho.gov/pubs/EBR00135_11-17-2010.pdf*.

[7] Although Ordinance 4512 purports to establish the Stormwater Utility to finance stormwater maintenance, it is unclear whether the Council has adopted a distinct Stormwater Utility structure separate from the Street Maintenance Department.

[8] In practice, stormwater fees are commingled with the City's general funds in the City's primary checking account.

period, assessing 50% of the fee the first year (October 1, 2008 to September 30, 2009), 75% of the fee the second year (October 1, 2009 to September 30, 2010), and 100% of the fee after October 1, 2010.

The Council later adopted Resolution No. 2009-68 amending Resolution No. 2008-55 and extending the 50% phase-in rate for an additional year (from October 1, 2009 through September 30, 2010) and limiting the expenditure of "[a]ll Storm Water Utility Fees collected . . . to [the] maint[enance], operat[ion] or enhance[ment] **[***8]** [of] the Storm Water Utility system of the City of Lewiston."

In practice, the revenues generated from the stormwater fees are divided between the City's street sweeping and maintenance of the stormwater system.[9] The remaining 10% to 15% of the budget is allocated to NPDES compliance. As per its maintenance of the stormwater system, the City currently uses or intends on using stormwater utility revenue for what it defines as "stormwater activities,"[10] including street surface repair, winter sanding and rock cleanup on roads, seal coat cleanup, street sweep training and equipment, shoulder guard curb work, curb and gutter patching, trash and debris clean up, road shoulder grading and ditching, weed control clean up, oil spill clean-up, tree and limb removal, hauling debris, and other interdepartmental charges assessed by the Street Maintenance Department and other departments and divisions.[11] Before the **[**911]** **[*804]** adoption of the Ordinance, most of these activities were paid out of the general revenue fund as part of the Street Maintenance Department's budget.

The City began billing its residential and non-residential property owners for stormwater fees on October 1, 2008. The Entities filed suit on September 28, 2009, seeking a declaratory judgment that the City acted outside of its constitutional authority in assessing an unauthorized tax, injunctive relief, a writ of prohibition, and a writ of mandate to stop the City from collecting the stormwater fee. The Entities thereafter filed their motion for summary judgment on April 2, 2010. The City filed its cross-motion for summary judgment on April 30, 2010, contending that the stormwater fee is authorized pursuant to the City's police powers, the Revenue Bond Act, the Local Improvement District Code, and various other statutory provisions under Title 50 of the Idaho Code. The district court issued its Memorandum Decision and Order on July 16, 2010, **[***11]** which granted summary judgment for the Entities' declaratory judgment claim and denied the City's cross-motion for summary judgment. The district court, thereafter, issued its Order for Entry of Final Judgment on the declaratory judgment claim on August 23, 2010.

## III. Issue on Appeal

1. Whether the district court erred in granting the Entities' summary judgment motion alleging that the City's stormwater fee is an unauthorized tax?

## IV. Standard of Review

*HN1*[↑] When this Court reviews a district court's grant of summary judgment, it uses the same standard properly employed by the district court originally ruling on the motion. *Lowder v. Minidoka Cnty. Joint Sch. Dist. No. 331, 132 Idaho 834, 837, 979 P.2d 1192, 1195 (1999)*. *HN2*[↑] Summary judgment is proper "if the pleadings, depositions, and admissions on file, together

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[9] As per the City's Stormwater Utility Business Plan, the Stormwater Utility has a $1.201 million yearly base cost. In estimating how the **[***9]** revenues from the stormwater fee are allocated, Thomas Dechert, Stormwater Program Coordinator, stated that $90,000 to $100,000 is allocated for NPDES compliance; $332,470 is allocated to street sweeping, debris cleanup, and pollution control; and $301,750 is allocated to the City's stormwater system operations. This estimate was based off of the City's 2009 budget.

[10] In generating his stormwater activity list, Keith Bingman, Street Maintenance Manager, makes an ad hoc determination as to what constitutes interdepartmental stormwater activities assessing whether the activity is "storm related" or "stormwater maintenance related" and then bills the Stormwater Utility for work done by the Street Maintenance Department. Thus, as Bingman related, in referring to his budgeting methodology, if a tree limb blows onto the street, it is billed as street maintenance; if, on the other hand, the limb washes onto the street, it is billed to the Stormwater Utility. In this sense, anything related to the cleaning and maintenance of streets that affects the quality of the City's stormwater, including street sweeping, has the potential to be deemed "stormwater maintenance related."

[11] In the future, the **[***10]** City asserts that the stormwater fee also will be used to fund the City's Capital Improvement Plan, which will be used to update various drainage channels and pipes, rebuild streets, build and rebuild stormwater systems, build detention and retention ponds, among others. Some stormwater basins in the City will not receive any capital improvements.

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). Movant has the burden of showing that no genuine issues of material fact exist. Stoddart v. Pocatello Sch. Dist. No. 25, 149 Idaho 679, 683, 239 P.3d 784, 788 (2010). HN3[↑] This Court "liberally construe[s] the record **[***12]** in a light most favorable to the party opposing the motion, drawing all reasonable inferences in favor of that party." DBSI/TRI V v. Bender, 130 Idaho 796, 801-02, 948 P.2d 151, 156-57 (1997). "If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review." Watson v. Weick, 141 Idaho 500, 504, 112 P.3d 788, 792 (2005). "If the record contains conflicting inferences or if reasonable minds might reach different conclusions, then the district court's order granting summary judgment must be reversed." DBSI/TRI V, 130 Idaho at 802, 948 P.2d at 157. "The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits." Borley v. Smith, 149 Idaho 171, 176, 233 P.3d 102, 107 (2010) (quoting Intermountain Forest Mgmt., Inc. v. La. Pac. Corp., 136 Idaho 233, 235, 31 P.3d 921, 923 (2001)).

## V. Analysis

### A. The Stormwater Fee Is an Unauthorized Tax, Not Reasonably Related to a Regulatory Purpose

The Idaho Constitution provides that HN4[↑] "[a]ny county or incorporated city or town may make and enforce, within **[***13]** its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws." Idaho Const. art. XII, § 2. HN5[↑] Police powers consist of government conduct that has "for its object the public health, safety, morality or welfare." Potts Constr. Co. v. N. Kootenai Water Dist., 141 Idaho 678, 681, 116 P.3d 8, 11 (2005) (quoting 6A Eugene McQuillin, *The Law of Municipal Corporations, Police Powers* § 24.28 (3d ed. 1997)). A municipality may collect fees considered incidental to regulation and enacted **[**912]** **[*805]** pursuant to the municipality's police powers. *See* Brewster, 115 Idaho at 504, 768 P.2d at 767; Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene, 126 Idaho 740, 742-43, 890 P.2d 326, 328-29 (1995). "[A] fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs." Brewster, 115 Idaho at 505, 768 P.2d at 768. A fee's purpose is regulation, while taxes are primarily revenue raising measures. BHA Invs., Inc. v. State, 138 Idaho 348, 352-53, 63 P.3d 474, 478-79 (2003) (citing Brewster, 115 Idaho at 504-05, 768 P.2d at 767-68). "If municipal **[***14]** regulations are to be held validly enacted under the police power, funds generated thereby must bear some reasonable relationship to the cost of enforcing the regulation." Brewster, 115 Idaho at 504, 768 P.2d at 767 (citing State v. Nelson, 36 Idaho 713, 213 P. 358 (1923)). Legislative authorization is required for a municipal corporation's taxes on the general public. *See* Idaho Const. art. VII, § 6; *see also* Brewster, 115 Idaho at 504, 768 P.2d at 767. The Idaho Constitution prohibits a municipality from imposing a tax on other governmental entities. *See* Idaho Const. art. VII, § 4 (providing that "[t]he property of . . . the state, counties, towns, cities, villages, school districts, and other municipal corporations and public libraries shall be exempt from taxation . . .").[12]

In Loomis v. City of Hailey, 119 Idaho 434, 807 P.2d 1272 (1991), this Court articulated HN6[↑] a two-part test in determining whether a fee by a municipal corporation is a disguised tax, not reasonably related to a regulatory purpose under *Brewster*. "First, [this Court] . . . must determine whether the . . . fee constitutes an impermissible tax. Secondly, [this Court] . . . must determine whether the . . . fee is appropriately and reasonably assessed."[13] Id. at 437, 807 P.2d at 1275.

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[12] Although the Idaho Constitution prohibits a municipality from imposing a tax on other government entities, a municipality may charge a fee on government entities so long as it is specifically authorized by the Idaho Constitution or the Legislature. *See* Brewster , 115 Idaho at 503-05, 768 P.2d at 766-68; Caesar, 101 Idaho at 160, 610 P.2d at 519 ("a municipal corporation, as a creature of the state, possesses **[***15]** and exercises only those powers expressly or impliedly granted to it").

[13] In interpreting the *Loomis test,* Idaho Building Contractors Ass'n, 126 Idaho at 743, 890 P.2d at 329, provides guidance:

> Under the first step of the analysis, [this Court must] **[***16]** . . . consider whether, on its face, the . . . fee is a tax or a regulation. If it at least appears to be a regulation, we then reach the question of whether or not it is reasonably related to the regulated activity. If it is not reasonably related to the regulation, then it is purely a revenue raising assessment, and once again is not permissible without a specific legislative enactment.

The burden falls on the party challenging the exercise of a police power to show that it is in conflict with the general laws of the state or clearly unreasonable or arbitrary. *See* Potts Constr. Co., 141 Idaho at 682, 116 P.3d at 12; Plummer v. City of Fruitland, 139 Idaho 810, 813, 87 P.3d 297, 300 (2004); Sanchez v. City of Caldwell, 135 Idaho 465, 468, 20 P.3d 1, 4 (2001) (holding that whether or not an ordinance is unreasonable or arbitrary is a question of law).

*1. The Stormwater Fee Is a Tax*

It is apparent that Ordinance 4512[14] is a revenue generating tax created to benefit the general public by charging all property owners for the privilege of using the City's preexisting stormwater system, regardless of whether they are using the stormwater system or not. *See* Brewster, 115 Idaho at 503-04, 768 P.2d at 766-67. By its terms, the Ordinance states that its purpose is to "provide[] the funding necessary to enable on-going maintenance, operation, regulation, water quality management and improvement of the [stormwater] system . . .." Ordinance 4512 only provides for the creation and administration of the Stormwater Utility, a method of assessing residential and non-residential rates, an enterprise fund, and a process for appeal and exemption. Thus, by its terms, **[***17]** the Ordinance is purely concerned with revenue generation. *Id*.

The planning process for Ordinance 4512 further highlights this objective. In referring **[**913] [*806]** to the Council's motives for the stormwater fee, Thomas Dechert, Stormwater Program Coordinator, who was part of the planning process for the Stormwater Utility, elaborated that the stormwater fee is like "police services" in that it "benefits the public generally." Dechert's proposal to the Council for the stormwater system asserts the main virtue of the stormwater fee as providing a solution for the Street Maintenance Department's funding concerns by freeing up $700,000 annually in general tax revenue.[15] Literature composed by the City for public dissemination posed in question and answer format further extols this theme. The document posits:

> All of my stormwater stays on my lot. Why should I have to pay more money now? The fee will go towards fixing, building, and maintaining the stormwater system that benefits the whole City. Just like streets or the wastewater system, it's part of what we pay for as a community. We want to **[***18]** ensure that stormwater discharged to the rivers and creeks from the City meets water quality standards to maintain the fish and wildlife we value.

This document strongly suggests that even the City recognizes that this fee is a tax to provide community services to the general public.

Ordinance 4512 contains no provisions of regulation and is not incidental to regulation. As a result, the stormwater fee is indistinguishable from the street restoration and maintenance fee in Brewster, 115 Idaho at 502-05, 768 P.2d at 765-68, and the development impact fee in Idaho Building Contractors Ass'n, 126 Idaho at 741-44, 890 P.2d at 327-30, both of which this Court characterized as unauthorized taxes. Ordinance 4512 contains no provision purporting to control activities relating to stormwater regulation, such as stormwater pollution control or illicit discharge. Furthermore, the City cannot point to any statute authorizing the imposition of the stormwater fee besides its reference to the Revenue Bond Act[16] and the Clean Water Act, 33 U.S.C. § 1342(p)(1)-(6).[17]

The Stormwater Utility provides no product and renders no service based on user consumption of a commodity. *See* Brewster, 115 Idaho at 505, 768 P.2d at 768. The City has no involvement with the flow or removal of stormwater on private property. The essence of the charge imposed is for the privileges of having a pollutant free stormwater system and clean streets. This benefit is no different from the privilege shared by the general public, much like the public's use of city streets or police and firefighter services. *See* id. at 504-05, 768 P.2d at 767-68 (holding that **HN7**[↑] "a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs"). Thus, the fee serves the purpose of providing funding for public services at large previously funded out of the City's general tax revenues, not to the individual assessed. *See id*.; *see also* Idaho Bldg. Contractors Ass'n, 126

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[14] City of Coeur d'Alene has a stormwater utility. Ordinance 4512 is based on City of Coeur d'Alene's Ordinance.

[15] This figure includes $280,016 in street sweeping costs and $228,787 in stormwater operations and maintenance costs.

[16] The City concedes **[***19]** the Revenue Bond Act is inapplicable because there were no revenue bonds issued.

[17] The NPDES draft permit does not mandate the creation of the Stormwater Utility. Regardless, only 10% to 15% of the stormwater fee is used for NPDES compliance.

Idaho at 744, 890 P.2d at 330. **[***20]** As in *Brewster*, the stormwater fee is "not dissimilar from a tax imposed for the privilege of owning property within the municipal limits of [the City]." 115 Idaho at 504, 768 P.2d at 767.

The administration of the Stormwater Utility further suggests that the stormwater fee is a tax used for the non-regulatory function of cleaning, maintaining, and expanding the City's streets and stormwater infrastructure. Brewster, 115 Idaho 504-05, 768 P.2d at 767-68. Unlike water, sewer, or electrical service fees, which are based on user consumption of a particular commodity, the stormwater fee is assessed on those who do not use the Stormwater Utility. Id. at 505, 768 P.2d at 768. The City is charging homeowners based on the extent of impervious surfaces on their property reasoning that this method equitably spreads the cost of **[**914]** **[*807]** maintaining the stormwater system to those who contribute non-stormwater and pollutants to the system. But, the City concedes that some of the individuals who are assessed the stormwater fee have their own private stormwater systems or are not connected to the stormwater system. The City's Stormwater Utility Business Plan estimates "that the number of ERUs actually discharging **[***21]** to the City's stormwater system is probably at least 30% less than the totals given" and that "as much as 20% of the non-residential ERUs might be public or institutional property that could be exempted from fees." The Stormwater Utility Business Plan also relates that "30% of the ERUs might qualify for credits, immediately." There is no evidence of how much stormwater the fee payers actually contribute to the stormwater system. The ERU impervious surface area rate structure does not account for actual use of the stormwater system, which is understandable because the City plays no part in water flowing over properties unlike garbage, water, electrical, and sewer services. Id. at 504-05, 768 P.2d at 767-68.

Furthermore, the stormwater activities that the City's Street Maintenance Department bills to the Stormwater Utility are broad and seem to incorporate any service that Keith Bingman, Street Maintenance Manager, declares to be "storm related" or "stormwater maintenance related . . .." Keith Bingman's stormwater activity list suggests that the City has shifted its Street Maintenance Program into the Stormwater Utility in order to free up its general revenues. Much like its method of **[***22]** budgeting and accounting, the Stormwater Utility has an ad hoc structure, which looks a lot like the Street Maintenance Department. As a result, there is no sure means to control how the stormwater revenue is spent contrary to Idaho Building Contractors Ass'n, 126 Idaho at 743, 890 P.2d at 329.[18] In addition, the reality of the enterprise fund is that these revenues are not segregated; instead, they are kept in a single checking account from which the City draws its general funds. *See* Potts Constr. Co., 141 Idaho at 681, 116 P.3d at 11; Loomis, 119 Idaho at 443, 807 P.2d at 1281.

*2. This Court Does Not Need to Address Whether the Stormwater Fee Is Reasonably Related to a Regulatory Purpose Under Brewster Because the Stormwater Fee Is a Tax with No Regulatory Purpose*

The City argues that the stormwater fee is reasonably related to the regulated activity. Because the Ordinance, no matter how rationally and reasonably drafted, imposes a tax and not a regulatory fee, this Court "[need] not ever reach the second part of the Loomis test set forth above." Idaho Bldg. Contractors Ass'n, 126 Idaho at 745, 890 P.2d at 331. "The reasonableness of the ordinance simply never becomes an issue." *Id*.

*3. The Facts in Waters Garbage, Kootenai County, and Loomis Are Distinguishable Because They Involved Interpretations of Statutes*

The Entities' reliance on Waters Garbage v. Shoshone County, 138 Idaho 648, 650-52, 67 P.3d 1260, 1262-64 (2003), **[***24]** is inapposite. *Waters Garbage* dealt primarily with statutory construction of waste disposal fees under I.C. § 31-4401. *Id*. Applying the plain meaning of the statute, this Court held that waste

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[18] In Idaho Building Contractors Ass'n, 126 Idaho at 741-42, 890 P.2d at 327-28, a development impact fee was assessed for improvements requiring a building permit. Ordinance 2569 required that the revenue be spent on public facilities, such as library, police services, fire services, and streets. *Id*. Because the fee essentially funded the general revenue and did not account for any service relating to the development (i.e., it does not include hookup costs, drainage, sewer, water or other services associated with the building improvements), this Court noted that it was "antithetical to this Court's definition **[***23]** of a fee." Id. at 743, 890 P.2d at 329. "[A] fee serves only the purpose of covering the cost of the particular service provided by the state to the individual [as opposed to providing funding for public services at large]." Id. at 744, 890 P.2d at 330 (*citing* Alpert v. Boise Water Corp., 118 Idaho 136, 145, 795 P.2d 298, 307 (1990); Brewster, 115 Idaho at 504-05, 768 P.2d at 767-68).

disposal fees under I.C. § 31-4401 must be tied to the provision of an actual service. *See* id. at 651-52, 67 P.3d at 1263-64. Here, there is no applicable statute to interpret.

**[**915]** **[*808]** Similarly, the City's reliance on Kootenai County Property Ass'n v. Kootenai County, 115 Idaho 676, 769 P.2d 553 (1989), is equally unconvincing. The facts in Kootenai County are distinguishable from this case. In *Kootenai County*, this Court held that a waste disposal fee was reasonably related to the benefit conferred even though some residents did not use Kootenai County's waste disposal site. Id. at 679-80, 769 P.2d at 556-57. This Court specifically distinguished *Kootenai* from *Brewster*, noting that in *Kootenai* there was specific legislative authorization for the imposition of a tax or fee for the acquisition and operation of Kootenai County's waste disposal site. Id. Again, here, there is no legislative authorization for the stormwater fee or statute to interpret.

Although useful in establishing the two-part test under Brewster, **[***25]** the facts in Loomis, 119 Idaho at 439, 807 P.2d at 1277, are also distinguishable because they deal with a sewer connection fee authorized under the Revenue Bond Act. This Court held that for the sewer connection fee not to be a disguised tax, it must be allocated and budgeted in conformity with the Revenue Bond Act. Id. "However, if fees are collected under the disguise of the Act and allocated and spent otherwise, then the fees are primarily revenue raising and will be construed as taxes." *Id*. The Revenue Bond Act is not applicable because no revenue bonds were issued by the City.

*4. The City Has No Statutory, Constitutional, or Police Power Authority to Enact the Stormwater Utility Fee Under Any of the Statutes that the City Cites*

The City attempts to appeal the denial of its cross-motion for summary judgment citing I.A.R. 11(a)(1) in its Notice of Appeal. **HN8**[] "This Court does not review denials of summary judgment after a judgment is made on the merits." Grover v. Wadsworth, 147 Idaho 60, 66, 205 P.3d 1196, 1202 (2009) (citing Gunter v. Murphy's Lounge, LLC, 141 Idaho 16, 26, 105 P.3d 676, 686 (2005)). "An order denying a motion for summary judgment is not an appealable order itself, **[***26]** nor is it reviewable on appeal from a final judgment." Hunter v. Dep't of Corr., 138 Idaho 44, 46, 57 P.3d 755, 757 (2002). Thus, this Court declines to review this issue so far as the City attempts to appeal the denial of its cross-motion for summary judgment. However, to the extent that the arguments pertain to the issue of reversing the grant of summary judgment to the Entities, we will review such arguments.

The City contends that the stormwater fee was enacted pursuant to valid police power authority under the Revenue Bond Act, the Local Improvement District Code, and numerous provisions of Title 50 of the Idaho Code. The City does not provide any arguments for how those provisions authorize a fee; neither does the City refer to the specific sections on which it relies. The only argument that the City makes is that the stormwater fee is valid under the Revenue Bond Act, I.C. § 50-1027, et seq. That issue, however, is not before this Court because the City did not proceed under the Revenue Bond Act.

Regarding the Local Improvement District Code and the various Title 50 provisions of the Idaho Code, the City failed to provide argument or authority addressing these issues. **HN9**[] The failure **[***27]** to support an alleged error with argument and authority is deemed a waiver of the issue. Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010). This Court will not consider an issue that is not "supported by argument and authority in the opening brief." *See* Jorgensen v. Coppedge, 145 Idaho 524, 528, 181 P.3d 450, 454 (2008) (quoting Hogg v. Wolske, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006)); *see also* I.A.R. 35(a)(6) ("The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon."). Thus, the City has waived these arguments.

## VI. CONCLUSION

This Court finds that the first step of the analysis leads to the conclusion that the assessment is a tax, not a regulatory fee. As per the second step, it is clear that the revenue to be collected from the stormwater **[**916]** **[*809]** utility fee has no rational relationship to a regulatory purpose because the stormwater fee is a tax. The stormwater fee is used to generate funds for the non-regulatory function of repairing, maintaining, and expanding the City's preexisting stormwater system **[***28]** and streets under Brewster. Ordinance 4512 is, therefore, an unauthorized tax intended to free-up the City's general revenues. It is for the Idaho Legislature to

authorize such a tax.

The judgment of the district court is affirmed with costs awarded to the Entities. Neither side has requested attorney's fees.

Chief Justice BURDICK, Justices EISMANN, J. JONES and HORTON **CONCUR**.

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# EXHIBIT – 24

# Oneida Tribe of Indians v. Vill. of Hobart

United States District Court for the Eastern District of Wisconsin

September 5, 2012, Decided; September 5, 2012, Filed

Case No. 10-C-137

**Reporter**
891 F. Supp. 2d 1058 *; 2012 U.S. Dist. LEXIS 125564 **; 42 ELR 20189

ONEIDA TRIBE OF INDIANS OF WISCONSIN, Plaintiff, v. VILLAGE OF HOBART, WISCONSIN, Defendant/Third-Party Plaintiff, v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF THE INTERIOR, and KENNETH SALAZAR, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, Third-Party Defendants.

**Subsequent History:** Affirmed by *Oneida Tribe of Indians of Wis. v. Vill. of Hobart, 2013 U.S. App. LEXIS 21195 (7th Cir. Wis., Oct. 18, 2013)*

**Prior History:** *Oneida Tribe of Indians v. Hobart, 787 F. Supp. 2d 882, 2011 U.S. Dist. LEXIS 41888 (E.D. Wis., 2011)*

## Core Terms

Tribe, storm water, charges, Ordinance, trust land, immunity, taxes, trust property, tribal, pollutants, parcels, Reservation, taxation, authorizes, runoff, collection, facilities, subject matter jurisdiction, regulation, stormwater, sovereign, courts, site, reasonable services, summary judgment, impermissible, municipal, purposes, exempt, third-party

## Case Summary

**Overview**
A Native American tribe was granted summary judgment on its action seeking a declaratory judgment that a village lacked authority to impose charges under its storm water management utility ordinance on trust lands located within the village where the charge was a tax upon tribal trust property, rather than a permissible fee. Specifically, the CWA did not provide the village the power to tax the tribe. Moreover, the village could not collect its storm water management charges against the federal government.

**Outcome**
Tribe's summary judgment motion granted; federal government's motion to dismiss granted.

## LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

*HN1*[] **Entitlement as Matter of Law, Appropriateness**

A motion for summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

*HN2*[] **Entitlement as Matter of Law, Materiality of Facts**

For summary judgment purposes, material means that the factual dispute must be outcome-determinative under law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

*HN3*[] **Entitlement as Matter of Law, Genuine**

**Disputes**

A genuine issue must have specific and sufficient evidence that, were a jury to believe it, would support a verdict in the nonmoving party's favor. Fed. R. Civ. P. 56(e).

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

**HN4 Burdens of Proof, Movant Persuasion & Proof**

The party moving for summary judgment has the burden of showing there are no facts to support the nonmoving party's claim.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

**HN5 Summary Judgment, Evidentiary Considerations**

In determining whether to order a motion for summary judgment, the court should consider the evidence presented in the light most favorable to the nonmoving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

**HN6 Entitlement as Matter of Law, Appropriateness**

When the record, taken as a whole, could not lead a rational jury to find for the nonmoving party, there is no genuine issue and therefore no reason to go to trial.

Governments > Native Americans > Indian Reorganization Act

Governments > Native Americans > Taxation

**HN7 Native Americans, Indian Reorganization Act**

Tribal lands, held by Indians with whom the United States maintains a formal trust relationship, cannot be taxed by states wherein they are located. Although this immunity from taxation was lost as to Indian lands that were conveyed by patent to tribal members during the allotment period, it was restored to those lands later acquired and taken in trust by the government under the Indian Reorganization Act (IRA) of 1934. The IRA expressly provided that lands taken into trust for an Indian tribe would be exempt from state and local taxation. 25 U.S.C.S. § 465. It therefore remains the law that a state is without power to tax reservation lands and reservation Indians absent some federal statute permitting it. Courts decline to find a grant of such authority in federal statutes without clear congressional intent.

Governments > Native Americans > Taxation

**HN8 Native Americans, Taxation**

The determination of whether a given charge upon Indian property constitutes an impermissible tax is determined by federal, not state, law. Moreover, whereas tax exemptions are generally construed narrowly, tax exemptions granted to Indians by the federal government are liberally construed.

Governments > State & Territorial Governments > Finance

Tax Law > State & Local Taxes > General Overview

**HN9 State & Territorial Governments, Finance**

A tax is a monetary charge imposed by the government on persons, entities, or property to yield public revenue. Black's Law Dictionary 1469 (7th ed. 1999). A fee, on the other hand, is generally a charge for labor or services. Of course, governments can also impose fees. And the line between a tax and a fee, and a tax and a fine, is sometimes fuzzy.

Governments > State & Territorial Governments > Finance

Tax Law > State & Local Taxes > General Overview

**HN10 State & Territorial Governments, Finance**

Courts have to distinguish taxes from regulatory fees in a variety of statutory contexts. Yet, in doing so, they analyze the legal issues in similar ways. They sketch 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, contributes to a general fund, and spends for the benefit of the entire community. The classic regulatory fee is imposed by an agency upon those subject to its regulation. It 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.

Governments > State & Territorial
Governments > Finance

Tax Law > State & Local Taxes > General Overview

**HN11** **State & Territorial Governments, Finance**

The United States Court of Appeals for the First Circuit suggests that in determining whether a government exaction is a tax or a fee, a court should focus on three questions: (1) what entity imposed the fee? (2) what parties are being assessed the fee? (3) is the revenue generated by the fee expended for general public purposes or used for the regulation and benefit of the parties upon whom the assessment is imposed? If the exaction is imposed by the legislature upon all, or almost all, of the citizens or property to accomplish a general public purpose, it is more likely to be a tax. If, on the other hand, the charge is imposed by a government agency on a specific subset of citizens or conduct subject to regulation by the agency and is set at such amount as to discourage certain conduct or defray the costs of the agency, it is a fee.

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

**HN12** **Clean Water Act, Coverage & Definitions**

See *33 U.S.C.S. § 1323(a)*.

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

**HN13** **Clean Water Act, Coverage & Definitions**

See *33 U.S.C.S. § 1323(c)(1)*.

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

Governments > Native Americans > Taxation

**HN14** **Clean Water Act, Coverage & Definitions**

Section 313, *33 U.S.C.S. § 1323*, of the Clean Water Act (CWA) is not the kind of clear statement of intent that is required to allow local taxation of Indian trust land. That section, by its terms, establishes the government's duty to comply with the substantive and procedural requirements of the CWA at federal facilities and explicitly waives its immunity for civil penalties. But it says nothing about Indian tribes or property owned by Indian tribes. It therefore falls far short of the unmistakable clarity required for a waiver of immunity from taxation.

Environmental Law > ... > Enforcement > Discharge Permits > Storm Water Discharges

Governments > Native Americans > Authority & Jurisdiction

**HN15** **Discharge Permits, Storm Water Discharges**

The Clean Water Act (CWA) prohibits the discharge of pollutants into navigable waters unless the discharge is authorized under a National Pollutant Discharge Elimination System (NPDES) permit. *33 U.S.C. § 1342*. Permits can be issued by the Environmental Protection Agency (EPA) or by state agencies subject to EPA review. *33 U.S.C.S. § 1342*. States can establish their own water quality standards for waters within their boundaries. *33 U.S.C.S. § 1313*. In 1987, Congress amended the CWA to authorize Indian tribes to apply to the EPA for authorization to establish and administer a system for issuing permits within their reservations. *33 U.S.C.S. § 1377(e)*. In the absence of tribal regulation of reservations, though, the EPA itself remains the proper authority to administer CWA programs on tribal trust lands because state laws may usually be applied to Indians on their reservations only if Congress so expressly provides. Nothing in the language of § 313, *33*

U.S.C.S. § 1323, of the CWA suggests that Congress intended to provide state or local governments authority to administer the CWA on Indian trust lands. The statute merely requires that federal agencies with jurisdiction over property or facilities comply with local regulations regarding storm water management.

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

Evidence > Burdens of Proof > Allocation

**HN16[] Defenses, Demurrers & Objections, Motions to Dismiss**

Under Fed. R. Civ. P. 12(b)(1), a court may dismiss an action for lack of subject matter jurisdiction. The district court must accept the complaint's well-pleaded factual allegations as true and draw reasonable inferences from those allegations in the plaintiff's favor. However, the plaintiff bears the burden of establishing jurisdictional requirements. Moreover, when considering a motion to dismiss for lack of jurisdiction, the district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Governments > Federal Government > Claims By & Against

**HN17[] Jurisdictional Sources, Statutory Sources**

In a suit against the United States, the jurisdictional allegations in the plaintiff's complaint must refer to a statute that waives the sovereign's immunity.

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

**HN18[] Subject Matter Jurisdiction, Federal Questions**

Under 28 U.S.C.S. § 1331, federal courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. According to judicial precedent, this provision for federal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law. A federal cause of action may be created either expressly or by implication. Courts hold that congressional intent to create a federal cause of action can be found in a federal statute permitting a claimant to bring a claim in federal court.

Governments > Federal Government > Claims By & Against

**HN19[] Federal Government, Claims By & Against**

Congress can waive federal sovereign immunity to suit, but it must do so unequivocally. Under the strict construction rule, any waiver of sovereign immunity must not only be express, but also must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires. The waiver may not be implied, assumed, or based upon inference or ambiguity. The existence of plausible alternative interpretations of statutory language is enough to establish that a reading imposing monetary liability on the government is not unambiguous, and therefore cannot stand.

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

Governments > Federal Government > Claims By & Against

**HN20[] Clean Water Act, Enforcement**

The language of § 313, 33 U.S.C.S. § 1323, does not reasonably support a construction that would, in essence, substitute the immunity of Indian tribes from taxation of their trust property for liability on the part of the federal government. Certainly, it falls far short of unequivocally indicating such an intent by Congress. By its terms, § 313 requires federal facilities to comply with the specified state and local water pollution control requirements and therefore is a waiver of sovereign immunity from suit in specific instances. Simply stated, holding bare legal title over Indian lands is not sufficient to bring such property within the jurisdiction of the United States within the meaning of § 313(a), 33 U.S.C.S. § 1323(a).

**Counsel:** **[**1]** For Oneida Tribe of Indians of Wisconsin, Plaintiff: Arlinda F Locklear, Arlinda F Locklear, Esquire, Washington, DC; James R Bittorf, Rebecca M Webster, Oneida Law Office, Oneida, WI.

For Village of Hobart WI, Defendant: Frank W Kowalkowski, Davis & Kuelthau SC, Green Bay, WI.

For United States of America, Third Party Defendant: Amy S Tryon, Joshua M Levin, United States Department of Justice (DC), Environment & Natural Resources Division, Washington, DC; Christian R Larsen, United States Department of Justice (ED-WI), Office of the US Attorney, Milwaukee, WI.

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For Village of Hobart WI, Third Party Plaintiff: Frank W Kowalkowski, Davis & Kuelthau SC, Green Bay, WI.

**Judges:** William C. Griesbach, United States District Judge.

**Opinion by:** William C. Griesbach

## Opinion

**[*1059] ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND GRANTING MOTION TO DISMISS**

This case represents another battle in the ongoing conflict between the Oneida Tribe of Indians **[**2]** of Wisconsin and the Village of Hobart over the regulatory control of the land situated within their common boundaries. Plaintiff Oneida Tribe of Indians of Wisconsin (the Tribe) filed this action on February 19, 2010, seeking a declaratory judgment that the Village of Hobart (the Village) lacks authority to impose charges under its Storm Water Management Utility Ordinance on parcels of land held in trust by the United States for the Tribe located on the Oneida Reservation and within Hobart (subject trust lands). The Tribe also seeks injunctive relief enjoining the Village from attempting to enforce its Ordinance upon tribal lands. (Compl., ECF No. 1.) There is no question that the Tribe is the beneficial owner of the subject trust lands. The case is before me now on the Tribe's motion for summary judgment. The Tribe moves for summary judgment on two claims for relief: first, that the charges imposed on its trust property under the Village's Storm Water Management Utility Ordinance (the Ordinance) constitute an impermissible tax on the subject trust lands; and second, **[*1060]** that federal common and statutory law preempt application of the Ordinance on the subject trust lands, whether or not **[**3]** it constitutes a tax.[1] (Tribe's Br. in Supp., ECF No. 48 at 1-2.)

The Village denies that the Tribe is entitled to such relief, but in the alternative, if the Tribe is not responsible for the utility charges, the Village claims that the United States must pay. Thus, in July 2010, the Village filed a third-party complaint against the United States, alleging that the United States, as holder of the bare title to the tribal trust lands, must pay the storm water fees if the Tribe is not responsible for doing so. (Third Pty. Compl., ECF No. 15.) This Court dismissed the third-party complaint, holding that the Village had failed to state a claim under the Administrative Procedure Act **[**4]** (APA), *5 U.S.C. §§ 701-706*, because there had been no final agency action. (April 18, 2011 Order, ECF No. 34.) The Village then presented the Department of the Interior with a request for payment of $237,862.06 in storm water fees, which the Department denied by letter dated October 20, 2011. (ECF No. 40-1.) Having thus obtained the final agency action required for a suit under the APA, the Village has renewed its third-party claims against the United States. (Am. Third Pty. Compl., ECF No. 43.) The Village seeks a declaratory judgment that the United States must pay "all past and future storm water related fees" and a monetary judgment "for all fees currently due and owing." (*Id.* at 16.) The Village also seeks declaratory and injunctive relief affirming the Village's jurisdiction to impose its Storm Water Management Utility charges on Indian trust land and preventing the United States from invoking a federal regulation, *25 C.F.R. § 1.4*, which exempts trust land from state and local property laws. *Id.* In response, the United States filed a motion to dismiss the Amended

[1] The Tribe also asserts a third claim for relief: that imposition of the Ordinance on the subject trust lands impermissibly infringes upon the Tribe's inherent powers of self-government, whether or not it constitutes a tax. But the Tribe concedes this third claim is dependent upon factual allegations regarding storm water activities and programs relating to the subject trust lands that may not be susceptible to disposition on summary judgment. (*See, e.g.,* Compl. ¶ 20.) Accordingly it will not be addressed here.

Third Party Complaint for lack of subject matter jurisdiction or failure to state a claim upon which relief can be **[**5]** granted. (Mot. to Dismiss, ECF No. 53.)

Both motions have been fully briefed and argued by the parties. For the reasons discussed herein, the Court concludes that the Village's Storm Water Utility Management charges constitute an impermissible tax on Tribal trust property for which neither the Tribe nor the United States are liable. Accordingly, the motions of the Tribe and the United States will be granted.

## BACKGROUND

The Tribe is a federally recognized Indian tribe in possession of the Oneida Reservation, set aside by treaty in 1838. (Treaty with the Oneida, *7 Stat. 566*.) The Tribe adopted a Constitution under the Indian Reorganization Act (IRA), which authorizes tribes to organize and authorizes the Secretary of the Interior to acquire and hold land in trust for tribes. *25 U.S.C. §§ 465* and *476*. On December 21, 1936, the Secretary of the Interior approved the Tribe's IRA Constitution. (Webster Aff., ECF No. 49 ¶ 3.) The Tribe is located on the Oneida Reservation in Wisconsin, which was established by the 1838 Treaty with the Oneida. The Reservation once encompassed 64,000 acres of tribal land; all or almost all of that land **[*1061]** was allotted and fell out of Tribal ownership between 1889 **[**6]** and 1934. *Oneida Tribe of Indians of Wisc. v. Village of Hobart, 542 F. Supp. 2d 908, 910-12 (E.D. Wis. 2008)*. Following passage of the IRA, and particularly since the dramatic increase in revenue the Tribe achieved after the enactment of the Indian Gaming Regulatory Act in 1988, the Tribe has been reacquiring land within the original reservation, some of which has been taken back into trust for the benefit of the Tribe by the Secretary of Interior.

Today, the United States holds in trust for the Tribe 148 parcels comprising approximately 1400 acres of land that are located within the boundaries of Hobart. (Stipulation of Facts, ECF No. 50, ¶¶ 4, 5.) The Tribe also owns land in fee within the Reservation, but that land is not the subject of this action. The subject trust lands include, among others, the following parcels, as identified in the county tax records: HB-1295, the site of the Oneida Police Department; HB-97, the site of the Oneida Community Health Center; HB-1317, the site of the Tribe's Oneida Elder Services Complex and the Tribe's Airport Road Child Care; HB-753, the site of the Oneida Cultural Heritage Department; HB-753-2, the site of the Tribe's Oneida Language House; **[**7]** HB-753-2 and HB-746, the site of a tribal, five-acre storm water retention pond known as Osnusha Lake; and HB-1313-1, the site of the Tribe's community building known as Parish Hall. (Webster Aff., ¶¶ 18-24.) Parcels held in trust also include an auto body shop, a park and a library. (Tribe's Resp. To Village Statement of Additional Facts, ECF No. 65, ¶¶ 26-37.)) The parcels at issue are not contiguous, but rather are interspersed throughout Hobart in a kind of checkerboard pattern.

The Town of Hobart (now the Village) was created by the state legislature in 1903 and lies wholly within the exterior boundaries of the Reservation. *Oneida Tribe, 542 F. Supp. 2d at 912*. In 2002, the Village incorporated under Wisconsin law, granting it additional authority under State law. *Id. at 913*. According to the United States Census Bureau, the estimated 2011 population for the Village was 6,254, approximately 17.5% of which were Native American. *http://quickfacts.census.gov/qfd/states/55/5535150.html* (last visited September 1, 2012). The Village is adjacent to the City of Green Bay and the Village of Ashwaubenon.

In 2007, Hobart adopted its Storm Water Management Utility Ordinance in accordance with **[**8]** the Clean Water Act (the CWA). Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *33 U.S.C. § 1251(a)*. As an operator of a Municipal Separate Storm Sewer System (MS4), Hobart is required to "develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from [the] MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act." *40 C.F.R. § 122.34(a)*.

The Ordinance identifies its purpose as protecting the general public welfare: "The Village of Hobart finds that the management of storm water and other surface water discharges within and beyond its borders is a matter that affects the public health, safety, and welfare of the Village, its citizens, businesses, and others in the surrounding area." Village of Hobart Code of Ordinances § 4.501(1). To accomplish this purpose, the Ordinance creates a storm water management utility, which is placed under the supervision of Hobart's legislative body, the Board. *Id.* § 4.502(1) and (2). The Ordinance authorizes the Village through the Storm **[**9]** Water **[*1062]** Management Utility to "acquire, construct, lease, own, and operate . . . such facilities as

are deemed by the Village to be proper and reasonably necessary for a system of storm and surface water management," including "surface and underground drainage facilities, sewers, watercourses, retaining walls and ponds and such other facilities as will support a storm water management system." *Id.* § 4.503(1). The Ordinance also authorizes the Village through the Storm Water Management Utility to "establish such rates and charges as are necessary to finance planning, design construction, maintenance, administration, and operation of the facilities in accordance with the procedures set forth in this ordinance." *Id.* § 4.503(2).

Two basic types of "charges" are authorized under the Ordinance. First, a "base charge" is imposed on all developed property "to reflect the fact that all developed properties benefit from storm water management activities of the Village and that all developed properties contribute in some way."[2] Second, an "equivalent runoff unit charge" (ERU) is imposed based upon the amount of impervious area as determined by Hobart's Administrator. *Id.* § 4.505(4)(a) and (b). In **[**10]** addition, a flat "equivalent runoff unit charge" is imposed even on undeveloped parcels at the rate of two-tenths of one unit per parcel up to 100 acres. *Id.* § 4.507(4)(g). The Ordinance authorizes offsets against the "equivalent runoff charge" but offsets against the "base charge" are specifically prohibited. *Id.* § 4.506(1). There are also percentage caps on the allowable credits which ensure that some amount of the "equivalent runoff unit charge" will always be assessed.

The Ordinance also authorizes an additional special charge that is linked to the delivery of storm water services, i.e., for those parcels "in a specific area benefited [sic] by a particular storm water management facility," and a one-time connection charge when a parcel converts from undeveloped to developed or otherwise connects to Hobart's system. *Id.* § 4.505(4)(c) and (d). Offsets against the special charges are authorized, again subject to a percentage cap. *Id.* **[**11]** § 4.506(1).

The Ordinance also sets forth a collection procedure and a set of penalties for nonpayment. It provides that the property owner is responsible for the storm water charges on real property "that he/she or it owns." *Id.* § 4.508(2). Unpaid delinquent charges "shall be a lien upon the property served and shall be enforced as provided in [*Wis. Stat.] § 66.0809(3)*." *Id.* § 4.508(3). The statutory provision adopted by the Ordinance for enforcement is that set out in state law for the collection of municipal public utility charges. This process requires delinquency notice; it further provides that unpaid charges become a lien upon the property and "the clerk shall insert the delinquent amount and penalty as a tax against the lot or parcel of real estate." *Wis. Stat. § 66.0809(3)*. Finally, the statute directs, "All proceedings in relation to the collection of general property taxes and to the return and sale of property for delinquent taxes apply to the tax if it is not paid within the time required by law for payment of taxes upon real estate." *Id.*

So far, the Village has not asserted a base charge as part of its storm water management fees. The current fees are based solely on the **[**12]** Equivalent Runoff Unit. Each year since its enactment, Hobart has billed the Tribe for "charges" allegedly due under the Ordinance as to **[*1063]** the subject trust lands. (Stip. ¶¶ 8-11.) The Tribe has refused to pay the "charges" as it believes its trust land is immune from the Ordinance and that Hobart lacks authority to impose charges under the Ordinance on the subject trust lands.[3] (*Id.* ¶¶ 8,9.) Because of its refusal to pay the allegedly outstanding "charges," the Tribe has received tax foreclosure notices from Brown County as to 143 of the subject trust lands. (Webster Aff. ¶ 11.) These notices state that, unless payment is made, the Tribe will incur "foreclosure costs and the publication of delinquent taxes in the newspaper." *Id.*

It is on the basis of these facts that the Tribe contends it is entitled to judgment as a matter of law. **[**13]** The Village opposes the Tribe's motion, but contends that if the Tribe is not responsible for the charges imposed under its Ordinance, then the Government is pursuant to *Section 313* of the CWA. Because the Village's claim against the Government arises only if the Tribe is not liable, I will address the Tribe's motion first.

## LEGAL STANDARD

[2] The Ordinance defines developed property as real property that "has been altered from its natural state by the addition of any improvements that may include a building, structure, impervious surface, and change in grade or landscaping." *Id.* § 4.504(3).

[3] The Tribe had also requested the assistance of the Regional Director, Bureau of Indian Affairs, Midwest Region, regarding Hobart's demand. The Regional Director responded in a letter to the Tribe and Hobart, dated March 24, 2009, that the "charge is clearly a tax that may not be imposed on land held in trust by the United States." (Compl., Ex. D. ECF No. 1.)

***HN1***[] A motion for summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. ***HN2***[] "Material" means that the factual dispute must be outcome-determinative under law. *Contreras v. City of Chicago, 119 F.3d 1286, 1291 (7th Cir. 1997)*. ***HN3***[] A "genuine" issue must have specific and sufficient evidence that, were a jury to believe it, would support a verdict in the non-moving party's favor. *Fed. R. Civ. P. 56(e)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. ***HN4***[] The moving party has the burden of showing there are no facts to support the non-moving party's claim. *Celotex, 477 U.S. at 322 (1986)*. ***HN5***[] In determining whether to order a motion for summary judgment, the court should consider the evidence presented **[**14]** in the light most favorable to the non-moving party. *Anderson, 477 U.S. at 255*. ***HN6***[] When the record, taken as a whole, could not lead a rational jury to find for the nonmoving party, there is no genuine issue and therefore no reason to go to trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

## ANALYSIS

### A. The Village's Storm Water Management Charges Constitute A Tax Upon Tribal Trust Property.

The Supreme Court long ago determined that ***HN7***[] tribal lands, held by Indians with whom the United States maintains a formal trust relationship, cannot be taxed by states wherein they are located. *The Kansas Indians, 72 U.S. 737, 18 L. Ed. 667 (1866)*. Although this immunity from taxation was lost as to Indian lands that were conveyed by patent to tribal members during the allotment period, it was restored to those lands later acquired and taken in trust by the Government under the Indian Reorganization Act (IRA) of 1934. *County of Yakima v. Confederated Tribes and Bands of Yakima Indian, 502 U.S. 251, 264, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992)*. The IRA expressly **[*1064]** provided that lands taken into trust for an Indian tribe would be "exempt from State and local taxation." *25 U.S.C. § 465*. It therefore remains the law that "a **[**15]** State is without power to tax reservation lands and reservation Indians" absent some federal statute permitting it. *Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995)* (quoting *Cnty. of Yakima, 502 U.S. at 258*). Courts have declined to find a grant of such authority in federal statutes without clear Congressional intent. *See Bryan v. Itasca Cnty., 426 U.S. 373, 380-87, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976)* (construing P.L. 280, *28 U.S.C. § 1360*); *Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 476, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976)* (construing the General Allotment Act (GAA), *25 U.S.C. § 349*). Based on this settled law, the Tribe argues that the Village has no right to impose charges on its trust property under its Storm Water Management Utility Ordinance.

The Village does not dispute the Tribe's claim that it's trust property is exempt from Village taxation. Instead, the Village denies it has imposed a tax on the Tribe's trust property. The Village contends that the charges its has imposed on the subject trust lands under its Ordinance constitute not taxes, but fees for the services performed, or to be performed, by its Storm Water Management Utility that will benefit all of the landowners of the Village, including the **[**16]** Tribe. Since the charges do not constitute taxes, the Village contends they are lawful and the Tribe's attempt to avoid them should be rejected.

In support of its argument that the Storm Water Utility Management charges are not taxes, the Village cites a string of decisions which apply state law to determine the validity of a given "tax" under either a state constitutional provision or state statute.[4] But as the Tribe points out, ***HN8***[] the determination of whether a given charge upon Indian property constitutes an impermissible tax is determined by *federal,* not state, law. *See Carpenter v. Shaw, 280 U.S. 363, 368-69, 50*

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[4] *See El Paso Apt. Ass'n v. City of El Paso, 2008 U.S. Dist. LEXIS 50918, 2008 WL 2641350 (W.D. Tx. June 24, 2008)* (state constitution); *Church of Peace v. City of Rock Island, 357 Ill. App. 3d 471, 828 N.E. 2d 1282, 293 Ill. Dec. 784 (Ill. App. 2005)* **[**17]** (state statute); *Smith v. Spokane Co., 89 Wn. App. 340, 948 P.2d 1301 (Wash. Ct. App. 1997)* (state constitution); *Sarasota Co. v. Sarasota Church of Christ, 667 S.2d 180 (Fla. 1995)* (state statute); *City of River Falls v. St. Bridget's Catholic Church of River Falls, 182 Wis. 2d 436, 513 N.W.2d 673 (Ct. App. 1994)* (state constitution); ***City of Littleton v. State, 855 P.2d 448 (Colo. 1993)*** (state constitution); *Long Run Baptist Ass'n v. Sewer Dist., 775 S.W.2d 520 (Ky. Ct. App. 1989)* (state constitution); *Zelinger v. City and Cnty. of Denver, 724 P.2d 1356 (Colo. 1986)* (state constitution); *Teter v. Clark Cnty., 104 Wash. 2d 227, 704 P.2d 1171 (1985)* (state constitution); *State v. Jackman, 60 Wis. 2d 700, 211 N.W.2d 480 (1973)* (state constitution).

S. Ct. 121, 74 L. Ed. 478 (1930)" ("Where a federal right is concerned we are not bound by the characterization given to a state tax by the 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."). Moreover, whereas tax exemptions are generally construed narrowly, tax exemptions granted to Indians by the federal government are liberally construed. *Id. at 366-37*.

***HN9***[↑] A tax is "a monetary charge imposed by the government on persons, entities, or property to yield public revenue." BLACK'S LAW DICTIONARY 1469 (7th ed. 1999). A fee, on the other hand, is generally a "charge for labor or services." *Id.* at 629. Of course, governments can also impose fees. And "[t]he line between a tax and a fee, and a tax and a fine, is sometimes fuzzy . . . ." *Empress Casino* ***[*1065]*** *Joliet Corp. v. Balmoral Racing Club, Inc., 651 F.3d 722, 729 (7th Cir. 2011)* (*en banc*). Yet, courts are frequently **[**18]** required to distinguish between them. The issue most frequently arises in federal courts in the context of deciding whether the requested relief is barred by the Tax Injunction Act, *28 U.S.C. § 1341*.

Perhaps the clearest discussion of the issue appears in *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico, 967 F.2d 683 (1st Cir.1992)*. There, then Chief Judge, now Justice, Breyer set out a framework for distinguishing between a tax and a fee:

> ***HN10***[↑] Courts have had to distinguish "taxes" from regulatory "fees" in a variety of statutory contexts. Yet, in doing so, they have analyzed the legal issues in similar ways. They 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. *See, e.g., National Cable Television Ass'n. v. United States, 415 U.S. 336, 340-41, 94 S. Ct. 1146, 39 L. Ed. 2d 370 (1974)*; *Robinson Protective Alarm Co. v. City of Philadelphia, 581 F.2d 371, 376 (3d Cir.1978)*; *Butler [v. Maine Supreme Judicial Court,* 767 F. Supp. [17] at 19 (D. Me. 1991). The classic "regulatory fee" **[**19]** is imposed by an agency upon those subject to its regulation. *See New England Power Co. v. U.S. Nuclear Regulatory Commission, 683 F.2d 12, 14 (1st Cir.1982)*. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. *See, e.g., South Carolina ex rel. Tindal v. Block, 717 F.2d 874, 887 (4th Cir.1983)*, *cert. denied, 465 U.S. 1080, 104 S. Ct. 1444, 79 L. Ed. 2d 764 (1984)*. 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. *See, e.g., Union Pacific Railroad Co. v. Public Utility Commission, 899 F.2d 854, 856 (9th Cir.1990)*; *In re Justices, 695 F.2d at 27*; *see also National Cable, 415 U.S. at 343-44*.

*967 F.2d at 685*. Distilled further, ***HN11***[↑] *San Juan Cellular* suggests that in determining whether a government exaction is a tax or a fee, a court should focus on three questions: "(1) What entity imposed the fee? (2) What parties are being assessed the fee? (3) Is the revenue generated by the fee expended for general public purposes or used for the regulation and benefit of the parties upon whom the assessment is imposed?" *McLeod v. Columbia County, GA, 254 F. Supp.2d 1340, 1345 (S.D. Ga. 2003)*. **[**20]** If the exaction is imposed by the legislature upon all, or almost all, of the citizens or property to accomplish a general public purpose, it is more likely to be a tax. If, on the other hand, the charge is imposed by a government agency on a specific subset of citizens or conduct subject to regulation by the agency and is set at such amount as to discourage certain conduct or defray the costs of the agency, it is a fee.[5]

**[*1066]** In *McLeod,* the plaintiff landowners sued their county in state court seeking to enjoin the assessment and collection charges imposed under a storm water management ordinance virtually identical to the one at issue here. Upon removal of the case to federal court, the Court raised the question of whether the Tax Injunction Act precluded federal jurisdiction. Using the

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[5] The Village offers a different test in its attempt to determine whether charges imposed by local governments upon federal facilities constitutes a service charge or a tax. It cites *Massachusetts v. United States, 435 U.S. 444, 98 S. Ct. 1153, 55 L. Ed. 2d 403 (1978)*. The Tribe notes that the question in Massachusetts was whether a federal charge imposed on state interests constituted a tax — not whether a local charge could be imposed on a federal interest. *Id. at 446*. 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. *Id. at 455*. The difference is significant and makes the two analytically distinct. *Massachusetts* is accordingly **[**21]** inapplicable here.

framework described above, the Court concluded that the charges imposed on the property constituted taxes and remanded the case back to state court for lack of federal jurisdiction. I find the Court's analysis persuasive here.

Like the ordinance in *McLeod*, a fair reading of the Ordinance in this case reveals that it is the legislative body, here, the Village Board, that imposed the fee. Although the Village established a Storm Water Management Utility, the Ordinance expressly states that "the Village Board is exercising its authority . . . . to set the rates for storm water management services." Ordinance at § 4.502(1). It is the Village, acting through the Storm Water Management Utility that is authorized to "establish such rates and charges as are necessary to finance planning, design construction, maintenance, **[**22]** administration, and operation of the facilities in accordance with the procedures set forth in this ordinance." *Id.* at § 4.503(2). Finally, the Ordinance states that "The amount of the charge to be imposed, for each customer classification shall be made by resolution of the Village Board." *Id.* at § 4.505(3). Thus, just as the Village Board is authorized to levy taxes on property within the Village, *see* Wis. Stat. § 61.34(4), it also is the body that determines the Storm Water Management charges. In fact, the assessments made under the Ordinance are collected in the same way and using the same procedure as unpaid property taxes. Ordinance at § 4.508.

The question of who is assessed the fees also supports the conclusion that the fee is a tax. The Ordinance authorizes an assessment on all property within the district, whether developed or not. *Id.* § 4.507(4). It expressly directs the Village Board to "establish a uniform system of storm water service charges that shall apply to each and every lot or parcel within the Village." *Id.* at § 4.505(1). The fact that the Village has not fully implemented its program and has so far assessed only the ERU rates and not the base charges authorized **[**23]** by the Ordinance does not alter the analysis. The Village has not suggested that the fact it has failed to so far fully implement the Ordinance reflects any intent to retreat from its claimed authority to impose such charges on all of the Tribe's trust property. Nor has the Village argued that its phased implementation of the Ordinance should somehow change the result.

Finally, the revenue generated by the fees is for a public benefit, as opposed to the individual owners of the property upon which the charges are assessed. *See McLeod, 254 F. Supp.2d at 1348* ("Storm water management was and is the type of service that is often funded through general tax revenue."). Storm water run-off can carry pollutants into waterways and thereby cause damage to the environment. But the resulting damage is to the public generally, not the individual property owner. Everyone who lives in the Village, and even many outside the Village boundaries, have an interest in preventing environmental damage due to storm water run-off.

The Village argues that the assessments should nevertheless be considered fees **[*1067]** rather than taxes because the rates imposed are set at a rate reasonably estimated to cover the costs **[**24]** of the program, and the Village created and maintains a separate budget for storm water management purposes. All revenue generated from the fees are used solely to fund the Storm Water Management Utility in the performance of its duties, and none of the money is commingled with the Village's general fund. But the segregation of funds for a particular purpose is not enough to change the character of the assessment. In *Schneider Transport, Inc. v. Cattanach,* for example, the Seventh Circuit held that registration fees for trucks charged by the Wisconsin Department of Transportation was a "tax" even though the fees were deposited in a segregated fund used for highway construction. *657 F.2d 128, 132 (7th Cir.1981)*, cert. denied, *455 U.S. 909, 102 S. Ct. 1257, 71 L. Ed. 2d 448 (1982)*. Storm water management and control, like highway construction, is a public service typically funded by government through tax revenue.

In reality, the Village's funding mechanism for its storm water management utility operates comparably to a school tax. Each property owner within a community is assessed a school property tax regardless of whether the property owners themselves have children attending public schools. The goal of school property **[**25]** tax is, of course, to benefit the community as a whole rather than individuals receiving a denominated service. Like a school tax, Hobart's ordinance assesses each property within the community a charge, the revenues of which will be collected to support the operation of the storm water management utility that benefits the community as a whole. In short, Hobart's "charge" is a tax for all meaningful purposes here. And like property taxes used to pay for schools, the storm water management fees confer a benefit on the public generally, as opposed to only those who pay.

Notwithstanding these considerations, the Village argues that in *Section 313* of the CWA Congress

expressly defined storm water charges as permissible fees owed for otherwise tax exempt properties, including Indian Tribes. Section 313 reads, in pertinent part, as follows:

**(a) Compliance with pollution control requirements by Federal entities.**

HN12[] 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, and **[**26]** 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). The CWA goes on to define what is meant by a reasonable service charge that may be asserted even though taxation is prohibited:

> **(c) Reasonable service charges.**
>
> **(1) In general**
>
> HN13[] For the purposes of this chapter, reasonable service charges described in subsection (a) include any reasonable nondiscriminatory fee, charge, or assessment that is—
>
> **(A)** based on some fair approximation 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
>
> **[*1068]** **(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 **[**27]** 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.

*Id.* Based on these provisions, the Village argues that Congress has expressly defined storm water charges as permissible fees, rather than taxes, and authorized the collection of such fees from Indian Tribes otherwise immune from state and local taxation. (Hob. Br. in Op., ECF No. 57, at 6.)

HN14[] Section 313 of the CWA, however, is not the kind of clear statement of intent that is required to allow local taxation of Indian trust land. *See* Cass County, Minn. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 110, 118 S. Ct. 1904, 141 L. Ed. 2d 90 (1998) ("We have consistently declined to find that Congress has authorized such taxation unless it has 'made its intention to do so unmistakably clear.' (quoting Yakima, 502 U.S. at 258)). That section, by its terms, establishes the Government's duty to comply with the substantive and procedural requirements of the CWA at federal facilities and explicitly waives its immunity **[**28]** for civil penalties. U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 627-28, 112 S. Ct. 1627, 118 L. Ed. 2d 255 (1992). But it says nothing about Indian tribes or property owned by Indian tribes. It therefore falls far short of the unmistakable clarity required for a waiver of immunity from taxation.

That the CWA does not provide the Village the power to tax the Tribe is also clear from the general framework of the CWA. HN15[] The CWA prohibits the discharge of pollutants into navigable waters unless the discharge is authorized under a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1342. Permits can be issued by the EPA or by state agencies subject to EPA review. 33 U.S.C. § 1342. States can establish their own water quality standards for waters within their boundaries. 33 U.S.C. § 1313. In 1987, Congress amended the CWA to authorize Indian tribes to apply to the EPA for authorization to establish and administer a system for issuing permits within their reservations. 33 U.S.C. § 1377(e). In the absence of tribal regulation of reservations, though, the EPA itself remains the proper authority to administer CWA programs on tribal trust lands "because state laws may usually be applied to Indians on their **[**29]** reservations *only if Congress so expressly provides.*" Wisconsin v. EPA, 266 F.3d 741, 747 (7th Cir. 2001) (emphasis added); *see also* State of Washington, Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (construing a related environmental statute and concluding it precluded state and local authority over tribal lands). Nothing in the language of Section 313 of the CWA suggests that Congress intended to provide State or local governments authority

to administer the CWA on Indian trust lands. The statute merely requires that *federal agencies* with jurisdiction over property or facilities comply with local regulations regarding storm water management.

The Village also suggests that Congress' 2011 amendment to the CWA adding subsection (c), which defined the "reasonable service charges" for which federal agencies are liable under subsection (a), constitutes a Congressional determination that such charges are not taxes and can thus be properly assessed against tribal trust property. Again, the Village reads too **[*1069]** much into the language of the statute. It simply states that the federal agency in charge of the facility is to be responsible for the charges regardless of what they are called. **[**30]** For the reasons set forth, the Court concludes that the Village's storm water management charges against the Tribe's trust property constitute an impermissible tax. Accordingly, the Village will be enjoined from assessing or collecting such taxes.

**B. The Village May Not Collect Its Storm Water Management Charges Against the Government.**

Having concluded that the storm water management charges on the subject trust lands constitute an impermissible tax, I now turn to the question of whether the Village's third-party complaint against the United States should be dismissed. The Government argues that dismissal is appropriate because this Court lacks subject matter jurisdiction and the complaint fails to state a claim upon which relief may be granted. Before reaching the merits on the Government's 12(b)(6) motion to dismiss, the Court must first determine whether there is any arguable basis for subject matter jurisdiction.

***HN16***[↑] Under Federal Rule of Civil Procedure 12(b)(1), a court may dismiss an action for lack of subject matter jurisdiction. "[T]he district court must accept the complaint's well-pleaded factual allegations as true and draw reasonable inferences from those allegations in the plaintiff's **[**31]** favor." Transit Express, Inc. v. Ettinger, 246 F.3d 1018, 1023 (7th Cir. 2001) (citing Rueth v. EPA, 13 F.3d 227, 229 (7th Cir. 1993)). However, the plaintiff bears the burden of establishing jurisdictional requirements. Apex Digital, Inc. v. Sears, Roebuck & Co., 572 F.3d 440, 443 (7th Cir. 2009). Moreover, when considering a motion to dismiss for lack of jurisdiction, "the district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." Johnson v. Apna Ghar, Inc., 330 F.3d 999, 1001 (7th Cir. 2003) (quoting Long v. Shorebank Dev. Corp., 182 F.3d 548, 554 (7th Cir. 1999)).

***HN17***[↑] In a suit against the United States, "the jurisdictional allegations in the plaintiff's complaint must refer to a statute that waives the sovereign's immunity." Metro. Sanitary Dist. Of Greater Chicago v. United States, 737 F. Supp. 51, 52 (N.D. Ill. 1990). The Village's complaint refers to § 313 of the CWA, 33 U.S.C. § 1323(a), and asserts the statute is a waiver of the Government's immunity. ***HN18***[↑] Under 28 U.S.C. § 1331, federal courts "have original jurisdiction of all civil **[**32]** actions arising under the Constitution, laws, or treaties of the United States." According to Supreme Court precedent, "[t]his provision for federal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law." Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005). A federal cause of action "may be created either expressly or by implication." Id. at 282. Courts have held that Congressional intent to create a federal cause of action can be found in a federal statute "permit[ting] a claimant to bring a claim in federal court." Int'l Union of Operating Eng'rs, Local 150, AFL-CIO, v. Ward, 563 F.3d 276, 283 (7th Cir. 2009). As an initial matter, the Village's claim does arise under the laws of the United States sufficient to confer jurisdiction under § 1331 provided that the Village's interpretation of the statute is correct.

The Village, in its amended third-party complaint seeks declaratory judgment that "it may impose upon the property **[*1070]** held in trust for the benefit of the Oneida Tribe of Indians of Wisconsin ("Tribe"), its storm water ordinances and assert fees and charges associated therewith, all pursuant **[**33]** to the Village's storm water ordinances and the Clean Water Act." (Am. Third Pty. Compl., ECF No. 43, ¶ 1.) For the reasons outlined above, the Village's claim that it can assess its charges against the Tribe's trust property fails. Since the Tribe's trust property is immune, there is no liability to impose upon the United States. To require the United States to pay the Village's storm water management fees would circumvent the immunity from taxation that Indian trust lands enjoy. For this reason alone, the Village's claims against the United States should be dismissed.

The Village contends, however, that the United States is

liable in its own right because it owns the property in trust for the Tribe and has expressly waived its own immunity. The Village again relies on CWA Section 313(a), claiming that this subsection contains, if not a waiver of immunity as to the Tribe, at least a waiver of United States' immunity. (Hobart Br. in Opp'n, ECF No. 58 at 3-6.) To repeat, Section 313(a) provides in pertinent part:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having *jurisdiction over any property* or facility, **[**34]** . . . 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). According to the Village, the language "jurisdiction over any property" is a waiver of the Government's immunity as it relates to its position as title holder over the subject trust lands. (ECF No. 58 at 3-4.)

As the Government points out, ***HN19***[⬆] Congress can, of course, waive federal sovereign immunity to suit, *Block v. North Dakota, 461 U.S. 273, 280, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983)*, but it must do so unequivocally. Under the Supreme Court's strict construction rule, any waiver of sovereign immunity must not only be express, but also must be "construed strictly in favor of the sovereign" and "not 'enlarged . . . beyond what the language requires.'" *Dep't of Energy v. Ohio, 503 U.S. at 615* (citations omitted). The waiver may not be implied, assumed, or based upon inference or ambiguity. *Lane v. Pena, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996)*; *Bethlehem Steel Corp. v. Bush, 918 F.2d 1323, 1329 (7th Cir. 1990)*. **[**35]** The existence of "plausible" alternative interpretations of statutory language "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous,'" *United States v. Nordic Vill., Inc., 503 U.S. 30, 37, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992)*, and therefore cannot stand.

***HN20***[⬆] The language of *Section 313* does not reasonably support a construction that would, in essence, substitute the immunity of Indian tribes from taxation of their trust property for liability on the part of the federal government. Certainly, it falls far short of unequivocally indicating such an intent by Congress. By its terms, *Section 313* requires federal facilities to comply with the specified state and local water pollution control requirements and therefore is a waiver of sovereign immunity from suit in specific instances. Simply stated, holding bare legal title over Indian lands is not sufficient to bring such property within the jurisdiction of the United States within the meaning of Section 313(a). The Village's claim against the **[*1071]** United States therefore fails. The United States is immune from the Village's suit and subject matter jurisdiction is therefore lacking. Accordingly the Village's third party claims **[**36]** will be dismissed.

## CONCLUSION

As suggested above, this is not the first case over which this Court has presided between the Tribe and the Village, and it is unlikely to be the last. The central problem is that a significant portion of land interspersed throughout the Village is owned by a sovereign Indian tribe and is therefore not subject to the Village's taxing and regulatory or zoning powers. Although counsel for the Government stated at oral argument that checkerboard patterns of Indian trust land within municipal boundaries are not unique to the Village of Hobart, it is clear that such situations present serious problems for local governments. Providing and funding public services becomes more difficult as various parcels are removed from the municipal tax rolls and are no longer subject to municipal zoning or land use regulations. *See* Amanda Hettler, *Beyond A Carcieri Fix: The Need For Broader Reform Of The Land-Into-Trust Process Of The Indian Reorganization Act Of 1934, 96 Iowa L. Rev. 1377, 1396-98 (2011)*. These difficulties are exacerbated when the land placed in trust is interspersed throughout the municipal boundaries. In order to overcome them, there must be cooperation **[**37]** between the Village and the Tribe. The plain fact, however, is that the interests of the Village and the Tribe are not aligned; their constituencies are not the same and they have vastly different plans for the future. As a result, cooperation is more difficult. But this does not change the law.

For the reasons set forth above, the "charges" in the Ordinance cannot stand against the Tribe. The "charges" under the Ordinance constitute an impermissible tax on the Tribe's trust property. The Tribe is therefore immune from Hobart's Storm Water Management Utility Ordinance. Accordingly, the Tribe's motion for summary judgment (ECF No. 47) is

**GRANTED.** The clerk is directed to enter judgment in favor of the Tribe declaring that the Tribe's trust land is immune from the Village's Storm Water Management Utility Ordinance and that the Village lacks authority to impose charges under the Ordinance on the Tribe's land directly or indirectly. The judgment shall also enjoin the Village from attempting to impose and collect "charges" under the Ordinance from the Tribe or from foreclosing on the Tribe's lands.

Furthermore, the Village's claims against the United States are dismissed for lack of subject **[**38]** matter jurisdiction because *Section 313* of the CWA does not constitute a waiver of the United States' sovereign immunity over Indian trust lands. Accordingly, the United States' motion to dismiss (ECF No. 53) is **GRANTED.**

**SO ORDERED** this 5th day of September, 2012.

/s/ William C. Griesbach

William C. Griesbach

United States District Judge

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# EXHIBIT – 25

# Michigan Department of Transportation

# DRAINAGE MANUAL

**NOTE: The most current version of this Manual can be found at: www.Michigan.gov\stormwater**

**Authors:**
**Michigan Department of Transportation**
**Tetra Tech MPS**

**January 2006**

This manual provides guidance to administrative, engineering, and technical staff. Engineering practice requires that professionals use a combination of technical skills and judgment in decision making. Engineering judgment is necessary to allow decisions to account for unique site-specific conditions and considerations to provide high quality products, within budget, and to protect the public health, safety, and welfare. This manual provides the general operational guidelines; however, it is understood that adaptation, adjustments, and deviations are sometimes necessary. Innovation is a key foundational element to advance the state of engineering practice and develop more effective and efficient engineering solutions and materials. As such, it is essential that our engineering manuals provide a vehicle to promote, pilot, or implement technologies or practices that provide efficiencies and quality products, while maintaining the safety, health, and welfare of the public. It is expected when making significant or impactful deviations from the technical information from these guidance materials, that reasonable consultations with experts, technical committees, and/or policy setting bodies occur prior to actions within the timeframes allowed. It is also expected that these consultations will eliminate any potential conflicts of interest, perceived or otherwise. MDOT Leadership is committed to a culture of innovation to optimize engineering solutions.

The National Society of Professional Engineers Code of Ethics for Engineering is founded on six fundamental canons. Those canons are provided below.

Engineers, in the fulfillment of their professional duties, shall:

1. Hold paramount the safety, health, and welfare of the public.
2. Perform Services only in areas of their competence.
3. Issue public statement only in an objective and truthful manner.
4. Act for each employer or client as faithful agents or trustees.
5. Avoid deceptive acts.
6. Conduct themselves honorably, reasonably, ethically and lawfully so as to enhance the honor, reputation, and usefulness of the profession.

# CHAPTER 3

# HYDROLOGY

**NOTE: All questions and comments should be directed to the Drainage Specialist, Design Support Area.**

**Revised January 2006**

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## 3.1 INTRODUCTION/PURPOSE

Hydrology is generally defined as a science dealing with the interrelationship between water on and under the earth and in the atmosphere. For the purpose of this manual, hydrology will deal with estimating flood magnitudes as the result of precipitation. In the design of highway drainage structures, floods are usually considered in terms of peak runoff or discharge in cubic feet per second (cfs), and hydrographs are considered in terms of discharge versus time. For structures which are designed to control the volume of runoff, such as detention storage facilities (Chapter 8, Stormwater Storage Facilities) or where flood routing through culverts is used, the discharge hydrograph will be needed. Wetland Hydrology for the design of weather water budgets is addressed in Appendix 3-D.

The analysis of the peak rate of runoff, volume of runoff, and time distribution of flow is fundamental to the design of drainage facilities. Errors in the analysis will result in a structure that is either undersized and causes more drainage problems or, is oversized and costs more than necessary. On the other hand, any hydrologic analysis is only an approximation. The relationship between the amount of precipitation into a drainage basin and the amount of runoff from the basin is complex, and too little data are available on the factors influencing the rural and urban rainfall-runoff relationship to expect exact solutions.

Factors Affecting Floods

In the hydrologic analysis, there are many factors that affect runoff. Some of the factors which need to be considered for each project are:

- Rainfall amount and distribution.
- Drainage area size, shape, and orientation.
- Ground cover and soil type.
- Slopes of terrain and stream(s).
- Antecedent moisture condition.
- Storage potential (overbank, ponds, wetlands, reservoirs, channel, etc.).
- Land use conditions.
- Type of precipitation (rain, snow, hail, or combinations thereof).

## 3.2 DEFINITIONS

Following are discussions of concepts which will be important in a hydrologic analysis. These concepts will be used throughout the remainder of this chapter in dealing with different aspects of hydrologic studies. Some defined terms are shown in Figure 3-1, Representation of Hydrograph, Hyetograph, and Rainfall Excess.

Antecedent Moisture Conditions - Soil moisture conditions of the watershed at the beginning of a storm. These conditions affect the volume of runoff generated by a particular storm event.

Base Flow - Normal or dry weather flow in a stormwater system.

Depression Storage - The natural depressions within a watershed which store runoff.

Design Discharge - The maximum rate of flow (or discharge) for which a drainage facility is designed and thus expected to accommodate without exceeding the adopted design constraints. Maximum flow a bridge, culvert, or other drainage facility is expected to accommodate without contravention of the adopted design criteria. The peak discharge, volume, stage, or wave crest elevation, and its associated probability of exceedance selected for the design of a road culvert or bridge over a channel, floodplain or along a shoreline. By definition, the design discharge, or wave, does not overtop the road. The design discharge headwater, or wave height, may be at an elevation lower than the road's profile grade in order to meet other design criteria such as the protection of property, accommodating land use needs, lowering of velocities, reducing scour, or complying with regulatory mandates.

Design Storm - Selected storm of a given frequency (recurrence interval) used for designing a design storm system.

Hypothetical storm derived from intensity-duration-frequency curves by reading the rainfall intensity from these curves for various durations for the frequency of interest and rearranging these rainfall intensities to fit an assumed storm pattern and storm duration.

A given rainfall amount, areal distribution, and time distribution used to estimate runoff. The rainfall amount is either a given frequency (25-, 50-year, etc.) or a special large (or specific frequency) value.

Drainage Area - The surface area draining into a stream or drain at a given point.

Evapotranspiration - Surface evaporation of water and transpiration through plants.

Flood Frequency - The number of times a flood of a given magnitude can be expected to occur on an average over a long period of time. Frequency analysis is then the estimation of peak discharges for various recurrence intervals. Another way to express frequency is with probability. Probability analysis seeks to define the flood flow with a probability of being equaled or exceeded in any year, i.e., 2 percent chance flood flow in

any given year is a 50-year flood flow. Drainage structures are designed based on specified flood frequencies. However, certain hydrologic procedures use rainfall and rainfall frequency as the basic input. Thus, in those procedures it is commonly assumed that the 10 percent chance (10-year) storm will produce the 10 percent chance (10-year) flood.

Gaged Sites - This is a site at or near a gaging station and the stream flow record is long enough to be statistically analyzed to estimate peak discharges. (Most sites in this category will be greater than the current regulatory drainage area limit and will be determined by the MDEQ's Hydrologic Studies Unit. The log-Pearson Type III probability distribution is used to analyze gaged flows.)

Hydraulic Roughness - A composite of the physical characteristics which influence the flow of water across the earth's surface, whether natural or channelized. It affects both the time response of a watershed and drainage channel as well as the channel storage characteristics.

Hydrograph - A graph of the time distribution of runoff from a watershed. (See Figure 3-1).

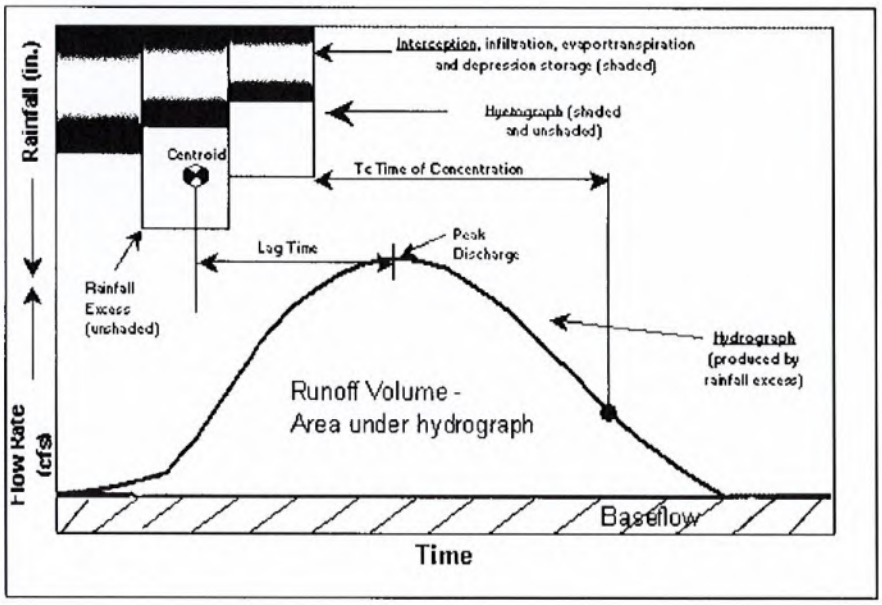



**Figure 3-1 Representation of Hydrograph, Hyetograph, and Rainfall Excess**

Hyetograph - A graph of the time distribution of rainfall over a watershed. (See Figure 3-1.)

Infiltration - The part of rainfall that enters the soil. The passage of water through the soil surface into the ground. Used interchangeably with percolation.

Interception - Storage of rainfall on foliage and other surfaces during a rainfall event.

Lag Time - The time measured from the centroid of the excess rainfall to the peak of the hydrograph.

Peak Discharge - The maximum rate of flow of water passing a given point as a result of a rainfall event or snowmelt; sometimes called peak flow.

Rainfall Excess - The water available to runoff after interception, depression storage, evapotranspiration, and infiltration have occurred.

Runoff Volume - Area under a hydrograph minus the base flow.

Stage - The elevation of the water surface above some elevation datum at a specific location.

Time of Concentration, $T_c$ - The time it takes water from the most distant point (hydraulically) to reach a discharge point.

Ungaged Sites - Those sites where no recorded stream flow data are available.

Unit Hydrograph - The direct runoff hydrograph resulting from a rainfall event that has a specific temporal and spatial distribution. A unit hydrograph lasts for a specific duration and has unit volume. When a unit hydrograph is shown with units of cubic feet per second, it is implied that the ordinates are cubic feet per second per inch of direct runoff.

To provide consistency within this chapter, as well as throughout this manual, symbols presented in Appendix 3-A will be used. These symbols were selected because of their wide use in hydrologic publications. A list of acronyms used in this chapter is also presented in Appendix 3-A.

## 3.3 POLICY AND DESIGN CRITERIA

Following is a summary of hydrologic analysis and design. For a more complete discussion of these concepts and others related to hydrologic analysis, the reader is referred to FHWA, *Hydraulic Design Series 2* and AASHTO, *Highway Drainage Guidelines*.

### 3.3.1 Data Collection and Evaluation of Runoff Factors

For all hydrologic analyses, the following factors should be evaluated and included when they will have an effect on the final results:

- Drainage basin characteristics including: Size, shape, slope, land use, geology, soil type, surface infiltration, and storage.
- Stream channel characteristics including: Geometry and configuration, or natural and artificial controls.
- Floodplain characteristics.
- Meteorological characteristics such as precipitation amounts, type (rain, snow, hail, or combinations thereof), and time rate of precipitation (hyetograph).

Studies considering environmental and ecological impacts of projects should be done because hydrologic considerations can influence the selection of highway corridors and alternate routes. The complexity of these hydrologic studies varies with the analysis. Typical data to be gathered are: topographic maps, aerial photographs, stream flow records, historical high water elevations, flood discharges and locations of hydraulic features, such as reservoirs, and designated or regulatory floodplain areas.

### 3.3.2 Policy of Flood Hazards/Design Frequency

#### 3.3.2.1 FHWA Requirements

FHWA's Federal Aid Policy Guide (FAPG) Part 650 for Federal-aid projects and state law requires plans to show the following at locations where a highway will encroach on a regulated floodplain:

- magnitude,
- frequency, and
- water surface elevations for the 2 percent chance (50-year) flood and 1 percent chance (100-year) flood.

Conveyance of the 2 percent chance (50-year) flood shall not overtop the roadway. The size of the waterway opening along with hydraulics/hydrology data must be on the plans for The Plan Review Meeting.

### 3.3.2.2 State Requirements

For the State of Michigan policy on floodplain management, please see the State Executive Order 1977-4, titled "State Flood Hazard Management Plan" in Chapter 2, Legal Policy and Procedure, Appendix 2-F.

MDEQ Requirements

All highways that encroach on the floodplain, both transversely and longitudinally, shall require a hydraulic analysis and shall be designed to permit conveyance of floods up to and including the 1 percent chance (100-year) flood without causing harmful interference such as:

- an adverse impact on natural and beneficial floodplain levels,
- damage to property, or
- a significant increase in potential for interruption or termination of emergency service or emergency evacuation routes

MDOT Requirements

Roadway with Enclosed Drainage: The computed runoff for a roadway with curb and gutter shall be based on a 10 percent chance (10-year) storm. The sewer should be designed to flow full, i.e., with a hydraulic grade line at or near the top of pipe.

When the hydraulic grade line (HGL) is influenced by the receiving water, the HGL will be allowed to rise above the pipe, but should remain at least 1-foot below the gutter.

Depressed Roadways: Methods for designing storm sewers for depressed roadways is the same as for a roadways with enclosed drainage, except that runoff shall be computed using a 2 percent chance (50-year) storm and the hydraulic grade line shall be a minimum of 1-foot below the gutter grade line of the roadway (pressure flow). A depressed roadway will require a pumping station when a gravity drainage system cannot be used to drain the low points. Frequently, the Department must provide a trunk sewer and an adequate and properly designed independent outlet. An existing municipal sewer may only be used by agreement. Contact the Design Engineer - Hydraulics, for assistance or additional guidance.

### 3.3.3 Coordination

Discharge requests for MDOT projects with drainage areas over two square miles are coordinated by the MDOT Design Engineer – Hydraulics with the Hydrologic Studies Unit of MDEQ and other agencies as necessary. (See Section 3.4.6.)

### 3.3.4 Documentation

Hydrologic design of highway drainage facilities must be documented. Frequently it is necessary to refer to project design files long after the actual construction has been completed. Thus, it is necessary to fully document the results of all hydrologic analysis. Documentation is retained in either a Hydraulics Unit file, project design file, or on the drainage and vicinity plan sheet (See RDM 1.02.03 and 4.05.06).

### 3.3.5 Flood History

All hydrologic analysis should consider the flood history of the area and the effect these historical floods would have on existing and proposed structures.

### 3.3.6 Rainfall Data and Flood Frequency

Since it is not economically feasible to design a structure for the maximum runoff a watershed is capable of producing, a design frequency must be established. The frequency with which a given flood can be expected to occur is the reciprocal of the probability or chance that the flood will be equaled or exceeded in a given year. If a flood has a 20 percent chance of being equaled or exceeded each year, over a long period of time, the flood will be equaled or exceeded on an average of once every five years. This is called the return period or recurrence interval (RI). Thus, the exceedence probability in percent equals 100/RI.

The designer should note that the 20 percent chance flood (5-year flood) is one that will not necessarily be equaled or exceeded every five years. There is a 20 percent chance that the flood will be equaled or exceeded in any year; therefore, the 20 percent chance flood could conceivably occur in several consecutive years. The same reasoning applies to floods with other return periods.

Stream flow measurements for determining a flood frequency relationship at a site are usually not available (ungaged sites); in such cases, it is accepted practice to estimate peak runoff rates and hydrographs using statistical or empirical methods. In general, results from using several methods should be compared, not averaged.

This chapter will address hydrologic procedures that can be used for both gaged and ungaged sites.

A consideration of peak runoff rates for design conditions is generally adequate for conveyance systems such as storm drains or open channels. However, if the design must include flood routing (e.g., storage basins or complex conveyance networks), a flood hydrograph is required. Although the development of runoff hydrographs (typically more complex than estimating peak runoff rates) is often accomplished using computer programs, some methods are adaptable to nomographs or other desktop procedures.

Rainfall data are available for many geographic areas for use in the Rational Method. Appendix 3-B at the end of this chapter contains rainfall data for design of MDOT projects.

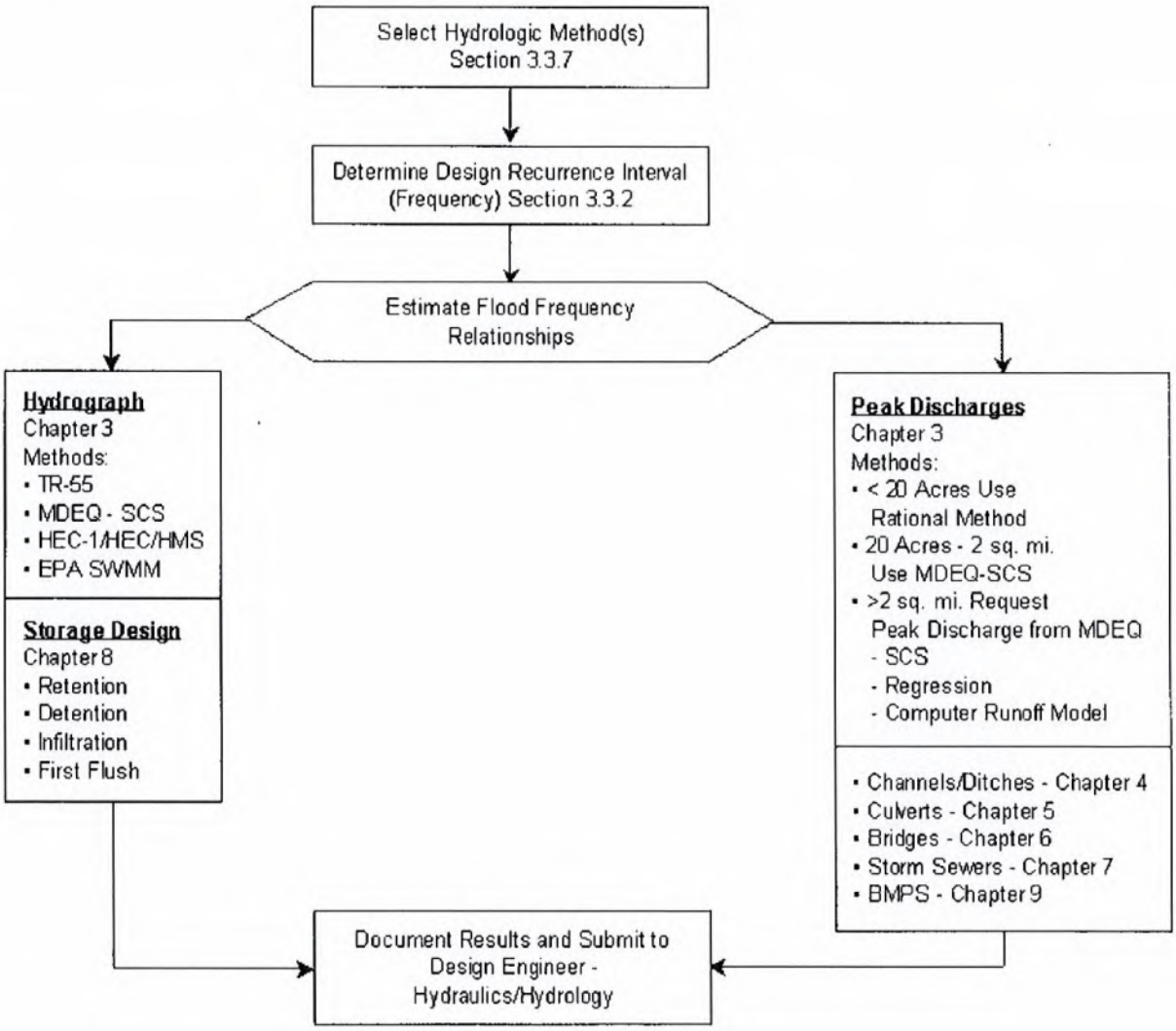
### 3.3.7 Hydrologic Method Selection

Many hydrologic methods are available. The methods to be used and the circumstances for their use are listed below. If possible, the method should be calibrated to local conditions and tested for accuracy and reliability.

- The Rational Method (Section 3.4.1) shall be used only for drainage areas less than 20 acres, and where only the peak discharge is needed.
- The National Resource Conservation Service's (NRCS) TR-55 can be used for any size watershed, up to the limiting time of concentration of 10 hours. This method will also produce a flood hydrograph. However, the dimensionless unit hydrograph used in this procedure should be the one specified by the Hydrologic Studies Unit of the Michigan Department of Environmental Quality (MDEQ). The coordinates for the dimensionless unit hydrograph are 0, 0.5, 1.0, 0.8, 0.6, 0.4, 0.2, and 0.
- The method in the MDEQ publication, "Computing Flood Discharges for Small Ungaged Watersheds," (Appendix 3-B) can be used for all other watersheds with drainage areas up to the regulated limit (currently two square miles). This method, MDEQ - SCS, produces a peak discharge and runoff volume. For times of concentration up to 10 hours, both this method and the TR-55 procedure should give comparable results.
- For drainage areas equal to or greater than the regulated limit (currently two square miles by Administrative Rule R 323.1312(a) for Part 31 of NREPA), the design discharges will be computed by the MDEQ Hydrologic Studies Unit. The methods used for the regulated drainage areas may include:
  - MDEQ - SCS method,
  - the drainage area ratio method,
  - a log-Pearson Type III probability stream gage analysis, or
  - the State regression equations.

### 3.3.8 Hydrologic Analysis Procedure Flow Chart

The flow chart shows the steps needed for the hydrologic analysis and the hydraulic designs that will use the hydrologic estimates.




### 3.3.9 Calibration of Hydrologic Models by MDEQ

MDEQ is responsible for providing hydrologic analysis for drainage areas greater than two square miles. The following section is a discussion of methodology and calibration of hydrologic models used by MDEQ. This discussion is provided for training purposes.

### 3.3.9.1 Definition

Calibration is a process of varying the parameters or coefficients of a hydrologic method so that it will estimate peak discharges and hydrographs consistent with local rainfall and stream flow data. Calibration is recommended to be performed whenever possible.

### 3.3.9.2 Hydrologic Accuracy

The accuracy of the hydrologic estimates will have a major effect on the design of drainage or flood control facilities. Although it may be argued that one hydrologic procedure is more accurate than another, practice has shown that all of the methods discussed in this chapter can, if calibrated, produce acceptable results consistent with observed or measured events. What should be emphasized is the need to calibrate the method for local conditions. This calibration process can result in much more accurate and consistent estimates of peak flows and hydrographs.

### 3.3.9.3 Calibration Process

The calibration process can vary depending on the data or information available for a local area. The following process should be followed during calibration.

1. If stream flow data are available for an area, the hydrologic procedures can be calibrated to these data. The process would involve generating peak discharges and hydrographs for different input conditions (e.g., slope, area, antecedent soil moisture conditions) and comparing these results to the gaged data. Changes in the model would then be made to improve the estimated values as compared to the measured values.

2. After changing the variables or parameters in the hydrologic procedure the results should be checked against another similar gaged stream or another portion of the stream flow data that were not used for calibration.

3. If some agency has data or information for an area based on stream flow data, general hydrologic procedures can be calibrated to these local procedures. In this way, the general hydrologic procedures can be used for a greater range of conditions (e.g., land uses, size, slope).

4. The calibration process should only be undertaken by personnel highly qualified in hydrologic procedures and design.

5. Should it be necessary to use unreasonable values for variables in order for the model to produce reasonable results, then the model should be considered suspect and its use carefully considered (e.g., having to use terrain variables that are obviously dissimilar to the geographic area in order to calibrate to measured discharges or hydrographs).

### 3.3.10 Rainfall Distribution

Hydrologic techniques that utilize hydrographs generally require the use of a design rainfall distribution. In Michigan, the former Soil Conservation Service (SCS) Type II distribution is appropriate.

## 3.4 DESIGN GUIDANCE AND PROCEDURE

### 3.4.1 Rational Method

The Rational Method is recommended for estimating the design storm peak runoff for drainage areas as large as 20 acres. This method, first introduced in 1889, is still used in many engineering offices in the United States. The Rational Method provides peak discharges and is not intended for computation of runoff volumes.

#### 3.4.1.1 Application

Considerations for using the Rational Method (as well as other hydrologic methods) are the following:

- The first step in applying the Rational Method is to obtain a good topographic map and define the boundaries of the drainage area in question. A field inspection of the area should also be made to determine if the natural drainage divides have been altered.
- In determining the runoff coefficient, C, for the drainage area, thought should be given to future changes in land use that might occur during the service life of the proposed facility that could result in an inadequate drainage system. FAPG allows for consideration of land use change 20 years into the future.
- Restrictions to the natural flow (creating storage areas) such as highway crossings and dams that exist in the drainage area should be investigated. Dams may affect the design flows determined by this method, so another method may be warranted.
- The charts, graphs, and tables included in this section are not intended to replace reasonable and prudent engineering judgment.

#### 3.4.1.2 Characteristics

Some precautions should be considered when applying the Rational Method. Characteristics of the Rational Method which limit its use to 20 acres or less include the following:

1. The rate of runoff resulting from any rainfall intensity is a maximum when the rainfall intensity lasts as long or longer than the time of concentration. That is, the entire drainage area does not contribute to the peak discharge until the time of concentration has elapsed.

   This assumption limits the size of the drainage basin that can be evaluated by the Rational Method. For large drainage areas, the time of concentration can be so large that constant rainfall intensities for such long periods do not occur, and shorter more intense rainfalls can produce larger peak flows.

2. The frequency of peak discharges is the same as that of the rainfall intensity for the given time of concentration.

   Frequencies of peak discharges depend on rainfall frequencies, antecedent moisture conditions in the watershed, and the response characteristics of the drainage system. For small and largely impervious areas, rainfall frequency is the dominant factor. For larger drainage basins, the response characteristics control. For drainage areas with few impervious surfaces, antecedent moisture conditions usually govern, especially for rainfall events with a return period of 10 years or less.

3. The fraction of rainfall that becomes runoff is independent of rainfall intensity.

   The assumption is reasonable for impervious areas, such as streets, rooftops and parking lots. For pervious areas, the fraction of runoff varies with rainfall intensity and the accumulated volume of rainfall. Thus, application of the Rational Method involves the selection of a coefficient that is appropriate for the storm, soil, and land use conditions.

4. The peak rate of runoff is sufficient information for the design of storm sewers and culverts.

   Modern drainage practice often includes detention of urban storm runoff to reduce the peak rate of runoff downstream. With only the peak rate of runoff, the Rational Method severely limits the evaluation of design alternatives available in urban and in some instances, rural drainage design.

### 3.4.1.3 Equations

The Rational Method estimates the peak rate of runoff at any location in a watershed as a function of the drainage area, runoff coefficient, and mean rainfall intensity for a duration equal to the time of concentration (the time required for water to flow from the most remote point of the basin to the location being analyzed). The rational formula is expressed as follows:

$$Q = CIA \qquad (3.1)$$

where: $Q$ = maximum rate of runoff, cfs
$C$ = runoff coefficient representing a ratio of peak rate of runoff to rainfall (see Table 3-1)
$I$ = average rainfall intensity for a duration equal to the time of concentration, for a selected return period, in./hr. (See Appendix 3-B)
$A$ = drainage area tributary to the design location, acres

A unique aspect of the Rational Method is the units (when utilizing English units). One acre-inch/hour is approximately equivalent to 1 cfs, so conversion of the units is not necessary when using the rational formula.

### 3.4.1.4 Parameters

The results of using the Rational Method to estimate peak discharges are very sensitive to the parameters that are used. The designer must use good engineering judgment in estimating values that are used in the method. Following is a discussion of the different variables used in the Rational Method.

Time of Concentration

Time of concentration ($T_c$) is the time it takes for runoff to travel from the hydraulically most distant point in the watershed to the point of design of a highway waterway crossing. In hydrograph analysis, $T_c$ is the time from the end of rainfall excess to the inflection point on the falling limb of the hydrograph. This point signifies the end of surface runoff and the beginning of base flow recession. The $T_c$ may vary between different storms, especially if the rainfall is nonuniform in either aerial coverage or intensity. However, in practice, $T_c$ is considered to be constant.

Measuring from a recorded hydrograph provides the most accurate estimate of $T_c$. For ungaged watersheds, $T_c$ is calculated by estimating the velocity through the various components of the stream network. The method presented expresses velocity in the form:

$$V = KS^{1/2} \qquad (3.2)$$

Where K is a coefficient depending on the type of flow, S is the slope of the flow path in percent, and V is the velocity in feet per second.

Three flow types are used on the designation on U.S. Geological Survey topographic maps.

- Small Tributary: Permanent or intermittent streams, which appear as a solid or dashed blue line on the topo maps. This also applies to a swamp that has a defined stream channel.
- Waterway: Any over-land route which is a well-defined swale by elevation contours but does not have a blue line denoting a defined channel. This also applies to a swamp that does not have a defined channel flowing through it.
- Sheet Flow: Any over-land flow path which does not conform to a defined waterway. Engineering judgement should be used, but maximum length should be approximately 300 feet.

The K coefficient for each of these types of flow are:

| Flow Type | K |
|---|---|
| Small tributary | 2.1 |
| Waterway | 1.2 |
| Sheet flow | 0.48 |

These coefficients were derived by Richardson (1969) as a means of estimating velocities when detailed stream hydraulic data are unavailable. Once the velocity is determined, time of concentration can be computed as:

$$T_c = L / (60V) \quad (3.3)$$

Where L is the length in feet of the particular flow path and the factor 60 converts $T_c$ from seconds to minutes.

In most watersheds all three flow types will be present. Starting at the basin divide, the runoff may proceed from sheet flow to waterway, back to sheet flow, then waterway again, then small tributary, etc. The $T_c$ for each segment should be computed and then summed to give the total $T_c$.

It is important that the length used to compute $T_c$ has a uniform slope. As an example, assume a 5,000-foot length of small tributary has a change in elevation of 10.4 feet. This slope of 0.208 percent produced a $T_c$ of 1.45 hours. However, if it is known that the upper 1,000 feet of this stream falls 10 feet, and the lower 4,000 feet only falls 0.4 feet, this would produce a total $T_c$ of 5.42 hours. Therefore, it is best to sum $T_c$ over the smallest possible contour interval, which is usually 5 or 10 feet on most topographic maps. This interval can be enlarged if a visual examination of the topographic map shows a uniform spacing between successive contour crossings.

In the design of storm sewer systems, it is common for the time of concentration for the upstream inlet to be estimated. Past practice has indicated a 15-minute initial or inlet time to be adequate for the design of most highway sewers. However, the steep grades associated with single sag depressions tend to produce more rapid runoff. If construction of a pump station is contemplated at such a location, the use of a 10-minute initial time is warranted.

## Common Errors

Two common errors should be avoided when calculating $T_c$. First, in some cases runoff from a portion of the drainage area which is highly impervious may result in a greater peak discharge than would occur if the entire area were considered. In these cases, adjustments can be made to the drainage area by disregarding those areas where flow time is too slow to add to the peak discharge. Sometimes it is necessary to estimate several different times of concentration to determine the design flow that is critical for a particular application.

Second, when designing a drainage system, the overland flow path is not necessarily perpendicular to the contours shown on available mapping. Often the land will be graded and swales will intercept the natural contour and conduct the water to the streets, which reduces the time of concentration. This is why a field visit should be made, to verify the information presented on the mapping.

## Rainfall Intensity

The rainfall intensity (I) is the average rainfall rate (inches/hour) for a duration equal to the time of concentration for a selected return period. Once a particular return period has been selected for design and a time of concentration calculated for the drainage area, the rainfall intensity can be determined from Rainfall-Intensity-Duration tables (given in Appendix 3-B).

## Runoff Coefficient

It is often desirable to develop a composite runoff coefficient based on percentage of different types of surface in the drainage area. The composite procedure can be applied to an entire drainage area or to typical blocks as a guide to selection of a reasonable coefficient for the entire area. Table 3-1 lists runoff coefficients for use in the Rational Method.

**Table 3-1 Runoff Coefficients for Rational Formula**

| Type of Drainage Area | Runoff Coefficient, C* |
|---|---|
| Concrete or Asphalt Pavement | 0.8 – 0.9 |
| Commercial and Industrial | 0.7 – 0.9 |
| Gravel Roadways and Shoulders | 0.5 – 0.7 |
| Residential – Urban | 0.5 – 0.7 |
| Residential – Suburban | 0.3 – 0.5 |
| Undeveloped | 0.1 – 0.3 |
| Berms | 0.1 – 0.3 |
| Agricultural – Cultivated Fields | 0.15 – 0.4 |
| Agricultural – Pastures | 0.1 – 0.4 |
| Agricultural – Forested Areas | 0.1 – 0.4 |

For flat slopes or permeable soil, lower values shall be used. For steep slopes or impermeable soil, higher values shall be used. Steep slopes are 2:1 or steeper.

From Michigan State Administrative Rules R 280.9.

### 3.4.2 Rational Method Procedure

The Rational Method procedure follows these general steps:

Step 1 Obtain topographic information for the entire area that is contributing runoff. Include drainage area outside of the R.O.W. Useful information may include:

- USGS quadrangle maps
- Construction drawings
- Other topographic maps if available

Step 2 Define the drainage limits to the point where a flow estimate is desired.

Step 3 Define a weighted average "C" value for the tributary area

Step 4 Calculate a time of concentration to the point where a flow estimate is desired.

Step 5 Determine the rainfall intensity that applies to the calculated time of concentration and geographical location (See map in Appendix 3-B).

Step 6 Calculate Peak Flow, Q, using the equation Q = CIA.

A detailed description for using the Rational Method for storm sewer design is contained in Chapter 7, Road Storm Drainage Systems.

### 3.4.3 Rational Method - Example

Following is an example problem which illustrates the application of the Rational Method to estimate peak discharges.

Preliminary estimates of the maximum rate of runoff are needed at the inlet to a culvert for the 1 percent chance (100-year) and 2 percent chance (50-year) storm events.

**SITE DATA**
From a topographic map and field survey, the watershed, which is located in Ingham County, Michigan, has a drainage area of 20 acres. In addition, the following data are measured:

| | | |
|---|---|---|
| Length of channel flow (upstream) | = | 400 feet at a slope of 0.0007950 foot/foot. |
| Length of channel flow (downstream) | = | 600 feet at a slope of 0.0007576 foot/foot. |
| Length of waterway flow | = | 300 feet at a slope of 0.0011364 foot/foot. |
| Length of sheet flow | = | 100 feet at a slope of 0.0007576 foot/foot. |
| Average overland slope | = | 1 percent |

## LAND USE

From existing land use maps, land use for the drainage basin is estimated to be:

| | | |
|---|---|---|
| Woods | = | 20 percent |
| Cultivated Land | = | 60 percent |
| Pasture | = | 20 percent |

## RUNOFF COEFFICIENT

Since the watershed contains different types of land uses, a weighted runoff coefficient (C) needs to be estimated from the values in Table 3-1.

For the given land uses and average overland slope, the runoff coefficients for woods, cultivated land, and pasture corresponding to the 10 percent chance (10-year) and 2 percent chance (50-year) storm event are listed below.

| | C Value |
|---|---|
| Woods | 0.20 |
| Cultivated Land | 0.40 |
| Pasture | 0.20 |

The following tabulation illustrates the computation of the weighted runoff coefficient.

| Land Use | Percent of Total Area | Runoff Coefficient | Weighted Coefficient |
|---|---|---|---|
| Woods | 20 | 0.20 | 0.20 (20/100) = 0.04 |
| Cultivated Land | 60 | 0.40 | 0.40 (60/100) = 0.24 |
| Pasture | 20 | 0.20 | 0.20 (20/100) = 0.04 |
| **Sum** | | | **0.32** |

Total weighted runoff coefficient 0.32.

## TIME OF CONCENTRATION

The following tabulation shows the $T_c$ calculations, based on the equations in Section 3.4.1.4.

| Flow Type | Length (feet) | Slope (percent) | Velocity (fps) | Tc (min.) |
|---|---|---|---|---|
| Small Tributary (upstream) | 400 | 0.07950 | 0.59 | 11.3 |
| Small Tributary (downstream) | 600 | 0.07576 | 0.58 | 17.2 |
| Waterway | 300 | 0.11364 | 0.40 | 12.5 |
| Sheet Flow | 100 | 0.07576 | 0.13 | 12.8 |
| Total | | | | 54 min |

Calculations:

For the small tributary (upstream):

$V = KS^{1/2} = 2.1(0.07950)^{1/2} = 0.59$ fps — Equation 3.2

$T_c$ = 400 ft. / (0.59 fps)(60sec) = 11.3 min. — Equation 3.3

For the small tributary (downstream):

$V = KS^{1/2} = 2.1(0.07576)^{1/2} = 0.578$ fps — Equation 3.2

$T_c$ = 600 ft. / (0.58 fps)(60sec) = 17.2 min. — Equation 3.3

For the waterway:

$V = KS^{1/2} = 1.2(0.11364)^{1/2} = 0.40$ fps — Equation 3.2

$T_c$ = 300 ft. / (0.40 fps)(60sec) = 12.5 min. — Equation 3.3

For the sheet flow:

$V = KS^{1/2} = 0.48(0.07576)^{1/2} = 0.13$ fps — Equation 3.2

$T_c$ = 100 ft. / (0.013 fps)(60sec) = 12.8 min. — Equation 3.3

**RAINFALL INTENSITY**

The intensity used in the Rational Method is for a rainfall duration equal to the $T_c$. Since we have computed a $T_c$ of 54 minutes, the intensity for a 54-minute rainfall must be determined.

As seen in Appendix 3-B, we note that Ingham County is located in Michigan's Rainfall Frequency Zone 9. The rainfall intensities listed for this zone during the 1 percent chance (100-year) and 2 percent chance (50-year) storm events are 2.74 inch/hour and 2.47 inch/hour, respectively.

**PEAK RUNOFF**

Substituting the appropriate values into the Rational Method, Q = CIA:

1 percent chance (100-year) flood peak discharge
= (0.32)(2.74 in./hr.) (20 acres) = 17.5 cfs

2 percent chance (50-year) flood peak discharge
= (0.32)(2.47 in./hr.) (20 acres) = 15.8 cfs

### 3.4.4 SCS Rainfall - Runoff Relationship

The SCS Techniques developed by the former U.S. Soil Conservation Service (SCS) for calculating rates of runoff require the same basic data as the Rational Method: drainage area, a runoff factor, time of concentration, and rainfall. The SCS approach, however, is more sophisticated in that it also considers the time distribution of the rainfall, the initial rainfall losses to interception and depression storage and an infiltration rate that decreases during the course of a storm. With the SCS method, the direct runoff can be calculated for any storm, either real or fabricated, by subtracting infiltration and other losses from the rainfall to obtain the precipitation excess. The SCS method produces

both a peak discharge and a hydrograph, which can be used to estimate runoff volume and be used in routing procedures.

MDEQ has adapted the SCS method for use in Michigan (for calculation of peak flow only). The method referred to as MDEQ-SCS method is contained in the report *Computing Flood Discharges for Small Ungaged Watersheds* (Sorrell, 2001), which is included as Appendix 3-C. The report includes a description of the method's equations and concepts and an example problem.

### 3.4.5 Other Hydrograph Methods

There are many other methods that can be considered for calculating flow rates in watercourses not under MDEQ's floodplain regulatory authority. These methods are especially useful when a runoff hydrograph for a single event is needed. The majority of these methods can be used to size or confirm sizing of storage facilities (See Chapter 8, Stormwater Storage Facilities). Contact the Design Engineer - Hydraulics for approval prior to their use on MDOT projects.

A summary of some potential methods follows.

| Method | Author | Typical Applications |
|---|---|---|
| EPA SWMM (Stormwater Management Model) | Environmental Protection Agency | • Urban watersheds<br>• Consider effect of storage in channels, pipes, and basins<br>• Surcharged storm drainage systems |
| TR-20/TR-55 | Natural Resources Conservation Service (formerly SCS) | • Urban or rural watersheds<br>• Consider effect of storage in channels and basins |
| HEC-1/HEC-HMS | U.S. Army Corps of Engineers | • Urban or rural watershed<br>• Consider effect of storage in channels and basins |

### 3.4.6 Methods Used for Watersheds Regulated by MDEQ

MDEQ will provide design discharge estimates for projects that are regulated under the Floodplain Regulatory Authority found in Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (Part 31). These projects are typically on watersheds where other methods may be used. These methods may include:

- Regression analysis.
- Statistical analysis of stream flow record, if available.
- Computer runoff model or MDEQ - SCS Method.
- Drainage area ratio method.

**Request for discharges from MDEQ must be made by the Design Engineer - Hydraulics/ Hydrology.**

## References

**AASHTO Highway Subcommittee on Design. Task Force on Hydrology and Hydraulics. *Guidelines for Hydrology - Volume II Highway Drainage Guidelines*. 1999.**

**Angel, James R. and Huff, Floyd A., *Rainfall Frequency Atlas of the Midwest*. Illinois State Water Survey, Bulletin 71. Champaign, Illinois. 1992.**

Chow, V.T., D.R. Maidment, and L.W. Mays. *Applied Hydrology*. McGraw-Hill Book Company, New York, St. Louis, San Francisco, Auckland, Bogota, Caracas, Colorado Springs, Hamburg, Lisbon, London, Madrid, Mexico, Milan, Montreal, New Delhi, Oklahoma City, Panama, Paris, San Juan, Sao Paulo, Singapore, Sydney, Tokyo, and Toronto. 1988.

*Federal Aid Policy Guides*.

Michigan Department of Environmental Quality, Land and Water Management Division. Sorrell, Richard C., P.E., *Computing Flood Discharges for Small Ungaged Watersheds*. 2001. (Included in Appendix 3-C.)

Watkins, D., Johnson, D., et al., Michigan Technological University, *Rainfall Intensity-Duration-Frequency Curves for the State of Michigan*. June 2002.

Newton, D.W., and Janet C. Herin. Transportation Research Board. National Academy of Sciences, Record Number 896. *Assessment of Commonly Used Methods of Estimating Flood Frequency*. 1982.

Overton, D.E., and M.E. Meadows. *Storm Water Modeling*. Academic Press. New York, N.Y. pp. 58-88. 1976.

Potter, W.D. *Upper and Lower Frequency Curves for Peak Rates of Runoff Transactions*, American Geophysical Union, Vol. 39, No. 1, pp. 100-105. February 1985.

Richardson, Harvey, *unpublished document*, Massachusetts Soil Conservation Service. 1969.

Sauer, V.B., W.O. Thomas, V.A. Stricker, and K.V. Wilson. *Flood Characteristics of Urban Watersheds in the United States C Techniques for Estimating Magnitude and Frequency of Urban Floods*. U.S. Geological Survey Water-Supply Paper 2207. 1983.

**U.S. Department of Agriculture. NRCS. *TR-55, Urban Hydrology for Small Water Sheds*. June 1986.**

U.S. Department of Agriculture. NRCS. *National Engineering Handbook*. Section 4, Hydrology. 2001.

**U.S. Department of Transportation, Federal Highway Administration. *Hydrology. Hydraulic Engineering Circular No. 19.* 1984.**

**U.S. Department of Transportations, Federal Highway Administration, *Hydrologic Design for Highways, Hydraulic Design Series 2.* 1996.**

**U.S. Department of Transportation, Federal Highway Administration, *Urban Drainage Design Manual, HEC-22.* November 1996.**

Wahl, Kenneth L. Transportation Research Board. National Academy of Sciences, Record Number 922. *Determining Stream Flow Characteristics Based on Channel Cross Section Properties*. 1983.

**Water Resources Council Bulletin 17B. *Guidelines for Determining Flood Flow Frequency*. 1981.**

**Note: References in bold type are recommended references for the engineer's library.**

**Weblinks/Sources of Material**

Federal Aid Policy Guides:

www.fhwa.dot.gov

Federal Emergency Management Agency:

www.fema.gov/cis/mi.pdf

- List of Michigan `communities participating in National Flood Insurance program

Michigan Department of Environmental Quality:

www.michigan.gov/deq/
go to water link

- Flood flow discharge database
- Flood Flow request form
- *Computing Flood Discharges for Small Ungaged Watersheds* (Sorrell)
- Revised HEC-1 executable code

Michigan Department of Transportation

- Standard plans/details: http://www.michigan.gov/mdot/0,1607,7-151-9622_11044_11357---,00.html
- Road/Bridge design manual: http://www.michigan.gov/mdot/0,1607,7-151-9622_11044_11367---,00.html

National Weather Service – National Climatic Data Center:

http://www.nws.noaa.gov

- Historical rainfall at selected sites

Southeastern Michigan Council of Governments:

www.semcog.org

- Historical rainfall at selected sites in Southeastern Michigan

United States Geological Survey:

www.usgs.gov

- Measured flows at gaged streams
- USGS maps are USGS maps (topographic maps) are available at the Office of Geological Surveys located in Lansing. Also, order them at USGS, Box 25286 Federal Center, Denver, Colorado 80225. The phone number to the Denver location is 1 (888) 275-8747.

United States Department of Agriculture

www.soils.usda.gov/survey/printed_surveys/michigan.html

- Soil surveys, The local office is located in East Lansing.

Natural Resources Conservation Service (formerly the Soil Conservation Service)

- Window TR_55 program is: www.wcc.nrcs.usda.gov/hydro/hydro-tools-models-wintr55.html Change the ordinates of the dimensionless hydrograph before using the program. At the main window, click on the picture of the graph (it is the 11th picture from the left.) A screen labeled "dimensionless unit hydrograph" appears. The ordinates for the dimensionless unit graph are: 0, 0.5, 1.0, 0.8, 0.6, 0.4, 0.2, 0.0. Click on done. Change the dimensionless unit hydrograph to these new numbers whenever using the program by choosing the new hydrograph at the main screen (labeled dimensionless unit hydrograph.

**Note: MDOT does not claim responsibility for the information at these links or their maintenance.**

# EXHIBIT – 26

EPA
United States Environmental Protection Agency and the EPA Region III states of Pennsylvania, Maryland, Delaware, District of Columbia, Virginia and West Virginia

# Funding Stormwater Programs

EPA 833-F-07-012

January 2008



## Executive Summary

The construction, operation and maintenance of a municipal separate storm sewer system (MS4) can involve significant expense, especially when regulatory requirements (stormwater Phase I or Phase II), flooding concerns, water quality issues (including total maximum daily loads, or TMDLs) and population growth are factored in.

This document is intended to assist local stormwater managers understand the alternatives available to fund their stormwater program. The most stable source of funding is generally the stormwater utility, so this document briefly lists the various funding alternatives then describes in more detail the three different types of stormwater utility rate structures and the basic steps involved in creating a stormwater utility.

## Stormwater Funding Alternatives

There are many different mechanisms that municipalities can use to fund their stormwater programs. The two most common funding options, Property Taxes/General Fund and Stormwater Service Fees, are discussed below along with several other funding alternatives.

### Service Fees (including stormwater utilities)

Some communities include stormwater management costs as line items within their water or sanitary sewer enterprise system budgets. Water and sanitary sewer utilities charge customers fees for services rendered. Many of these base their customer fees on metered water flow. This is often not equitable because a property's metered water flow usually bears no relationship to the stormwater runoff it generates. For example, a shopping center typically generates a significant amount of stormwater runoff from the impervious area of its buildings and parking lots, but it usually uses a relatively small amount of metered water.

Many communities are now adopting stormwater service fees by means of a stormwater utility. A stormwater utility is a sustainable funding mechanism dedicated to recover the costs of stormwater infrastructure regulatory compliance, planning, maintenance, capital improvements, and repair and replacement. Stormwater fees are charged to taxpaying and tax-exempt properties and are typically based on property area. Stormwater utilities address the shortcomings and inequities of funding stormwater management by property taxes or water/sanitary service fees. There are more than 500 stormwater utilities in operation across the country. The average quarterly fee for a single family home is $11, which usually covers regulatory and operation and maintenance costs. Some communities charge as little as $2 per quarter, while others charge more than $40 per quarter to a single family home.

#### What is a stormwater utility?

A stormwater utility (called a *stormwater authority* in Pennsylvania) is a mechanism to fund the cost of municipal services directly related to the control and treatment of stormwater. A stormwater utility will operate similarly as an electric or water utility. The utility will be administered and funded separately from the revenues in the general fund, ensuring a dedicated revenue source for the expense of stormwater management.

### Property Taxes/General Fund

Many communities have funded stormwater management from property taxes paid into their general funds. However, there is great competition for municipal general fund dollars from other worthy municipal programs. Stormwater management improvements typically have a low priority, unless the municipality is reacting to a recent major storm or regulatory action. The total cost of stormwater management is not readily apparent when these costs are sprinkled among general fund departmental budgets. As stormwater management costs increase, general fund budgets are often not increased to meet those needs. In addition, tax-exempt properties do not support any of the cost, even though it can be shown that many of them, such as governmental properties, schools, colleges, and universities are major contributors of stormwater runoff. Finally, property taxes are based on assessed property value. The cost of stormwater service to individual properties bears no relationship to the assessed value of the property. Therefore, this method of recovering stormwater management costs might not be equitable.

### Special Assessment Districts

If a stormwater construction project benefits only a portion of a municipality, it can be funded by fees assessed only to those properties within that area, which is called a *special assessment district*.

### System Development Charges (SDCs)

SDCs (also known as *connection fees* or *tie-in charges*) are one-time fees commonly charged to new customers connecting to a water or sanitary sewer system to *buy into* the infrastructure that has already been built for them, to pay their fair share of the infrastructure expansion necessary to serve them, or a combination of both. The amount of the new customer's SDC is typically calculated on the basis of the potential water demand that the new customer will place on the system. Stormwater SDCs can also be developed. However, the amount of a customer's stormwater SDC is typically tied to the area of the customer's property.

## Grants and Low-Interest Loans

Stormwater management grants might be available for various types of projects on a state-by-state basis.

## Environmental Tax Shifting

Environmental Tax Shifting is a concept that has been proposed by the Friends of the Earth and other environmental groups to redirect tax code incentives in a direction that would support energy conservation and sustain the environment. In 2001 the Environmental League of Massachusetts published a report prepared by the Tellus Institute titled, *Environmental Tax Shifting in Massachusetts*. This report discussed two creative proposals to change state tax policy to enhance stormwater management. One was a *pay to pave* tax that would be levied "on newly-paved surfaces on a per-square foot basis." The second was to eliminate the Massachusetts pesticide and fertilizer sales and use tax exemption. This would generate $1.1 million in annual revenue in Massachusetts. The report stated that 28 other states also exempt pesticides and fertilizers from sales and use taxes.

# Types of Stormwater Utilities

There are three basic methods that stormwater utilities use to calculate service fees. These are sometimes modified slightly to meet unique billing requirements. Impervious area is the most important factor influencing stormwater runoff and is therefore a major element in each method (source: *Establishing a Stormwater Utility in Florida*, Florida Association of Stormwater Utilities, Chapter 4, Rate Structure Fundamentals).

***Equivalent Residential Unit (ERU) (Also known as the Equivalent Service Unit (ESU) method)***: More than 80 percent of all stormwater utilities use the ERU method. Parcels are billed on the basis of how much impervious area is on the parcel, regardless of the total area of the parcel. This method is based on the impact of a typical single family residential (SFR) home's impervious area footprint. A representative sample of SFR parcels is reviewed to determine the impervious area of a typical SFR parcel. This amount is called one *ERU*. In most cases, all SFRs up to a defined maximum total area are billed a flat rate for one ERU. In some cases several *tiers* of SFR flat rates are established on the basis of an analysis of SFR parcels within defined total area groups. Having such a tiered-SFR, flat-rate approach improves the equitability of the bills sent to homeowners. The impervious areas of non-SFR parcels are usually individually measured. Each non-SFR impervious area is divided by the impervious area of the typical SFR parcel to determine the number of ERUs to be billed to the parcel.

### *Advantages*

The relationship (or nexus) between impervious area and stormwater impact is relatively easy to explain to the public on the basis of you pave, you pay. The number of billable ERUs can be determined by limiting the parcel area review to impervious area only. Because pervious area analysis is not required, this approach requires the least amount of time to determine the total number of billing units.

### *Disadvantages*

Because the potential impact of stormwater runoff from the pervious area of a parcel is not reviewed, this method is sometimes considered to be less equitable than the Intensity of Development (ID) or Equivalent Hydraulic Area (EHA) methods because runoff-related expenses are recovered from a smaller area base. This method could still be used to charge a fee to all parcels, pervious as well as impervious, to cover expenses not related to area, such as administration and regulatory compliance.

***Intensity of Development (ID):*** This stormwater cost allocation system is based on the percentage of impervious area relative to an entire parcel's size. All parcels (including vacant/undeveloped) are charged a fee on the basis of their *intensity of development*, which is defined as the percentage of impervious area of the parcel. Rates are calculated for several ID categories. These ID categories are billed at a sliding scale, as shown in the table below. For example, an SFR parcel, which is categorized as *moderate development*, would pay $0.16/month/1,000 ft² (or $1.60 for a 10,000 ft² lot).

| Category (impervious percentage range) | Rate per month per 1,000 square feet of total served area (Impervious plus pervious) |
|---|---|
| Vacant/Undeveloped (0%) | $0.08 |
| Light development (1% to 20%) | $0.12 |
| Moderate development (21% to 40%) | $0.16 |
| Heavy development (41% to 70%) | $0.24 |
| Very heavy development (71% to 100%) | $0.32 |

### *Advantages*

The ID method accounts for stormwater from the pervious portion of parcels. Therefore, it can be more equitable than the ERU method. It accounts for completely pervious parcels and therefore can allow vacant/undeveloped parcels to be billed. If a parcel's impervious area is increased slightly because of minor construction modification, it probably would not be bounced up into the next higher ID category. This reduces the time required for staff to maintain the billable unit master file.

### *Disadvantages*

Parcels are grouped into broad ID categories. Parcels are not billed in direct proportion to their relative stormwater discharges. This method can be more difficult to implement than the ERU method because parcel pervious areas and impervious areas need to be reviewed. It is also more complicated to explain to customers than the ERU method.

***Equivalent Hydraulic Area (EHA):*** Parcels are billed on the basis of the combined impact of their impervious and pervious areas in generating stormwater runoff. The impervious area is charged at a much higher rate than the pervious area.

#### *Advantages*

The EHA method accounts for flow from the pervious portion of parcels. Therefore, it is often seen to be more equitable than the ERU method. It accounts for undeveloped/ vacant parcels and allows them to be billed. It is perceived to be fairer than the ID method because parcels are billed on the basis of direct measurements of pervious and impervious areas to which hydraulic response factors are applied to determine a unique EHA for such parcels.

#### *Disadvantages*

Because pervious area analysis is required in addition to impervious area, this approach requires more time to determine the total number of billing units. It is also more complicated to explain to customers than the ERU method.

## Creation of a Stormwater Utility

The following are the typical steps involved in creating a stormwater utility.

### Development of a Feasibility Study

The first step is to develop a study that provides the community with enough information to decide if it makes sense to proceed to implementation. The feasibility study will typically address preliminary revenue requirements (usually from current stormwater budgets), a preliminary assessment of the billing area to determine the SFR billing rate, the service fee method to use and credits to provide, the preliminary rate charge for each ERU, and the responsible party for billing. The feasibility study is then presented to municipal staff and officials to decide whether to proceed with development of the utility.

### Create a Billing System

If the municipality decides after the feasibility study to continue development of a stormwater utility, a billing system is then created. This involves collecting user data, collecting parcel area data (such as ownership and impervious area for each parcel), and developing a system to bill users. The two most common stormwater billing systems are (1) a stormwater user fee with an existing water/sewer user fee bill and (2) non-ad valorem assessments. Approximately 80 percent of stormwater utilities use the first approach mainly because it is cost-effective due to the fact that an existing water and sewer billing system is already in place.

### Roll Out a Public Information Program

Critical throughout the stormwater utility development process is a strong public education program. Many people are unaware of the increasing cost of stormwater management and the options to fund it. A well-funded stormwater program can help reduce flooding, improve drought conditions, create better fishing and recreation, and improve water quality. An organized public information and education effort, which typically involves the following components, is essential to the success of a stormwater utility:

- *Identifying key users and groups.* Two potential groups to target include (1) universities schools, and shopping malls that generate a significant amount of runoff and often receive high stormwater bills; and (2) tax-exempt properties, such as universities, schools and churches, that do not contribute property taxes into the general fund, which traditionally have funded stormwater management.
- *Establishing an advisory committee.* Include a cross-section of the community including representation from the university, business, nonprofits, churches, developers and shopping center owners.
- *Creating a stormwater utility Web site.* The Web site should post appropriate progress documents and develop a *frequently asked questions* page.
- *Preparing pamphlets and presentations.* A brochure describing the need for the stormwater utility, rate method, and projected rates should be prepared as well as an electronic presentation for use at public meetings.
- *Meeting with key user groups and the media.* Presentations to civic groups and the media should be given. One-on-one meetings with customers projected to receive the highest bills should occur.
- *Distributing information before initial billing.* The stormwater utility brochure should be sent to all customers before billing. If possible, include the customer's actual projected bill.

### Adopt an Ordinance

An ordinance will provide legal authority for establishment of the utility. An example stormwater utility ordinance from Takoma Park, Maryland, is at **www.takomaparkmd.gov/code/Takoma_Park_Municipal_Code/index.htm** (see Title 16 Stormwater Management, Chapter 16.08 Stormwater Management Fee System).

### Provide Credits/Exemptions

Credits or exemptions are often built into the ordinance, and can be used to provide incentives for certain practices or relief from utility fees to certain types of land uses. Credits should be clearly described and can include installation of approved retention/ detention best management practices (BMPs), installation of approved BMPs such as rainspout disconnections or porous pavers, and educational programs for employees. Exemptions are often granted for undeveloped (100 percent pervious)

land because the impervious area is usually used to calculate the rate. Other exemptions can include roads (because the municipality typically owns the roads) and parcels on waterways (which do not discharge to the municipality's storm drain system), although not all programs allow these last two exemptions.

### Implementation

The first bill is the most important—many customers do not focus on the new stormwater fee until they actually receive their first bill. Customers should be notified several months in advance of the date of billing initiation and their estimated fee. A telephone hot line, e-mail service and website should be created to address questions and concerns. In addition, the municipality should be prepared to address legal challenges to its stormwater fee. The municipality should also be prepared to maintain the master account file, including developing a process for updating the billing unit data for an existing customer and for entering the data for a new customer.

## Barriers to Creating a Stormwater Utility

There are typically two barriers to creating a stormwater utility: legal and political.

### Legal Barriers

In EPA Region 3, all states have legal authority to establish stormwater utilities (Pennsylvania has a bill to clarify its legal authority). A summary of the current or proposed legal authority within EPA Region 3 states is presented below (cities within that state with stormwater utilities are indicated in parenthesis):

- **Delaware** (Wilmington): Chapter 40, Title 7 of the Delaware Code authorized the creation of stormwater utility districts.
- **Maryland** (Montgomery County, Takoma Park): Section 4-204(d), Environmental Article, of the Annotated Code of Maryland, authorizes municipalities to create stormwater utilities.
- **Pennsylvania** (Philadelphia—bills water customers for stormwater management according to water meter size): Pennsylvania HB88—*The Comprehensive Watershed Stormwater Act* is expected to be introduced in the fall of 2007. It requires counties to develop Comprehensive Watershed Stormwater Plans; requires municipalities to implement infrastructure improvements and recover costs from counties; authorizes counties to charge annual fees and assessments to pay for the program.
- **Virginia** (Chesapeake, Hampton, James City, Newport News, Norfolk, Portsmouth, Prince William County, Richmond, Suffolk, Virginia Beach): Section 15.1-2114 of the Virginia Code is the enabling legislation that gives local communities the authority to establish stormwater utilities.
- **West Virginia** (Fairmont, Beckley, Morgantown): The West Virginia Legislature amended sections 8-20-1 et seq. and 16-13-1 et seq. of the West Virginia Code in 2001 so as to authorize municipalities to include the operation and management of stormwater systems as part of a municipal combined waterworks and sewerage system.
- **District of Columbia** (D.C.: Flat monthly fee for residences; others are billed on the basis of metered water flow): The District of Columbia Storm Water Permit Compliance Enterprise fund was established in 2000 by the D.C. City Council. The legislation was titled, *Storm Water Permit Compliance Amendment Act of 2000.*

### Political Barriers

It usually takes at least one *champion* to help create a stormwater utility, especially in the face of local political opposition. A public information program that visually presents the inadequacies of the community's current stormwater management program, coupled with the benefits that have occurred at communities with stormwater utilities would help garner public support to offset opposition to the fee. A senior manager (city manager or county administrator, for example), or a senior elected official, such as the mayor, usually provides that steadfast leadership. It is important to explain the benefit of implementing a stormwater utility to opinion makers. Opposition from local news outlets has sometimes been able to stop the implementation of stormwater utilities (often by using inaccurate terms such as a *rain tax*). Educational materials and public meetings are necessary to show the financial benefit of stormwater utilities. When the public is clearly informed of the financial benefit to them—along with the many environmental benefits such as improved flood control, fishing, and recreation—support usually follows.

## EPA Region 3 Stormwater Funding Case Studies

### Wilmington, Delaware

Wilmington has a combined sewer system and used a three-step approach to establish a stormwater utility to recover costs related to stormwater management on a fair and equitable basis.

1. *Determine stormwater revenue requirements*: The city maintained a single water/sewer enterprise fund. The city's combined sewer costs were allocated to three buckets: a wholesale sewer customer, city retail sewer customers, and city stormwater customers. The annual stormwater cost came to approximately $4.2 million—equal to approximately 43 percent of the city's total combined sewer costs.
2. *Determine stormwater billing units*: City staff reviewed several stormwater billing approaches and selected the ESU method, which would bill parcels solely on the basis of their impervious area. The city had accurate impervious area data for all SFR and multi-family residential (MFR) parcels. This SFR/MFR category comprised 75 percent of all parcels. The median impervious area of all SFR/MFR parcels was approximately 789 square feet, which was defined as one ESU. The SFR/MFR parcels were divided into four tiers to be billed at four

separate flat rates. Condominium complex impervious areas were calculated using geographic information system (GIS) data. The remaining properties' impervious areas were estimated by applying predefined stormwater coefficients to the total property area. The impervious areas of these properties were converted to ESUs. All parcels were to be billed except for city-owned parcels. The estimated total number of billable ESUs was 155,363.

3. *Calculate stormwater fees*: The annual stormwater cost was increased to include bad debt and stormwater credits, resulting in adjusted annual stormwater revenue of approximately $5.1 million. The quarterly stormwater fee, effective January 2007, was calculated to be $8.141 per quarter per ESU. A four-tier rate schedule, with a fixed fee for each impervious area tier, was established for all SFR/MFR parcels. For all other parcels, the quarterly stormwater charges were based on their individual ESUs. Therefore, a parcel with 7,890 square feet of impervious area would be billed for 10 ESUs, or $81.41 per quarter.

### Takoma Park, Maryland

**(www.takomaparkmd.gov/publicworks/stormwater.html)**
Takoma Park established a stormwater utility in July 1996. It is responsible for constructing and maintaining the stormwater system, reviewing stormwater management plans, inspection and enforcement activities, watershed planning, and water quality monitoring.

User fees are based on the amount of impervious area on a property. The annual fee for single family residences is $48.00 and became effective on July 1, 2003. Nonresidential and multifamily parcels are charged a fee on the basis of their measured impervious area as compared to the impervious area of an average SFR parcel (i.e., the ERU method). One ERU is equal to an impervious area of 1,228 square feet. Tax-exempt parcels also pay the fee with the exception of property used for public purposes and owned by the state, county, or city agency or volunteer fire department.

### Suffolk, Virginia

**(www.suffolk.va.us/pub_wks/index.html)**
In 2004 Suffolk spent approximately $1.5 million from its taxpayer-supported general fund on stormwater management. In 2006 it implemented a stormwater utility, using the ERU method, at an initial rate of $3.95 per month per ERU. In Suffolk, one ERU is equal to 3,200 square feet of impervious area and is the weighted average for both SFR and MFR parcels. The rate increased to $5.20 per month effective July 2007. The fee is collected via property tax bills due in June and December. Schools, state, and federal developed parcels pay the fee. They are exempt only if they have a separate stormwater permit and discharge directly to a body of water not maintained by the city.

## Additional Resources

National Association of Flood and Stormwater Management Agencies. *Guidance for Municipal Stormwater Funding.*
**www.nafsma.org/Guidance%20Manual%20Version%202X.pdf**

University of Maryland, Environmental Finance Center.
**www.efc.umd.edu**

Indiana University-Purdue University Indianapolis. *An Internet Guide to Financing Stormwater Management.*
**http://stormwaterfinance.urbancenter.iupui.edu**

Natural Resources Defense Council. *Stormwater Strategies: Community Responses to Runoff Pollution.* Chapter 4: Funding and Gaining Support for Stormwater Programs.
**www.nrdc.org/water/pollution/storm/chap4.asp**

Florida Stormwater Association, *Establishing a Stormwater Utility in Florida.*
**www.florida-stormwater.org/manual.html**

Kaspersen, J. 2000. The Stormwater Utility, Will It Work in Your Community? *Stormwater* 1(1).
**www.forester.net/sw_0011_utility.html**

U.S. Environmental Protection Agency, Watershed Academy. *Catalog of Federal Funding Sources for Watershed Protection.*
**http://cfpub.epa.gov/fedfund**

## Contacts

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**NOTE:** This document is not law or regulation; it provides recommendations and explanations that MS4s may consider in determining how to comply with requirements of the CWA and NPDES permit requirements.

# EXHIBIT - 27

**In The Matter Of:**

*Supreme Court Argument*

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*Hearing*

*October 7, 2020*

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Judy Jettke

& Associates

COURT REPORTING AND VIDEO

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JUSTICE McCORMACK: We will call the first case this morning, the Detroit Alliance against the Rain Tax versus the City of Detroit. Mr. Baker and Miss Mithani, you each have 15 minutes. We will do as we have done on Zoom since April and let you have a short uninterrupted period of time and then we will turn to each justice in order for questions. Mr. Baker.

MR. BAKER: Good morning, Your Honors, Madam Chief Justice. May it please the Court, Frederick Baker for the Appellant. I wish to reserve two minutes.

The Court ordered argument on whether the Court below correctly distinguished this case from Bolt against City of Lansing because Detroit has a combined septic and storm sewer system, while in Bolt, the City of Lansing's charge paid to separate its combined sewer system, allowing storm water to be discharged to the river without treatment in a separate storm water drain system.

The Court of Appeals thought this meant that this case involves a regulatory component not present in Bolt. I'm quoting. We believe that is incorrect. As the Bolt Court expressly noted, the City of Lansing imposed its charge to achieve the same

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regulatory purpose that Detroit has sought to achieve, which is to satisfy the requirements of the Clean Water Act and the conditions of its NPDES permit.

Lansing merely chose a different method to achieve the same regulatory goal, which is preventing combined sewer overflows, which I'll refer to as CSO's; the same regulatory goal that Detroit chose to achieve by increasing its combined sewer systems treatment capacities. This was a choice, not a difference.

Bolt sought to achieve a regulatory goal. Importantly, even though Lansing's charge was imposed to achieve a regulatory purpose, it was unconstitutional under Headlee, and here, as in Bolt, the issue is whether despite the regulatory purpose of the charge, Detroit's 2016 storm water charge is a tax.

The City asks the Court to overturn Bolt. It argues that Article 7, Section 34 of the 1963 Constitution requires this Court to liberally construe, and I quote them, and the Article 7, Section 34, liberally construe the Headlee Amendment in favor of municipalities, and they cite Associated Builders against City of Lansing, which is not in point, it's a prevailing wage case. And I would observe that the

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voters adopted Headlee 15 years after Section 34 in 1978.

Section 31 of Article 9, the Headlee Amendment provision at issue here, specifically forbids municipalities and taxing authorities to adopt a new tax without voter approval. A liberal construction cannot nullify this specific constitutional limitation. Certainly, the City wants to evade that voter approval requirement. It approached judge Cox in the Federal Court seeking to have an ex parte amendment to the order imposing the terms of its NPDES and other conditions upon it. Judge Cox properly refused to do that ex parte. They did that when this challenge was mounted to the 2016 trial.

JUSTICE McCORMACK: Mr. Baker, I'm going to interrupt you now because I want to make sure my colleagues have an opportunity to ask you any questions they have before we eat up your clock. Okay?

MR. BAKER: Thank you.

JUSTICE McCORMACK: Justice Markman, do you have any questions for Mr. Baker?

MR. MARKMAN: Thank you, Mr. Baker. I don't have any questions at this time.

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JUSTICE McCORMACK: Justice Zahra?

JUSTICE ZAHRA: Let me pull back up my notes in this case. Mr. Baker, this was an original action that was filed in the Court of Appeals, but I note that the Court of Appeals did not appoint a Special Master to engage in fact finding, there is no oral argument in this case. Do you know why it is that there was no Special Master that was appointed?

MR. BAKER: My clients are a citizen organization, they don't have the money to go to Circuit Court and have a Special Master or Circuit judge allow us to engage in discovery and motion practice. We opted to base our claim on what the City has itself disclosed and published about this program. We believe the evidence available from the public record is sufficient, just as it was in the Bolt case, in which I represented Mr. Bolt.

JUSTICE ZAHRA: So if we find the Court of Appeals, or if we conclude the Court of Appeals' findings and a particular area of the Bolt factors are unsupportable, is it your position, then, that rather than trying to find out what the basis was for these documents that have been provided and upon which you rely, we should instead assume it's a tax under Bolt?

MR. BAKER: We believe that the record

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before you, and the tree stump of exhibits that has been filed collectively by the parties, is more than ample for you to determine whether this is a tax or fee.

JUSTICE ZAHRA: How exactly was the rate broken down when it comes to, for example, sewage versus storm water?

MR. BAKER: You mean on the bill?

JUSTICE ZAHRA: Yes.

MR. BAKER: There is a separate charge on each rate payer's bill, and in the case of this charge, the only bill that they receive is for the storm water charge because the property subject to the 2016 charge is not served by either water or sewer. These are unmetered properties, a little load that the city decided to mine by imposing this charge on them.

JUSTICE ZAHRA: I get that, but I'm trying to determine if it's proportional. It's my understanding that it costs more to treat sewage than it does storm water, but when they put them together, it just becomes one charge, is that the way it works?

MR. BAKER: Well, there are separate charges for sewer and for storm water on a bill for someone who has sewer service. But this charge, which began as 750 dollars per acre per month, which is an

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enormous new charge for these properties that had never received any bill before, because they are unmetered and have no water or septic service, reflect only that charge, 760 dollars a month.

JUSTICE ZAHRA: I'm trying to determine proportionality, the second prong of the Bolt factor. So I'm trying to understand on a bill that had separate sewage from storm water, how did they distinguish how much should be for sewage versus how much should be for storm water? Do we know that?

MR. BAKER: Well, none of this charge would be allocated to septic sewer, but it specifically -- or sewer service, because the properties subject to this charge are not served by sewer. However, because this is a combined sewer, all of the waste is treated as a single commodity or a single unit, and this charge goes toward paying the cost that is allocated to storm sewer system by the Detroit Water and Sewer Department.

JUSTICE ZAHRA: Again, I'm trying to understand whether it was proportional, the fee charged for the storm water.

MR. BAKER: We believe not, for several reasons, including the simple fact that these properties are subject to a charge only if they have

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impervious area and yet, that charge funds the treatment of storm water discharged from property that has pervious area which discharges storm water when it is saturated. During the wet weather events that cause the combined sewer overflows, the elimination of which is the regulatory purpose the Detroit program seeks to accomplish.

JUSTICE ZAHRA: I have no more questions.

JUSTICE McCORMACK: Justice Viviano?

JUSTICE VIVIANO: I don't have any questions at this time.

JUSTICE McCORMACK: Justice Bernstein?

JUSTICE BERNSTEIN: Good morning and welcome to the Supreme Court. I just want to kind of look at the practical implications of this, and I'm hoping you can kind of help me and guide me through this. Ultimately, if the Court were to rule in your favor, what would the practical implications be of a city trying to oversee its water department? Ultimately, would this have to then kind of go to a millage every time they needed to do any kind of basic things? I realize there's test that we have to follow, but what I'm trying to get at is, should I be concerned about how cities are able to oversee their water facilities with basically the idea that every

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time they need to do something to implement something, it would then require a vote; how would that affect cities' governances and the ability to kind of operate their systems?

MR. BAKER: Absolutely not, Your Honor. To answer the gist of your question, which is whether our position is this charge has to be put to a vote every time the City wants to process wastewater, of course not. The City has the power -- and by the way, the City does not oversee this charge or its implementation; it is imposed solely by the water and sewer department, which under the City's charter, has the authority to levy these charges without any legislative action by the City Council. It is a power unto itself.

Now, in designing a charge, the Bolt test simply requires that the charge -- as Justice Zahra has inquired about this charge -- that the charge be for regulatory purpose and that it be proportional to the benefit that is conferred upon the person subject to the charge.

In this case, by choosing -- and by the way, the third element, volition, is simply not at issue here, even the Court of Appeals agreed that that third element is not implicated here. It's

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involuntary, and that does not invalidate the charge, but that element of the test is not at issue.

And we all agree that there's a regulatory purpose being sought to achieve here. The question is whether the charge imposed is proportional, whether it is within that second prong of the Bolt test.

We think it's pretty clear that the charge is not proportional to either the cost of rendering the service or to the benefit conferred by the service, because it is limited to a tiny fraction, probably about 14 percent of the property in the City of Detroit is subject to this charge because it is imposed only on impervious area. That means that pervious surfaces, owners who -- well, homes are presumed to have a certain amount and they receive a monthly charge that's pretty standard, I think it's 28 dollars or something like that. But for larger properties, supposedly the properties have all been measured, the impervious areas have been determined and the charge is imposed based on those asserted measurements.

The problem is by using impervious area as a proxy and imposing no charge on anyone else in the City, including the City's own streets, which are the largest single component of impervious area, which the

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City exempts under the rationale that they're part of the collection system, while at the same time imposing charges on both the county and the state for it, the streets they own, which they are entitled to do under the decision they rely upon, a City of Detroit case, the City has imposed on a very small part of the property ownership population of the City, the entire burden, the entire cost of processing this wastewater. The charge simply has to be redesigned in a way that spreads that burden over a larger -- the entire property owning base. I see that your questions have exhausted -- the time I wanted to reserve is now running. So unless there are --

JUSTICE McCORMACK: You can stop talking and I'll ask my other colleagues and see how it goes.

MR. BAKER: I hope I answered questioner.

JUSTICE BERNSTEIN: You did. Thank you.

JUSTICE McCORMACK: Justice Cavanagh?

JUSTICE CAVANAGH: No questions.

JUSTICE McCORMACK: You're saving some time. Well done. Miss Mithani.

MS. MITHANI: Good morning, Your Honors. May it please the Court, Sonal Mithani for the City of Detroit defendants.

We believe this is a case about the

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authority and discretion that the Michigan Revenue Bond Act of 1933 confers upon municipalities to use their best judgment to determine what utility related costs should be recovered through municipal rates.

As we stated in our supplemental brief, Bolt versus City of Lansing does not account for the clear legislative directives that are provided for in Section 21 of the Revenue Bond Act. Directives that expressly address how public improvements like the City's combined sewer system can be financed and explicitly require that the costs related to those improvements be recovered through rates, not taxes.

Nor does Bolt account for Section 34 of Revenue Bond Act, which requires courts to construe the act in a way that secures the public health, safety and welfare of municipalities.

And finally, as Mr. Baker noted, Bolt does not account for Article 7, Section 34 of the Michigan Constitution, which requires courts to construe laws like the Revenue Bond Act and the Headlee Amendment liberally in favor of the municipality. If the Court were to apply Bolt as it stands today to the City's drainage charges, charges that undisputedly recover only combined sewer system costs, and conclude that those charges are unreasonable fees and thus,

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unconstitutional taxes, it would also be effectively construing parts of the Revenue Bond Act as unconstitutional. This is contrary to the longstanding Michigan law that statutes in this state are clothed in the presumption of constitutionality, and thus, courts give deference to a deliberate act of the legislature, construing that act as constitutional unless unconstitutionality is clearly apparent. There's nothing in the plain language of the Headlee Amendment that renders the Revenue Bond Act unconstitutional.

So while we believe the City's drainage charge is a reasonable user fee that is also compliant with Bolt, we also believe that if the Court is inclined to grant leave to appeal, it would be appropriate to revisit Bolt, to at the very least account for the legislative guidance that is contained in the Revenue Bond Act.

And I'm happy to answer any questions that the Court has about the City's drainage charge.

JUSTICE McCORMACK: Thank you. Justice Markman?

JUSTICE MARKMAN: I have no questions. Thank you very much, counsel.

JUSTICE McCORMACK: Justice Zahra?

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JUSTICE ZAHRA: I'm very concerned about the proportionality of the prong of Bolt. Can you help me understand how it is that it was proportionate to first charge 750 dollars per acre per month at a rate that probably exceeded people's probably taxes for the entire year on that property, then drop it down to 125 dollars, and then exclude some organizations like church organizations who complained about it, but not others; how is this proportionate?

MS. MITHANI: Sure. Let's start with your original question that Mr. Baker had, how do you divide the sewage cost and the storm water cost. So the City makes a special attempt to make sure that the overall costs of the combined sewer system are allocated proportionally between customers who contribute drainage to the system and customers who contribute sewage to the system. And so we rely on measurements that we get from flow that comes in right to the wastewater treatment plant and some of our other facilities to decide what flow is wet weather flow, which really ties to storm water, and what flow is dry weather flow which ties to sewage. And so based on that proportionality, which is about 28 to 30 percent, that's how we allocate the cost of the system; although all of the costs relating to those

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combined sewage overflow facilities are allocated to storm water because those facilities were required by federal regulation and law to hold storm water so that it can all be routed to the wastewater treatment plant to be treated. So that's the proportionality between storm water and sewage.

As it relates to the storm water cost itself, originally, we were not charging all customers who were contributing drainage to the system. We were only charging people who had a water account. And that was disproportionate and the City was sued over that because the City was unfairly burdening certain customers who contributed drainage but not all customers. And so the The city made an effort to make sure that this was going to be a uniform charge that was assessed on all individuals and users of the combined sewer system that were contributing drainage towards storm water in other words.

And so when it did that, it brought on additional customers that had never been charged before. And so the City had planned in two years to basically bring everybody to a uniform rate, which would have been roughly around, I think it would have ended up being in the 500 dollar range.

But what happened is, in the first year of

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bringing these new customers on and charging them that 750 dollars, the City realized that many of these customers were experiencing rate shock. So it implemented what is a well-known rate setting mechanism called a phase-in. It's used in regulated utilities all the time, which are private utilities that are more heavily regulated than municipal utilities are under the state law.

JUSTICE ZAHRA: I get it. Because I have questions and everybody goes into their argument when I ask a question, so I get it. You phased in a rate, so you went from 750 to 125, and you chose to not charge churches and then charge churches eventually; is that your answer on proportionality as it relates to that?

MS. MITHANI: No, churches have always been charged. What happened is, is we had new customers that were coming in, we had residential customers who were transitioning, we had customers who were being charged on a meter basis that were transitioning. All of those customers were part of the phase-in and transition. And at this point in time, everybody but one class is paying the same uniform rate, and that last class will be phased in the next year or so, and so in the next year, everybody will be paying the same

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uniform rate.

JUSTICE ZAHRA: Do you charge counties for runoff from county roads?

MS. MITHANI: We do charge Wayne County and the State of Michigan, but both of those entities have consent judgments that dictate what the terms of that charge have to be, so we're bound by court order on that.

JUSTICE ZAHRA: The answer is yes? Is that right, the answer is yes?

MS. MITHANI: Yes, absolutely.

JUSTICE ZAHRA: Do you account for the city streets as having some runoff?

MS. MITHANI: We do not because those are part of the conveyance system, and under the Revenue Bond Act, properties that are part of the conveyance system do not have to be charged.

JUSTICE ZAHRA: Is there a breakdown between drainage charges for impervious acreage versus water runoff from pervious acreage?

MS. MITHANI: No. We only assess everybody's impervious acreage. We individually measure impervious acreage for every user.

JUSTICE ZAHRA: Why is that proportional?

MS. MITHANI: That's proportional because

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most of the studies that are in the record evidence that we provided show that impervious acreage is the number one contributor to storm water.

JUSTICE ZAHRA: But pervious acreage, depending on how hard it rains, contributes as well, does it not?

MS. MITHANI: But everybody gets the same benefit of the assumption that pervious acreage is a hundred percent permeable. Everybody gets that same benefit applied to them.

JUSTICE ZAHRA: But it becomes disproportionate when property owners have nothing but pervious acreage; they are paying for the runoff -- I'm sorry, from properties owners who have impervious acreage. If they have a parking lot that's completely paved, they're paying for the person who has a gravel lot or a dirt lot who also has runoff. They're paying for them, are they not?

MS. MITHANI: No. They're paying their proportionate share. Again, the test even under Bolt is that it needs to be proportionate, not exact. And if you look at the historical case law here, the overall test was not that it had to be specifically individually proportionate. The overall test was that in the aggregate, the revenue had to match the cost of

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overall regulation, and that is clearly the case here. There's no additional revenue being generated by our charge.

JUSTICE ZAHRA: But the revenue is being charged only to what Mr. Baker describes as 14 percent of the area of the city. I don't know if that's accurate, but I do know you're admitting to me, you don't charge for city streets, you don't charge for pervious acreage, because everybody gets the benefit of that, but not everybody gets the benefit of that when your property is completely impervious. I've been on golf courses, beautiful golf courses in the City of Detroit, they all have wonderful drainage; that's considered pervious acreage, but that drainage is going all into the rainwater system, is it not?

MS. MITHANI: No, not necessarily. Most of that drainage is being held and retained and detained, and that's the point. Studies show that most pervious acreage, while there might be some runoff, most of the time that allows for retention and detention. And so that is a way that these homeowners and property owners avoid burdening our system. The way these people choose to develop their property does impact and burden our system.

JUSTICE ZAHRA: You're telling me, then,

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that all of the rain that goes on a golf course is soaked into lawn and none of it goes into the sewer system?

MS. MITHANI: I can't say that with a hundred percent certainty, but again, the test is not that it has to be exact as to property to property. The test is that it has to be proportionate.

JUSTICE ZAHRA: The test is proportionality, and I'm very concerned about a fee that's only put on people who are deemed to have impervious acreage, when I know from common sense that water runoff goes off of lawns, soil surfaces that are sometimes compacted and goes into the sewer system.

MS. MITHANI: Well, I would contend that the legislature has not prescribed in the Revenue Bond Act a specific methodology that we are supposed to employ for assessing this charge. The legislature has conferred that discretionary authority to the municipality, and in the Revenue Bond Act, we are required, this is not even optional, the legislature required us to recover all of the costs of our combined sewer system through a rate, and the legislature has deferred to us to try to make the best determination of how to make that rate assessed upon all parcels.

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There are other alternative methods that allow you to charge impervious acreage and pervious acreage, but the studies all say that any methodology -- there are three that are accepted, and the City has one, that relies on impervious acreage, is an adequate way to measure storm water flow and contribution.

JUSTICE ZAHRA: That's to be determined under Bolt, wouldn't you agree?

MS. MITHANI: Proportionality?

JUSTICE ZAHRA: Yes.

MS. MITHANI: I would contend that Bolt has to take into account the legislative guidance and policy that's been set in the Revenue Bond Act. The Revenue Bond Act dictates what is a rate and what is a tax and it needs to be accounted for as part of the will of the people.

JUSTICE ZAHRA: Thank you very much.

JUSTICE McCORMACK: Justice Viviano?

JUSTICE VIVIANO: Counsel, can you just help me understand one point that you discussed with Justice Zahra, and that is, why is it that the county roads and state roads are not considered by the City to be part of the conveyance under the Revenue Bond Act but the city streets are? Don't the county roads

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and the state roads have a sewer system under them like the city streets?
MS. MITHANI: The public improvement is what we own. We don't own the county roads, we don't own the state roads. We can't control the way they're maintained, we can't control the way that they're designed.
JUSTICE VIVIANO: I get that, but I'm guessing that however impervious something has to be to be considered impervious would apply whether the city has their streets paved by asphalt or concrete or something else or the county. In other words, they're just as impervious as the city roads, aren't they? The city roads are just as impervious as they are.
MS. MITHANI: The point of the city not being charged for its roads is that the city roads are part of the city's conveyance system. They're designed in a way, and we have studies in the record that support this, they're designed in a way to facilitate the conveyance. The city itself, the city proper is the entity that maintains all of those roads.
JUSTICE VIVIANO: Does the runoff, is it conveyed from the sewers on the state and county roads, or that's not connected to the City's system?

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MS. MITHANI: I do not know the answer to that question, and I'm sure at some point it routes its way to the City's system. But we do have consent judgments that actually have litigated the issue of what is the appropriate amount that those institutions are supposed to pay. And so their charge is somewhat less, and I think in part that probably is a reflection of what they add to the system.
JUSTICE VIVIANO: If the city roads were in included in this calculation, that would significantly lessen the charge; do I understand that correctly?
MS. MITHANI: It would have to, necessarily. But again, under the Revenue Bond Act, the city roads are part of the property and part of the public improvement and are not required to be charged.
JUSTICE VIVIANO: Thank you.
JUSTICE McCORMACK: Justice Bernstein?
JUSTICE BERNSTEIN: Good morning, counsel. If you could just help me, I want to basically see if you could respond to brother counsel's kind of assertions that I made when I asked the question about how would the City and how would other cities kind of continue their operations if they were forced to have to go to election on these issues; and he had given

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kind of a more elaborate response to that, and I'm wondering if you could take the opportunity to respond to his comments to my earlier question.
MS. MITHANI: I think that if this particular charge is going to be ruled a tax, and this is a slippery slope down having all sorts of municipal rates having to be voted upon as taxes, and that is going to be difficult, because that makes these costs suddenly optional. It suddenly becomes optional to actually pay for water, pay for sewer, pay for storm water management and the Michigan Municipal League put in amicus brief that sort of explained what would happen if, in fact, we had to put every single rate to a vote. And that would be problematic, and it would also be contrary to what the legislature has dictated as policy in the Revenue Bond Act. None of these issues are supposed to be put to a vote. Per the legislature, these are all supposed to be costs that are recovered through rates.
JUSTICE BERSTEIN: Thank you, counsel.
JUSTICE McCORMACK: Just at the Clement?
JUSTICE CLEMENT: No questions.
JUSTICE McCORMACK: Justice Cavanagh?
JUSTICE CAVANAGH: No questions.
JUSTICE McCORMACK: Mr. Baker, you have a

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minute and a half to respond.
MR. BAKER: Thank you. Quickly. Studies that counsel refers to are rate methodology, the three types, do not reflect or take into account the Headlee Amendment and its requirement of proportionality.
The Bond Act, secondly, Revenue Bond Act, cannot override the Constitution. Thank you very much. The Headlee Amendment governs when there is conflict between the two of them.
Third, we don't dispute that the allocation between sewage and storm water costs at the plant is correct, we think it's probably correct. These are experts, they know how to determine what's normal flow and what increase occurs during weather events.
Fourth, if the city streets are part of the collection system, then so are the state and county roads; they also discharge to the sewers and that's why they pay a charge for the processing of that discharge to the sewers. Counsel does know the answer to that question, she just didn't give it to you.
Justice Holmes is remembered for his statement that the power to tax is the power to destroy. The Court should recall that he went on to say that as long as this Court sits, the power to tax is not the power to destroy. And we urge you to

reverse the Court of Appeals and find that this is a tax because it's not proportional. And I also urge you to recall in the words of Justice Marshall, that in considering this question, we must never forget that it is the Constitution we are expounding, which he said in McCulloch against Maryland. Thank you very much, Your Honors, for your attention. Are there any questions?

JUSTICE McCORMACK: Anybody have any follow-up questions for Mr. Baker? Thank you both very much, the case will be submitted.

# EXHIBIT - 28

# STATE OF MICHIGAN

# COURT OF APPEALS

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| JAMILA YOUMANS, and all others similarly situated,<br><br>Plaintiff-Appellee/Cross-Appellant, | UNPUBLISHED<br>January 7, 2021<br>APPROVED FOR PUBLICATION<br>March 2, 2021<br>9:00 a.m. |
| v | No. 348614<br>Oakland Circuit Court |
| CHARTER TOWNSHIP OF BLOOMFIELD,<br><br>Defendant-Appellant/Cross-Appellee. | LC No. 2016-152613-CZ |

Before: STEPHENS, P.J., and MURRAY, C.J. and SERVITTO, JJ.

PER CURIAM.

In this certified class action, plaintiff Jamila Youmans, who is the sole class representative, challenged certain municipal utility rates and ratemaking practices of defendant, Charter Township of Bloomfield ("the Township"). Defendant appeals as of right the trial court's amended judgment, entered after a bench trial, that awarded plaintiff and the plaintiff class permanent injunctive relief and more than $9 million in restitution. Plaintiff has filed a cross-appeal, challenging the trial court's refusal to award damages for certain components of the Township's water and sewer rates.[1] We affirm the trial court's ruling concerning plaintiff's claims based upon a violation of § 31 of the Headlee Amendment, Const 1963, art 9, § 31, reverse its judgment awarding monetary and equitable relief to plaintiff and the plaintiff class, and remand for entry of a judgment of no cause of action in favor of the Township.

## I. FACTUAL AND PROCEDURAL BACKGROUND

[1] By leave of this Court, the Michigan Municipal League and the Michigan Townships Association have submitted an amicus brief that supports the Township's position. *Youmans v Charter Twp of Bloomfield*, unpublished order of the Court of Appeals, entered January 29, 2020 (Docket No. 348614).

This case arises out of plaintiff's challenge to various aspects of the Township's water and sewer rates and its related ratemaking methodology during the "class period," which commenced on April 21, 2010, for purposes of plaintiff's assumpsit claims (i.e., six years before plaintiff initiated this action) and on April 21, 2015, for purposes of plaintiff's Headlee claims (i.e., one year before plaintiff initiated this action). In October 2016, the trial court entered an order "certifying this case as a class action" and appointing plaintiff as the sole class representative. Plaintiff's amended complaint included six counts, the first of which asserted several claims for violation of § 31 of the Headlee Amendment, and the remainder of which asserted claims for "**ASSUMPSIT/MONEY HAD AND RECEIVED**" with regard to both certain specific components of the Township's water and sewer rates and the "arbitrary, capricious, and unreasonable" nature of those rates and the underlying ratemaking processes. After the trial court denied the parties' competing motions for summary disposition, the matter proceeded to a 10-day bench trial.

## A. THE UTILITY SYSTEMS AND BASIC RATEMAKING METHODOLOGY

Wayne Domine, the director of the Township's "engineering and environmental services" department from 1991 until his retirement in May 2017, testified that the Township consists of approximately 18,000 parcels of realty, approximately 3,000 of which are not serviced by the Township's water utility. The water system provides treated, potable water to its municipal customers, but it is also used for firefighting capability, providing water to the Township's fire hydrants.

According to Domine, much of the Township's water system was privately constructed by real estate developers beginning in the 1920's. The infrastructure was originally a piecemeal collection of "several subdivision well water supply systems throughout the township." However,

> [i]n 1963, the township had decided that the existing well systems would not be adequate to provide the water quality and quantity required to maintain the projected future demands of the community. The connection to the City of Detroit system was found to be most dependable for the health and welfare of the township residents. Several miles of transmission mains were constructed. . . . Since then over 200 miles of lateral water mains have been extended into areas either by means of special assessments or developer funded projects.

Since 2004, the Township has been subject to an abatement order, which arose out of litigation with the Michigan Department of Environmental Quality (DEQ), to "dry out" the sewer system, i.e., prevent water infiltration into the system. After performing a long-term needs study, the Township approved a 20-year capital improvement program, which is funded by the inclusion of a "water debt charge" in the disputed utility rates.

Domine agreed that the Township's sewer system is a separated system, with "one set of pipes for sanitary sewage," and a separate storm-sewer system, which is "intended to collect storm water runoff or . . . water from the land" and discharges such water directly into a waterway. The

Township does not own its storm-sewer system, other than the storm drains that are on the property of the township. Rather, the storm-sewer system is owned and maintained, in concert, by several county and state entities. Oakland County bills the Township for the "sewer flow" that exits in the Township, as estimated by approximately 30 meters located in various areas, based on the Township's proportional contribution to the entire system. Conversely, the Township does not measure "sewer flow" in order to determine the rate that it charges its municipal sewage customers; it bases the overarching sewer rate on water usage, which is the common practice throughout Oakland County.

Domine was involved in the Township's annual budgeting (on a limited basis) and water and sewer ratemaking from before the class periods in this case commenced until his May 2017 retirement.[2] He also coauthored the "annual rate memorandum," which included an outline of recommended water and sewer rates and was presented to the Township "board" for approval each year. The "first" consideration in ratemaking was "to gather up all the expenses, and then determine a revenue that would cover those expenses." Put simply, the rates were intended to allow the Township to "[b]reak even," but the process is complex, generally taking place "over several months." By nature, the rates are predictive—intended to cover expenses that will be incurred after the rates are set—and thus they merely *estimate* the revenue that will be required. Accordingly, to provide a "margin of error," the rates were generally set to generate "a revenue stream slightly above" the projected expenses, but in some years during Domine's tenure, the "water and sewer fund" was operating at a deficit. Even so, and in at least one year, a midyear adjustment to the rates was required to prevent an excessive deficit. The ratemaking process employed by the Township did not focus on individual line items; it employed a holistic approach, focusing on generating sufficient overall annual revenue to cover the overall annual costs.

Jason Theis testified that he served as either the Township's finance director or deputy finance director at all times pertinent to this case, during which time he was also involved in the annual budgeting process for the Township's water and sewer fund. Theis is a certified "public finance officer," which is akin to being a certified public accountant, but with an exclusive focus on governmental, rather than private, finance and accounting. He indicated that, in setting the disputed utility rates, it was desirable to budget both revenues and expenses "conservatively," in hopes of ensuring sufficient revenue to cover expenses. As a result, with regard to individual line items in the budget, the actual amounts received or expended often varied considerably from the projections used in setting the rates. Over the ratemaking period of six months, the disputed rates would go "through many different iterations."

According to Domine and Theis, the water rate included a "variable rate" for consumption, which was intended to recover the Township's operating expenses, depreciation improvements, and the cost of the water purchased from the Southeastern Oakland County Water Authority, and

[2] Thomas Trice, the director of the Township's Department of Public Works (DPW), testified that he was also involved in the disputed ratemaking process during the pertinent timeframe.

the water rate also included a "fixed," "ready-to-serve" charge to cover extra operational expense. The fixed portion of the water rate generally represented about 80% of the utility's required revenue stream, and it was intended to help the Township cover its "steady stream of monthly expenses" despite fluctuating water use and revenue over time.

Similarly, Domine indicated that the sewer rate included a "variable rate," which was intended to recoup operating expenses (including treatment of raw sewage) and depreciation improvements, and the sewer rate also included a "fixed" charge that was intended to recover the remainder of the Township's operating expenses. In addition, both the sewer and water rates included debt service charges, which were assessed in amounts intended to pay the debt service on bonds or other obligations issued by the Township related to water and sewer.

The parties stipulated that some portion of the Township's utility ratepayers were not also on the "tax rolls" that fund the Township's general fund, citing examples including tax-exempt entities like churches. Domine indicated that about 80% of the Township's water customers are also sewer customers, with the remainder using septic-tank systems. A small portion of customers—about 3%—receive sewer services only; they are not water customers. Domine agreed that those "sewer only" customers are billed in one of two ways. The majority pay a fixed annual charge, while the remainder have elected to have a meter installed on their well-water line and are billed "for their sewer based upon actual water usage." Additionally, the water system permits homeowners to install a "secondary" water meter that measures water used outside the home (e.g., for lawn irrigation or swimming pools), and such water usage is not included when calculating the homeowner's sewer charges.

Because the Township has no way of determining the amount of "sewer" services a sewer-only customer uses, the "fixed annual charge" is determined by averaging the rate of the "sewer only" customers who have elected to have a water meter installed. Domine admitted that the sewer ratemaking methodology did not account for the sewer only customers explicitly. But Domine also indicated that, because the Township had been overestimating volume in an attempt to keep the sewer rate from excessively increasing, "a lot" of the time the Township did not collect enough "sewer revenue" to cover the associated costs fully.

According to Theis, the budgeting program for the water and sewer fund—which he sometimes referred to as the creation of a "projected income statement"—involved "a lot of back and forth" "looking at five year trends of all the different accounts within the water and sewer fund," establishing projected figures for "operational" overhead (including staffing expenses), and projecting the anticipated water costs. Of the 18 different Township funds for which annual budgets and projections are prepared, the water and sewer fund was the only "enterprise fund" (i.e., a proprietary, non-tax revenue, self-sustaining fund, which charges for services provided, is not supported by a millage, and falls outside the operating township budget), and it was the most difficult to budget for because it involved "more guess work" than the other funds, particularly with regard to commodity charges and tap sales. For instance, the revenue received during a "dry season" would vary by "millions of dollars" from the revenue received in "a wet season[.]" In

addition to the Township's 18 budgeted funds, Theis also oversees approximately another 10 that aren't budgeted. Most of the Township's utility customers were billed on a quarterly basis, while most of the "suppliers" billed the Township monthly. As a result, in calculating the necessary revenue flow to meet its utility expenses, the Township needed to plan to keep sufficient cash on hand from quarter to quarter.

As an expert witness, plaintiff called Kerry Heid, who is a "rate consultant specializing in the public utility field," ratemaking in particular, and has approximately 40 years of experience in that field. He agreed that the "first step" in utility ratemaking "is to determine the revenue requirement," i.e., the revenue that the utility will need to cover its expenses, and he also agreed that this involves cost projections regarding variable expenses that are generally unknown when the rates are set.

According to Heid, "almost industry-wide, the generally recognized standard to use for generally accepted cost of service and rate making practices for water utilities" was, at the time of trial, set forth in the seventh edition of "the American Water Works Association M1 Manual" (the "M1 Manual"). Heid's opinions in this case concerning the disputed water rates were based on those methodologies and principles. He indicated that there are "two generally accepted methods" by which a utility's revenue requirements are determined: (1) "the cash basis, or the cash method," and (2) "the utility basis." In Heid's opinion, the Township used the cash method in calculating the disputed rates. Under that method, a municipality determines "its cash needs" by considering expenses such as "debt service, which would include principal and interest on bonds or outstanding debt," "operating and maintenance expenses," taxes, "[a]nd any other cash needs that the utility would need in order to operate its utility." The total of such expenses constitutes the utility's "revenue requirement." In determining which expenses, precisely, are properly considered in ratemaking, a utility should only include an expense if it is "prudently incurred" and "necessary for the utility to operate."

According to Heid, after a utility has determined its anticipated revenue requirement, "[t]here are two different sources of funds that the utility needs to consider, such that the total of those fund sources would generate the needed revenue requirement": (1) rate revenue, and (2) "miscellaneous revenues," which are also known as "non-rate revenues." Non-rate revenue includes any "sources of revenue that the utility does receive over and above the actual rates that are developed by the utility." Before determining its rates, a utility should "net out the non-rate revenue from the total revenue requirement." For example, if a utility's initial revenue requirement was estimated to be $100,000, but it expected to generate non-rate revenue of $5,000, it should "design rates that would generate revenues of $95,000."

Heid indicated that, after determining its "net revenue requirement," the utility would determine what portion it "want[ed] to recover through a customer charge," such as the fixed portion of the Township's water rate, and how much the utility wanted to recover by way of "a volumetric charge" for water use. Although there is an element of "discretion" in deciding the proper ratio of the fixed customer charge and volumetric charge, Heid opined that the proper

method was to perform a "cost of service study," which is something that the Township had failed to do, instead relying on what Heid described as "an arbitrary allocation[.]" In any event, Heid indicated that after deducting the fixed charge from the revenue requirement, a utility should divide the remaining portion (i.e., the portion it wished to recover through a volumetric charge) by the expected "total usage," with the result of that equation equaling the appropriate utility rate. In Heid's view, it was "[a]bsolutely not" appropriate for a municipal utility to design its rates to "over-recover," i.e., to recover more than the utility's net revenue requirement.

The Township called Joe Heffernan as an expert witness. Heffernan is a certified public accountant and retired from Plante Moran with at least 30 years of experience in conducting "public sector" accounting audits and consultations. He indicated that municipalities are obliged to have such external audits performed under Michigan law. According to Heffernan, before he reviewed the financial statements in this case, the Township's independent auditing firm had "already looked at the underlying general ledger and tested the internal controls and looked for compliance with laws and regulations[.]" After doing so, the independent auditors issued an audit opinion indicating that the Township's "financial statements are fairly stated" and were "free of material misstatement," meaning that "they're reliable." Similarly, Heffernan discerned "nothing" in the financial statements that would have led him to suspect that the Township's water and sewer department was potentially failing to comply with any applicable regulatory law.

Heffernan testified that Plante Moran audits "125 communities in southeast Michigan." About "[a] third to half of them don't" issue rate memoranda or any other "formal written document" explaining their utility-ratemaking methodology. Nor was he aware of any "requirement" for municipalities to do so. In setting their utility rates, such municipalities "just look at two things, what do our cash reserves look like, do they seem too high or too low, what's the percentage increase that we're going to get from our supplier, and based on whether their cash is too high or too low they bump . . . up or bump . . . down" the rates. Such "simple" ratemaking was "really common," and it "seem[ed] to work," historically resulting in relatively proportional cash inflows and outflows for the utilities that employ it.

Heffernan agreed that it is "possible to reach a reasonable water and sewer rate using a flawed rate model" or no model at all, and he also agreed that "mathematical precision" in calculating rates is neither required nor possible because rate models are based on predictions, "[a]nd honestly, every single one of your individual projections will be wrong" to one degree or another. "[T]he numbers are so big . . . and can change by so much you really have to accept a certain amount of fluctuation and variation[.]"

The Township also called Bart Foster as an expert, with his expertise "in the area of municipal water and sewer service rate setting[.]" Foster has "30-plus years' experience" in "providing financial, management consulting, and rate consulting services to predominantly municipal water and waste water utilities." He has performed such services for "between 10 and 20" municipalities in Michigan, and he was "pretty much regularly engaged for over 30 years with the Detroit Water and Sewage Department until they transitioned into the Great Lakes Water

Authority" (GLWA). At the time of trial, he was employed as a consultant at the GLWA, and he indicated that he was familiar with Michigan regulatory law regarding municipal utilities.[3]

## B. "LOST" WATER AND "CONSTRUCTION" WATER

According to Domine, one factor that was considered in setting the water rates was "non-metered water," which was, in essence, "lost" water that the Township purchased but never actually sold. This occurred for "a variety" of reasons, such as broken water mains, leaks, "[c]onstruction water" (i.e., water used in the construction and maintenance of the water system itself), "billing inaccuracies," "meter inaccuracies," and "lag time" in meter reading. During the relevant "class period" years, Domine had estimated the anticipated "lost" water, for ratemaking purposes, at between 5% and 7% of the Township's annual projected water purchase. Such "lost water" figures were included in setting the water rates, intended to offset the cost of the water that the Township had purchased but never sold to its metered customers.

According to Heffernan, "water loss" is something that he commonly encountered in auditing municipal utilities because one "key" metric in "every" such audit was a comparison between "the volume of water purchased and sold by the water and sewer fund[.]" On the other hand, Foster indicated that he disfavored the use of the phrase "lost water"—preferring to use the phrase "unaccounted-for water"—because "lost water" is an "unduly simplified" description. Terminological disputes aside, Foster agreed with Domine and Heffernan about the essential underlying concept, explaining that for a municipality like the Township, which has no water "production facilities" and instead "purchases water wholesale," unaccounted-for water "would simply be how much water is being purchased on a wholesale basis from the provider . . . compared to how much water [the municipality] sells to the customers[.]" Such unaccounted-for water was generally attributable to "the possibility of inaccurate meter reads, both on the purchase side and on the sales side," "natural leakage out of the pipes," and "uses of water for construction purposes that's unmetered[.]" Foster indicated that "the Township had an unaccounted-for water percentage of between 4 and 5 percent," which was "on the low" or "medium side" for municipalities in southeast Michigan. He opined that, because unaccounted-for water was "a cost of maintaining the system," "it is appropriate to recover that" cost in the corresponding utility rates, and it would be inappropriate for the water and sewer fund or the Township's general fund to bear such expense.

Domine indicated that "construction water" is used primarily in "the flushing and filling of the water mains that are being built," in "pressurizing the main," and also when "doing bacteria testing." In his opinion, the use of such unmetered construction water is "necessary . . . for the operation of the system itself[.]"

[3] In substance, Foster's relevant expert opinions were largely identical to those expressed by Heffernan.

## C. WATER USED BY TOWNSHIP FACILITIES

In addition to "lost" water, Domine agreed that "the township's facilities use water, but there isn't a check written from the water and sewer fund to the general fund for the value of that water[.]" He explained that, rather than paying for such water with cash, the Township provides in-kind "services and value" to "the water and sewer fund," the value of which "exceeds the value" of the water used by the Township's facilities. Domine and Theis admitted that they were aware of no formal documentation of such in-kind remuneration. As an example of one such in-kind service, Domine indicated that Township firefighters performed inspection, "flushing, and some of the maintenance" on the Township's fire hydrants. As other examples, Theis indicated that his services and those of his staff (i.e., accounting, finance, and human resources services) are provided to the water and sewer fund at no charge, as are the services of the Township's "IT department," which spends approximately 10% of its resources servicing the water and sewer fund. That fund is also provided "maintenance" and "cleaning" services by Township employees.

Although some of the municipal buildings are equipped with water meters, readings were never taken, and thus there was no record of precisely how much water was used by the municipal facilities during the pertinent timeframe. As part of this litigation, however, Domine prepared an estimate of the water used by the Township's facilities, estimating a total annual use of approximately 3.8 million gallons. Based on that figure, he estimated that the combined water and sewer services provided to the Township facilities was worth approximately $35,000 annually,[4] while the water provided to the Township's fire hydrants was valued at $10 per hydrant, for a total of $31,000. Domine and Theis each estimated the value of the Township's in-kind remuneration for such services to be more than $100,000 annually.

Contrastingly, Heid indicated that any in-kind remuneration that the Township provided to the water and sewer fund was inadequate because, based on his estimations, the value of the "public fire protection" services rendered to the Township by the water utility "was in excess of a million dollars every year[.]" And with regard to fire hydrant water usage, Heid indicated that the $10 estimate per hydrant was "grossly inadequate and without any basis[.]"

According to Heffernan, most municipalities "typically" have water meters installed on municipal buildings, and their water and sewer departments typically bill the general fund for such water use. Foster agreed, indicating that he does not "normally see . . . the practice employed by [the] Township" of accepting in-kind remuneration for water from the general fund rather than directly billing the general fund for the water used by municipal facilities. But according to Heffernan, based on his experience with "other communities of a similar size," he estimated that the true value of the in-kind services provided to the water and sewer department by way of

[4] Heid indicated that the $35,000 estimate was facially reasonable.

"general fund" dollars was "in the neighborhood of" $700,000 or $800,000. On that basis, Heffernan opined that he would not consider the Township's facilities to be receiving "free water."

On the other hand, Foster indicated that the value of the water used by the Township facilities and the in-kind services provided to the water and sewer fund were "close to being a wash[.]" But he also indicated that the Township's in-kind remuneration strategy was "perfectly reasonable" and opined that the disputed utility rates would most likely go up, not down, if the Township were to undo the in-kind arrangement and, along with beginning to pay for water used by Township facilities, also begin to charge the water and sewer department for all of the services that it had previously received from the Township at no charge.

## D. "NON-RATE" REVENUE

Domine indicated that he never employed the term "non-rate revenue" while working for the Township and had not heard that term before this litigation commenced; rather, he categorized such revenue as "other revenue." His testimony concerning the treatment of non-rate revenue in the ratemaking process was somewhat convoluted. He agreed that the annual rate memoranda "probably" contained no "discussion" of non-rate revenue—those memoranda "never" specified all of the "expenses" underlying the recommended rates—but he disagreed that non-rate revenue was "not factored into" the rate "model" for the disputed utilities, explaining that they were considered as part of the "revenue stream" for the Township's annual budget, but not as a source of revenue attributable to the disputed rates. Later, however, Domine testified that "non-rate revenue . . . is *not* included in the rate calculation. It's considered as extra revenue to pay towards the expenses." (Emphasis added.) Later still, when Domine was asked, "[Y]ou weren't recovering all of your budgeted expenses through the rate, but instead were leaving some of them off because you anticipated getting non-rate revenue[?]", he replied, "Yeah, that—that would be what I've been saying all along." He also indicated that non-rate revenue was "reflected in the numbers" in the annual rate memoranda, explaining that the total operating expenses listed in those documents were actually "the net expenses, after deducting the non-rate" revenue. Notably, Domine qualified his answers somewhat by stating that his memory of such issues was hazy, given that he had retired, and questions about non-rate revenue would be better directed to the Township's finance director, Theis. But Domine also indicated that he "kn[e]w for a fact" that he had deducted non-rate revenue from the total operating expenses before calculating the disputed rates. In effect, this benefited the utility customers, lowering rates.

When the trial court asked Domine whether the deduction of non-rate revenue from total operating expenses had "historically" been "manifest" in his "paperwork," he replied, "It—it just came up in the last couple years . . . you got to understand, for 20 some years, a lot of it, I just did it[.]" Historically, Domine had performed the calculations informally for his own use, using

"notepads and sticky notes," rather than documenting the process formally.[5] However, during his final two years working for the Township, he had created a detailed spreadsheet to explain to his replacement "how the process works[.]" The spreadsheet showed the same process by which Domine had deducted non-rate revenue from the total operating expenses "in the past."

Theis agreed that, with the exception of "the '16, '17 rate memo," the rate memos for the other fiscal years at issue here did not include any "calculation that deducts non-rate revenue before setting the rate." Like Domine, however, Theis disagreed with the contention that non-rate revenue had not been accounted for in calculating the disputed rates, indicating that it had been used to offset projected annual expenses in ratemaking. Theis indicated that certain informal spreadsheets, which he had prepared for his own use in prior years, documented that process of incorporating non-rate revenue into the rates. Theis considered a specific item of non-rate revenue to be attributable as revenue of the water and sewer department if it was "directly related" to those utility services.

On the other hand, Heid indicated that, other than the Township's "rate document for fiscal year 2016-17," in his review of the documents provided to him in this case, Heid had "absolutely not" seen "any evidence" that non-rate revenue was properly accounted for in calculating the disputed rates. On the contrary, after comparing the "operating expenses that were reflected in the budget" for each class-period year "to the operating expenses that were utilized in the" corresponding "rate making model" for that year, Heid opined that the numbers indicated that the Township had not duly "netted out" the non-rate revenue in any fiscal year other than the one beginning in 2016. Heid summarized: "My opinion . . . is that the utility's reasoning or explanation for the treatment of non-rate revenues does not hold water, that they did not net out the non-rate revenue from the operating expenses as reflected in the rate memos." The Township's failure to deduct non-rate revenue "was not a reasonable rate making practice" because it "is commonly accepted that the non-rate revenues should be deducted from the total revenue requirement when establishing rates," and in Heid's reckoning, "if the rate methodology is faulty," then it is not possible to determine whether "the rate is reasonably proportionate" to the underlying utility costs.

On cross-examination, Heid indicated that he had "solely derived" his opinions concerning whether non-rate revenue was duly incorporated into the disputed rates by reviewing the annual "rate memorandums." He had not reviewed any "underlying work papers."

Although Heffernan agreed that non-rate revenues should be accounted for in ratemaking, he indirectly criticized Heid's methodology, indicating that it was not useful to compare the numbers in the rate memoranda and those in the water and sewer fund's annual "budget" because such documents are prepared "at two different points in time," "for two different purposes," utilizing different accounting principles. Thus, inconsistencies between the two documents were

[5] Theis described the prior methodology as, for "lack of a better term," "back of a napkin" calculations, which were not performed "consistently" during the relevant timeframe.

to be expected. Heffernan explained that "quite often" the budget does not have "a great relationship to what actually happens" after the budget is set, and the same is true with regard to rate memoranda.

Heffernan further explained that his analysis of the issues in this case involved "looking through the financial statements, some of the other documents ancillary to the financial statements, and most importantly, having some open discussion with the finance director, [the Department of Public Works (DPW)] director, and talking through what's behind the numbers in order to come to a conclusion." He focused on the financial statements particularly, "because those are what actually happened," whereas the annual utility "budget" was "merely a plan of what you may expect to happen," intended to permit the Township board to grant its "permission" for the "the various department heads . . . to conduct business and spend up to certain amounts for certain purposes." Similarly, although "rate memos can help inform you as to" the thought process employed in ratemaking, they cannot demonstrate the results—"what really happened"—like financial statements do. For that reason, financial statements are vitally important in auditing municipal utilities. They permit an auditor to assess whether the revenues *actually* received by a utility are "proportional" to the *actually* incurred underlying expenses.

Foster's opinions in this case were also primarily founded on his review of the Township's financial statements, and he agreed with Heffernan that they are preferable to the water and sewer fund's budgets and rate memoranda because it was best to evaluate "the effect" of rates and charges "after the fact[.]" Foster added that having been independently audited, the "financial statements have a degree of review that is arguably more—more rigorous than a budget or a rate memoranda."

After reviewing the Township's relevant financial statements, Heffernan and Foster both opined that the Township had duly accounted for non-rate revenues during the pertinent timeframe, although its calculations concerning non-rate revenue were not set forth in the rate memoranda. As Heffernan put it, "The work just wasn't shown." Even so, Heffernan believed that the financial statements and the proportionality of the water and sewer fund's cash flows during the relevant timeframe "clearly" demonstrated that the Township had properly accounted for non-rate revenue in the disputed rates. Heffernan expounded, "That's the great thing about the financial statements, you can't hide. It's in there or else the auditor would be disclaiming their opinion and saying everything is wrong."

Additionally, Heffernan indicated that even assuming, for the sake of argument, that the Township had *not* duly accounted for non-rate revenue in setting the disputed rates, that failure, standing alone, was insufficient to render the rates "unreasonable[.]" Foster agreed, stating that "it wouldn't matter" because if the water and sewer fund had recovered too much in the disputed rates, it would have either adjusted its rates accordingly or taken the opportunity to prudently add to its reserve funds, and if it had recovered too little, "there would need to be rate increases in order to get the reserves at . . . the prudent level."

When asked, on cross-examination, whether failure to account for non-rate revenues would result in "an overcharge to the rate payers," Heffernan replied:

> Potentially. And the reason I say potentially is there's only an overcharge if in fact you have charged them more than their actual cost. And in the rates there are so many other things that could be inaccurate in your rate model and you don't know until you see what—and that's why I look at the financial statements, what were the costs, what was the revenue that came in, that tells you if you've overcharged.

## E. THE COUNTY DRAIN CHARGES

Michael McMahon, who is an employee of the Oakland County Water Resources Commissioner's Office, testified that Oakland County assesses fees to its municipalities for maintenance of the county storm-sewer system. The charges for "chapter 4 drains" are generally "assessed . . . to individual property owners," although an "at large portion" is assessed to the municipality and some municipalities pay the "chapter 4" charges on behalf of their residents, while the charges for "chapter 20 drains" are "assessed to municipalities at large."[6] The county also charges municipalities a combined sewer overflow facility fee.

According to McMahon, in 2015, the Township was in arrears of approximately $346,560 with regard to its county drain charges because, before that time, the county "had sort of lapsed on some of [its] assessments." The same situation had occurred with multiple municipalities, and McMahon was tasked with getting all the drain funds out of deficit. Accordingly, he contacted Domine, seeking to establish a budgetary plan for the Township to satisfy its arrearage. Ultimately, it was agreed that the Township would do that over the course of a couple years so that they could budget for it.

Domine indicated that, as a result, in the fiscal year beginning April 1, 2015, the Township began including a line item in its water and sewer budget for "county storm drain maintenance" (the "drain charges"). Before that time, the Township's "chapter 20" drain fees had always been paid out of the Township's general fund with tax dollars, not included as an aspect of the disputed utility budgets. For example, in 2013, $23,000 was paid from the general fund to satisfy the drain charges. The first year after the switch, the new budgetary line item for drain charges was $200,000, which was included in calculating the disputed utility rates. An additional $200,000 was included in the same fashion the next year (i.e., in the fiscal year beginning April 1, 2016), and $75,000 was included for drain charges the year after that.

[6] Domine indicated that, to his knowledge, the Township does not pass any of its "chapter 4 drain" charges onto its tax base or ratepayers.

Domine was unable to explain specifically why the drain charges were shifted from a general-fund obligation to a component of the disputed utility rates, but he recalled the Township's finance director indicating that he was closing the particular general fund from which the drain charges had previously been assessed and reallocating the line items that had been paid out of that fund "to other accounts . . . that would be more appropriate[.]" Domine agreed that one of the functions of the storm-sewer system is to collect water that runs off the road so it doesn't flood the roadways, and the system also prevents soil erosion. However, Domine also testified that the Township does not own any of the roads within it, indicating that they are all owned by the county, the state, or private entities, and the county and state, not the Township, therefore have sole responsibility for installing any new drains that are required to ensure proper drainage from roadways. Trice agreed with that sentiment. According to Domine and Trice, the storm-sewer system also benefits the Township's separate sanitary sewer system by preventing the "infiltration or inflow" that the Township was ordered to remedy in the litigation with DEQ; by lowering the water-treatment charges incurred by the Township (and thereby lowering the disputed utility rates); and by preventing the backflow of raw sewage into the ground, the sewer system, and sewer customers' homes. Trice explained that the county storm drains run parallel with the Township's sanitary sewers, and thus anytime the storm-sewer system floods as a result of improper maintenance, storm water would get into the sanitary sewer system and could wreak havoc (e.g., it could collapse Township pipes).

## F. RENT CHARGES

According to Theis, in 2014, the Township began to charge the water and sewer department annual rent of $350,000, which was included as an expense in the disputed ratemaking process in the years that followed. Such rent was paid by the water and sewer fund—by way of a quarterly journal entry in the ledger—to the Township's general fund, for the use of the DPW facility. The DPW facility was constructed "probably" sometime between 2007 and 2009, and it was financed by a new debt millage. The water and sewer fund had occupied the DPW facility since sometime in 2009 or 2010. The Township's motor pool also occupied several automotive repair bays at the DPW facility, which were used to service all of the Township's different departments and funds.

Trice testified that he was the individual who established the amount of the disputed $350,000 rent charge. He calculated that figure by estimating that the water and sewer department was occupying about 30,000 square feet of the DPW facility's total 77,000 square feet, then applying an estimated annual rental rate of $12 per square foot. Trice established that estimated rental rate of $12 per square foot based on storage space that the Township was already renting out in the local district court building, and the figure was also approved of by the Township assessor. In setting the $350,000 annual rent, Trice opined that the Township had used the lowest number available. In his opinion, it would have yielded a much higher rental figure had the Township based the rent on an allocation of all of the actual costs associated with the DPW facility, such as insurance, accounting, IT, HR, administration, and consultants. Trice also indicated that the disputed rental figure was calculated only by reference to the space in the DPW facility actually

occupied by the water and sewer department, it did not include the areas occupied by other departments, such as the motor pool.

In Theis's estimation, the annual rent of $350,000 was reasonable, given the Township's related expenses for depreciation and bond interest with regard to the DPW facility, which were, in concert, over $400,000 a year. In addition, the Township incurred costs for ongoing maintenance, operation, and cleaning of the DPW facility, and it paid a share of the facility's utility bills for gas and electric. In a broader sense, Theis believed that it was appropriate for the water and sewer fund to pay rent for its office space because, "as an enterprise fund, they should be self-sustaining, and all costs and revenues should be coming from and to that base of customers, as opposed to taxpayer[s] in general."

With regard to the disputed rent charges, plaintiff called James Olson as an expert witness. Olson is the director of a company that specializes in preparing federally mandated cost allocation plans for governmental entities, including municipalities. Olson testified that, in his professional opinion, the $350,000 annual rent charge was not "appropriate because it's not based on cost," i.e., "the cost of the facility, . . . utilities, maintenance, insurance; anything that related to capital improvements on the building once it's built, [and] that kind of thing." To the extent that the rent was instead based on depreciation and the interest associated with debt for that facility, Olson viewed that methodology as improper because those expenses were already "paid for" by the special millage that had financed the DPW facility. Olson explained, "Well, if you're a taxpayer, you're paying for the building and its interest cost in a separate bill, so you're paying for that once. You wouldn't pay for it again in the rate that you pay for your water and sewer." In Olson's estimation, the amount of rent charged by the Township for the DPW facility bore no discernible relationship to the properly considered costs, it was instead improperly based on an estimated market rate. However, because of the limited information that had been provided to him, Olson had admittedly been unable to determine the Township's annual maintenance expense for the DPW facility, and he acknowledged that it was "possible that there's some maintenance expense that could properly be charged" to the water and sewer fund. Olson also indicated that his opinion concerning the propriety of the Township's methodology in calculating the disputed rental figure involved a philosophical "gray area" of accounting principles.

On cross-examination, Olson admitted that, as an enterprise fund, it was appropriate for the water and sewer fund to be funding its own office space somehow, and he was not of the opinion that it was *altogether* inappropriate for the Township to charge that fund some amount of rent. Additionally, Olson conceded that it would be appropriate for the Township to consider the central service costs related to the DPW facility—including accounting, financial, auditing, human resources, insurance, security, legal, and "IT" services—in determining the proper rental amount, along with "general administrative expenses[.]" Because plaintiff's counsel had not supplied Olson with the necessary information, Olson had been unable to prepare a full cost allocation plan for the water and sewer fund, and he was also unable to comment on how, precisely, the Township had calculated the disputed rental amount. Finally, Olson admitted that, although he was not aware of any federal funding related to the DPW facility, his opinions in this case were based exclusively

on federal regulations establishing guidelines for development of indirect costs for federal programs.

When asked to critique Olson's opinion concerning the rent charges, Heffernan indicated that Olson's reliance on federal regulations was inappropriate because those regulations do "not apply to any spending that's not of federal dollars," and although every township in Michigan receives at least "a little bit" of federal funding in the form of a community development block grant, only those specific federal funds must be spent in accordance with the federal regulations relied on by Olson. Heffernan also disagreed with Olson's ultimate opinion that the disputed rent charges were inappropriate. In Heffernan's view, there were "hundreds of activities" funded by the Township's general fund that impacted the water and sewer fund's finances, and the overarching concern was to ensure that the overall allocation of expenses was "fair" when viewed in the context of the "whole system." Indeed, after performing such a review in this case and learning about all of the services that the Township's general fund provides to the water and sewer department without compensation, Heffernan believed that the $350,000 annual rent for the DPW facility represented "undercharging," not an overcharge.

## G. OPEB CHARGES

Domine confirmed that "OPEB" charges—i.e., charges for "[o]ther post-employment benefits"—were one budgetary line item that was factored into the disputed utility rates. According to Theis, "OPEB refers to benefits which are primarily health insurance expenses that the township is obligated . . . to pay on behalf of retirees," including both those already retired and current employees who will become retirees in the future. Aside from health-insurance expenses, which are by far the largest OPEB item, all expenses of retirees fall under the broad penumbra of "OPEB" expenses.

Heffernan testified that, unlike pension funds, which Michigan municipalities are constitutionally required to keep funded at actuarially determined levels, there is no such requirement with regard to OPEB funding, and thus many municipalities "really kind of ignored" OPEB funding "up until about 15 years ago[.]" Under accounting principles set forth by the Governmental Accounting Standards Board (GASB) somewhere between 2006 and 2008, however, a municipality is required to treat its unfunded OPEB obligations as a liability, which tends to incentivize it to begin the process of properly funding such obligations.[7] In doing so, there is generally an element of "catch up"—i.e., setting aside funds for the amortization of the unfunded actual accrued liability—while also setting aside funds to pay for the OPEB costs of one's current employees. It is "strongly" recommended for municipalities to be proactive about funding their OPEB obligations because it reduces the net present value cost of that benefit. Additionally,

[7] On cross-examination, Heffernan admitted that the GASB has no authority to *compel* municipalities to duly fund their OPEB obligations, only to direct them concerning how such obligations should be accounted for in financial documents.

Heffernan opined that municipalities have "a moral obligation" to do so, although there are still some communities that have not funded any of their OPEB obligations. He compared failing to fund OPEB requirements to not setting aside money for pension funds, which he viewed as "bonkers." He explained: "[T]o not pay today's cost for that really says I'm going to have employees provide me services and I'm going to tell them, in exchange for the services you provide me I'll give you a salary; I'll also give you this benefit that I'll ask your grandchildren to pay."

In Theis's view, OPEB entitlements were "earned" by employees during their work tenure, and the Township's obligation to fulfill those entitlements accrued at the same time. Heffernan agreed with Theis that employees "earned" their OPEB benefits during their working career with the Township, although such benefits are "paid for," primarily in the form of insurance premiums, after the employees retire. Theis indicated that the inclusion of OPEB charges in the disputed utility rates began in 2009, by way of a resolution passed by the Township board, and at some point, the Township also began to include OPEB charges in the fees charged by its cable studio and building inspection fund. The amount of the disputed OPEB charges included in the utility rates—which varied over the relevant years from about $200,000 to approximately $577,000—was based on a "very complicated calculation" that was, in turn, based on "a moving target" in the form of the latest actuarial reports concerning the Township's future OPEB obligations. Ultimately, during the fiscal year that began March 31, 2016, the Township transferred the $2.7 million in OPEB charges that had accrued in the water and sewer fund into a return-yielding retiree health care trust, which is "dedicated to . . . currently retired water and sewer employees as well as trying to save for the future retirees of the water and sewer fund."[8] Since then, smaller annual contributions of the accrued OPEB charges have been deposited to that trust. Such OPEB funds are partially intended as "catch up" to cover some of the past service cost, which was necessary "because all the prior administrations didn't set aside that money as the employees were earning it, which is what you should do." Theis indicated that the Township's "OPEB costs are jumping up exponentially each year" and are "some of the largest in the state," with current actuarial projections anticipating the future OPEB obligations of the Township at more than $160 million, more than $10 million of which is attributable to retirees or employees of the water and sewer fund.

According to Theis, by paying $2.7 million into the OPEB trust, the Township made an immediate impact on its current OPEB expenses. "[T]he OPEB line item expense immediately decreased the following year," which resulted in a corresponding decrease in the disputed utility rates, particularly in light of certain recently enacted GASB accounting practices for municipalities. In part, Theis admitted that the OPEB charges in the disputed rates were necessary because the Township can only collect so much in a millage and they get rolled back by Headlee and so forth. He indicated that, although he is aware of "nothing . . . that forces" the Township to

[8] In the Township's "main operating funds"—its "general fund, road fund, and public safety fund," which employ about 80% of the Township's employees—at the close of each fiscal year, any surplus funds are used to fund a similar OPEB trust for the employees of those funds.

proactively set aside funding for its OPEB expenses, the Township's goal is to fully fund its OPEB obligations in trust, thereby relieving the current operating budget and rate payers from that retiree expense. Theis hoped that it would actually accomplish that goal sometime during his career, but he had doubts, given that, at the time of trial, the Township was "only 3 percent funded." In his view, the disputed OPEB charges were something that was ultimately for the benefit of not just the Township, but the rate payers, given that new legislation was being contemplated that might force the Township to more aggressively fund its OPEB obligations, which could compel a more dramatic rate increase in the future. In Theis's opinion, it was prudent to be proactive, not reactive, with regard to such budgetary issues.

In Heffernan's view, there was nothing "improper" about the Township's transfer of $2.7 million to the OPEB trust. And Heffernan agreed that transfer will ultimately result in significant OPEB savings to the water and sewer fund because, once held in such a trust, up to 70% of the funds can be invested in "equities" with an expected annual return of 7% or more, whereas money held in the water and sewer fund is subject to certain regulations that has historically limited the annual return to under 1%.

## H. PUBLIC FIRE PROTECTION (PFP) CHARGES

Domine indicated that, aside from delivering potable water to the Township's customer, the municipal water system is also is also used for "firefighting capability," providing water to the Township's fire hydrants. According to Trice, the Township's water customers receive a special benefit from the Township's fire hydrants because those hydrants are only placed along the course of the "public water system[.]"

Heid agreed that the provision of fire protection capabilities is one of the two fundamental functions of a municipal water supply utility, with the other being the provision of potable water to municipal customers. By nature, however, those functions fundamentally differ insofar as municipal customers use water on a relatively constant basis, whereas a fire hydrant generally serves in a standby capacity, being used only when there is a fire or "the utility needs to flush their system for periodic maintenance." Nevertheless, the PFP function of a water system carries "a very significant cost" because "[g]enerally, . . . all of the facilities have to be oversized. They have to be two or three times the size that they would be" otherwise. Also, to provide PFP capability, a water system must have a source of supply that provides more water, a greater amount of elevated storage, larger water mains, and either extra higher-powered booster pumping stations. Hence, "[t]ypically, public fire protection is considered a service because public fire protection does require the utility to overbill, if you will, because it needs to be able to meet those particular demands when you do have a fire." Professional standards would generally require that the value of such PFP services be paid for out of a municipality's general fund, not borne by the municipal water utility and its ratepayers.

Heid indicated that, in determining the portion of a utility's PFP expenses that is properly allocable to the municipality, there are two generally employed methods. The first, "preferable,"

and "most widespread method" is to per-form "a fully allocated cost of service study where the utility actually calculates the capacity requirements associated with providing public fire protection service and determining the cost of providing that service and what the rate should be for providing that service." The second is an antiquated method that was developed in Maine in 1961 (the "Maine Curve method"). Under the Maine Curve method, the peak day requirements of the utility are calculated by multiplying the estimated average daily water usage by an "average peak" factor of 2½, thereby estimating the "peak day" (or "peak hour demand") on the system's water usage. Subsequently, the utility's *overall* "peak day requirements" are compared to the calculated peak day requirements associated with providing public fire protection, as calculated by a formula that is based upon population that establishes the estimated need of fire flow. The ratio between those two figures is then charted on a graph of "the Maine Curve" to determine what percentage of the water utility's gross revenue should be recovered by PFP charges assessed to the given municipality's general fund.

Heid did not attempt to analyze the Township's PFP expenses under the preferable 'fully allocated cost of service study" method because he had inadequate information, and it is "virtually impossible" to do so in the adversarial setting of litigation because the process relies on the candid opinions of the given utility's staff members. Rather, for each year at issue in this case, Heid calculated the Township's public fire protection costs utilizing the Maine Curve methodology. In doing so, he estimated the Township's overall "peak day requirements" using the "average peak" factor of 2½, and he admitted that, if the Township's actual peak day requirements varied from that estimated figure, it would alter his analysis. Using the estimated figure, however, the results indicated that, during the relevant years, the Township's water and sewer fund should have recovered between 10% to 15% of its gross revenue by way of PFP charges paid by the Township's general fund. Indeed, under the Maine Curve method, the minimum appropriate charge to a municipality for PFP services is 6% of the water utility's gross revenues. Heid opined that the Township had acted improperly by failing to pay such expenses out of its general fund and instead recovering its PFP expenses in the disputed water rates, which effectively forced the water utility's "end use customers" to pay for PFP services that were provided to all of the Township.

On cross-examination, however, Heid admitted that the M1 Manual indicates that assessing PFP costs to the rate payers, rather than the municipal taxpayers, is one method for meeting any revenue requirement for the PFP costs. Moreover, it is a method that is, in Heid's experience, used "from time to time under certain circumstances," although he did not specify when or under what circumstances. Heid also reaffirmed that the M1 Manual embodies the generally accepted rate making principles for water utilities.

About 96% of Heffernan's auditing experience involved Michigan municipal and governmental entities, and he indicated that he had never before encountered a PFP challenge like the one at issue in this case. Indeed, as far as Heffernan knew, neither his direct clients nor any other client of Plante Moran had ever been subject to any kind of requirement to have a PFP charge like the one described by Heid, although Heffernan had encountered municipalities that did so voluntarily. Similarly, Foster testified that, "most" water distribution systems in Michigan don't

even identify what the PFP costs are, and those that *do* generally recover such costs through their water rates, not by charging the general fund. Foster was aware of only one Michigan municipality that ostensibly recovered (or had in the past recovered) PFP charges in the fashion suggested by Heid, and it did so only because a local ordinance explicitly mandated the practice. When Foster was asked whether the Maine Curve method is "widely recognized as a method of determining fire protection costs" in Michigan, he replied: "I don't believe so. In the few instances that I'm aware that an entity goes through the practice of allocating . . . public fire protection costs, other methods besides the Maine curve are used."

Heffernan explained that, for municipal utilities, it is difficult to accurately follow generally accepted accounting principles (GAAP) concerning "revenue recognition" and "expense recognition," which is somewhat similar to the non-GAAP concept that is commonly referred to as the "matching principle." Under GAAP, "[e]xpenses should be recognized at the time the transaction occurs that causes you to incur a cost, regardless of when the cash flow goes out," and the same principle generally applies to revenues, although there are exceptions. In the context of municipal utilities, however, following such principles is difficult because water meters are generally read on a quarterly basis, and thus a utility can only estimate how much water was used at any given time. Accordingly, the goal is to use such estimates to "get it materially right."

On cross-examination, when Heffernan was asked whether he was "aware of . . . any state or local laws that require" PFP charges "to be incorporated as part of a general fund obligation as opposed to a water and sewer" fund obligation, he replied that he could think of only one such law. He had reviewed one attorney-prepared "interpretation" of the Revenue Bond Act of 1933, MCL 141.101 *et seq*., which suggested "that if you have a revenue bond, . . . it's better to have the general fund paying for" PFP charges.

## I. CASH BALANCE OF THE TOWNSHIP'S WATER AND SEWER FUND

According to Theis, the Township's "water and sewer" fund was one of several Township "funds" with its "own set of books," separate from the "general fund." As an "enterprise" fund, the state did not require the Township to maintain an annual "budget" for the water and sewer fund, but the Township nevertheless did so in the interest of "transparency" and accurate ratemaking. From 2011 to 2017, the water and sewer fund had total "cash inflows of 156-ish million dollars, and cash outflows" of "151 point something million." Theis opined that this represented clearly proportionate cash outflows of 96% of the cash inflows.

Theis agreed that, as of March 31, 2010, the Township's water and sewer fund included "about $4 million dollars of cash and cash equivalents[.]" One year later, on March 31, 2011, the fund included approximately $6.6 million in cash and cash equivalents; on March 31, 2012, it contained about $11.5 million; on March 31, 2013, it contained roughly $14.5 million; on March 31, 2014, it contained "in excess of $18 million"; on March 31, 2015, following annual capital-asset purchases of $5.7 million, it contained about $12.5 million; on March 31, 2016, after the $2.7

million OPEB transfer, it contained approximately $7.8 million; and on March 31, 2017, it contained about $8 million.

After reviewing the water and sewer fund's cash flows over that same period and duly considering its non-rate revenues, Heffernan opined that those cash inflows and outflows, which were within 4 percent of one another over the course of the relevant timeframe, were "very proportional." If anything, Heffernan believed that the Township should have been "trying to increase their cash investment reserves a little bit" more. Put succinctly, his opinion was that from 2011 to 2017, the water and sewer fund's "total accumulation of cash, even though it varied from year to year, wasn't unreasonable[.]"

Foster agreed that the disputed rates and charges were both reasonable and proportional to the underlying utility costs, summarizing his opinion as follows:

> Based on my review of the water and sewer rates in place between 2010 and 2017, . . . the revenues generated by the water and sewer rates have been commensurate with the revenue requirements of the water and sewer enterprise fund to provide service to the customers of the Township. The amount of money recovered through those rates has been proportionate to the cost of providing the service to the residents and businesses in the Township.

On cross-examination, however, Foster conceded that, hypothetically speaking, even if the disputed rates were duly proportional to the underlying utility expenses, the water and sewer fund could nevertheless use the revenue *generated* by such rates for clearly improper purposes, such as purchasing an expensive vacation home for the Township's board members.

Theis confirmed that the Township's water and sewer fund operated at a net loss in four of the fiscal years from 2005 to 2010, which forced the Township to subsidize it with cash from other Township funds. In 2010, for example, the water and sewer fund ended "9 of the 12 months . . . with negative operating cash." Over the years, Theis implemented multiple changes aimed at remedying such shortfalls, and since 2012, the water and sewer fund had no negative balances at any month end, although there had been "low balances." One month in 2017, for example, the fund was left with only $1,800 in cash on hand. Theis also endeavored to build up a sufficient "emergency reserve" in the water and sewer fund to address emergent breaks and repairs of items such as water mains, which can cost "hundreds of thousands of dollars" or even "millions" to repair, along with operating reserves, debt reserves, and capital improvement reserves. According to Theis, such reserve funding is essential "for the prudent operation of a healthy water and sewer fund," and despite his best efforts, he believed that the water and sewer fund was "still not in a position to have proper reserves[.]" He further opined that having total reserves of about $13 or $14 million was a "pretty conservative, appropriate . . . target to get to."

Theis admitted that, in reviewing financial statements for the disputed years, he found one instance in 2015 where a $600,000 expense was mistakenly counted twice in setting the disputed utility rates, thereby raising the rates. But he highlighted this as proof of how important it is to

view the water and sewer fund as a whole, rather than focusing on individual line items, noting that despite including the $600,000 expense twice in setting the rates for 2015, those rates ultimately resulted in an overall loss for the water and sewer fund that year, raising insufficient revenue to cover the fund's annual expenses.

Heffernan indicated that although there's no exact science to determine how much a municipal utility should keep in reserves, the water and sewer fund's reserves of about $4 million in 2010 "felt a little bit low." There is a consensus among experts that it is appropriate to maintain reserves for two fundamental areas: operating expenses and capital expenses (including future capital projects). In practice, Heffernan generally recommended that his clients maintain operational reserves of about 25% of their annual operating revenue, while his recommendation concerning capital reserves was dependent on the capital expenses the client anticipated in the next two to three years. Although a municipality could instead fund its capital projects on a pay-as-you-go basis, that was a "somewhat riskier" approach that Heffernan would "probably" advise against. After reviewing the water and sewer fund's 20-year capital plan, Heffernan opined that in the neighborhood of $13.9 million was an appropriate reserve target, and he agreed that the reserve levels at the time of trial were still "well below" what was advisable.

Foster added that his review of the Township's financial records during the relevant timeframe demonstrated that "the amounts that were specifically identified on the rate memoranda as capital improvements, and the amounts that were actually, from the audited statements, spent on capital improvements over that time period are remarkably close." This supported his opinion that the rates and charges have generated revenues commensurate with the revenues required to operate and finance capital improvements to the system over the time in question.

In addition, Heffernan opined that a municipality's reserve level is an appropriate consideration in both municipal utility ratemaking and in determining the proportionality of disputed utility rates. In short, a utility should "be setting [its] rates in a manner that will get the reserves where they should be." If the reserves are too low, rates should be increased—even if this results in temporarily "disproportional" cash flows—and the converse is equally true. On cross-examination, Heffernan admitted that the Township did not have a written plan with regard to its target reserve figures, but he explained that, based on the other 125 cities and townships that he was familiar with as an auditor, it was "highly unusual" for a municipality to have such a written plan.

## J. TRIAL COURT'S OPINION, JUDGMENT, AND AMENDED JUDGMENT

Following the parties' closing arguments, the trial court took the matter under advisement and, on July 12, 2018, it announced its opinion orally from the bench.[9] The court ruled in favor of the Township with regard to all of plaintiff's claims pursued under § 31 of the Headlee Amendment, entering a judgment of no cause of action with respect to those claims. Generally, the court reasoned that, under the test set forth in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998), plaintiff failed to demonstrate that the disputed charges in this case constituted unlawful tax exactions.

Turning to plaintiff's common-law claims for assumpsit for money had and received, the trial court ruled partially in favor of both parties. With regard to non-rate revenue and revenue attributable to the Township's sewer-only customers ("sewer-only revenue"), the court ruled in plaintiff's favor despite repeatedly finding that in light of the Township's ratemaking methodology—which the court referred to as "abstruse, recondite methodology"—the court was unable to determine whether the disputed rates were proportional to the associated utility costs and, if not, what "damages" figure was warranted. The trial court also chided the Township for failing to "show its work," indicating that, based on the record before the court, it was "not evident that the rates are just and reasonable."

This was a common theme in the trial court's decision. The court recognized that both *Novi v Detroit*, 433 Mich 414, 428-429; 446 NW2d 118 (1989), and *Trahey v Inkster*, 311 Mich App 582, 594, 597-598; 876 NW2d 582 (2015), held that municipal utility rates are presumed to be reasonable and that the plaintiff bears the burden of rebutting that presumption when challenging such rates. But the trial court indirectly criticized *Trahey*'s reasoning, and it refused to rely on the presumption of reasonableness in deciding this case. The court described that presumption as a "substitute for reason" and an exercise in "thoughtless thoughtfulness," at least as applied here; suggested that *Novi* and *Trahey* are outdated, having relied on caselaw from "1942 and 1943"; and indicated that application of the presumption of reasonableness in this case would "bastardize the presumption" and "absolutely, necessarily, unequivocally transform it into an unrebuttable presumption[.]" In support, the trial court reasoned that "[i]t is clear from a reading of the law that a presumption exists once the details are on the table for all to see. First comes the details, then comes the presumption." In this instance, the trial court reasoned, the Township's unclear ratemaking methods had

> impeded the Court, and more importantly, [the] customer[s] and taxpayers from passing upon the question of whether the [Township's] rates are proportionate to its costs. This impediment, abstrusity . . . estops invocation of the presumptive reasonableness, the thoughtful thoughtfulness presumption of the rates. Short of

[9] It appears that the trial court had prepared some sort of written decision, which it read into the record rather than issuing a written opinion.

> blind deference to [the Township], . . . [the Township's] impediment . . . hamstrings the Court . . . from even being able to hear a claim of disproportion. In a word, if the presumption were to prevail here, the presumption is and evermore shall be . . . unrebuttable.

After ruling in plaintiff's favor on that basis regarding the non-rate revenue and sewer-only revenue, the trial court reserved its ruling concerning the proper "damages" figures. The court indicated that, if the parties were unable to settle concerning such figures, the Township would be permitted to "chime in" with regard to why, in light of the Township's failure to "show its work," the court should not simply accept plaintiff's related damage calculations. After subsequently considering the matter further, the trial court awarded a "refund to Plaintiff and the Class" of approximately $2.935 million with regard to the "non-rate revenue" claim and about $2.173 million with regard to the sewer-only revenue.

As to plaintiff's claim concerning "lost water," the trial court also ruled in plaintiff's favor. After construing Bloomfield Township Ordinance § 38-225 ("The township shall pay for all water *used* by it in accordance with the foregoing schedule of rates. . . .") (emphasis added) and § 38-226 ("All water service shall be charged on the basis of water *consumed* as determined by a meter installed on the premises of the user by the department.") (emphasis added), the court agreed with plaintiff that, under those provisions, "[i]f water is not consumed, as determined by a meter under [§ 28-226], then by process of elimination, or by default, [it] must be water used by the Township under [§ 38-225]." Put differently: "The cost for this truly lost water bucket per ordinance . . . was destined to be borne on the shoulders of the general fund taxpayers." The trial court also rejected any argument that the Township paid for such "truly lost water" by way of the in-kind services it provides to the water and sewer fund. Rather than ruling concerning the amount of "damages," the trial court instructed the parties "to crunch the numbers."

As to water "used" by the Township's municipal facilities, the trial court held that, although the Township's "rationalization" concerning in-kind remuneration was "obfuscated," plaintiff had failed to "overcome . . . the presumptive reasonableness of the Township's decision to pay" for such water with in-kind services. The trial court also rejected plaintiff's contention that the in-kind arrangement violated Bloomfield Township Ordinance § 38-225, reasoning that the ordinance "does not specify" that in-kind services cannot be used as a form of payment. Nevertheless, the trial court found "liability in Plaintiff's favor" and in favor of the plaintiff class. It awarded no monetary "refund" but ordered defendant to "henceforth" and "permanently" provide "explicit accounting . . . with explicit valuations" of the in-kind services that the Township provides as payment to the water and sewer fund, including payments for "construction water," "lost water," PFP charges, rent, and water used by municipal facilities.

On the other hand, with regard to "construction water," the trial court held that such water is "used" by both the Township and the ratepayers within the meaning of Bloomfield Township Ordinance § 38-225, and it rejected the argument that the Township paid for such water via the in-kind services it provides to the water and sewer fund. On that basis, the trial court ruled in

plaintiff's favor concerning the construction water, again reserving its ruling concerning the amount of "damages" and instructing the parties "to crunch the numbers." After further considering the matter, the trial court eventually entered an amended judgment ordering the Township to issue "a refund to Plaintiff and the Class in the amount of" approximately $3.69 million related to "the Township's own water use," which seemingly covered both "lost water" and "construction water."

With regard to plaintiff's non-Headlee claim concerning the disputed county drain charges, the trial court stated no reasoning in support of its holding. Rather, it simply stated: "Storm water drain, judgment, no cause of action."

As to the disputed rent charges, without explaining its reasoning, the trial court ruled in plaintiff's favor with regard to "[l]iability," but it refused to award any "damages[.]" However, as noted earlier, it issued a permanent injunction against the Township, ordering it to explicitly document any in-kind services used to pay such rent charges.

Similarly, with regard to OPEB charges, the trial court ruled in plaintiff's favor with regard to "liability," but it refused to award any "damages[.]" However, the trial court permanently enjoined the Township to "explicitly document the OPEB dollars in setting its water and sewer rates." The trial court reasoned that the Township's commingling of OPEB-charge revenues that had not yet been funded into the OPEB trust with "surplus" funds in the water and sewer fund was improper given that, until such OPEB funds were transferred to trust, they could be utilized by the water and sewer department "for whatever it deems appropriate."

Finally, as to PFP charges, without explaining its reasoning, the trial court ruled "no cause of action in part," and "liability in Plaintiff's favor in part," initially holding that plaintiff "prevail[ed] in a dollar amount equal to the cost of water in fire hoses over the relevant time frame paid by the general fund." After considering the matter further, however, the trial court entered its amended judgment holding that plaintiff and the plaintiff class were entitled to no "refund" in that regard because the Township "already pays" for such water by way of in-kind services. But the trial court issued a permanent injunction ordering the Township to expressly document such in-kind services and their associated valuations, and it also ordered the Township provide "explicit accounting of water in fire hoses to be paid for by the general fund[.]"

Approximately two months after the trial court announced its decision, it held a hearing concerning the proper remedies in this case. While entertaining argument in that respect, the trial court asked plaintiff's counsel whether, in light of the Township's "abstruse, recondite" ratemaking, there was some "legal vehicle" by which the court might award plaintiff "damages" despite its having found both that it was unable to determine whether the disputed rates were actually disproportionate to the associated costs and that the amount of any disproportionality was impossible to determine based on the record evidence. The trial court indicated that it would keep that issue "on the backburner" and allow plaintiff to argue the issue further at a later date.

Less than two weeks later, however, the trial court entered its initial judgment in this case. That initial judgment explicitly indicated that it was not a final order and that the trial court retained jurisdiction "for all purposes[.]" But in a subsequently entered order, the trial court ruled: "[T]he inquiry to plaintiff was and remains this: 'Is there a legal or equitable doctrine which would yield a judicial adjudication in favor of one party because the other party obscured proofs needed for that judicial adjudication?'."

Hence, about three months after the initial judgment was entered, plaintiff filed a motion for relief from judgment under MCR 2.612(C)(1)(f), requesting entry of an amended judgment on the basis that there were, in fact, several legal or equitable doctrine that would yield a judicial adjudication in plaintiff's favor because the Township had obscured proofs. At the ensuing motion hearing, the trial court indicated that plaintiff's motion was "inaptly titled" as a motion for relief from judgment and would, instead, be treated as a motion to "supplement" the initial judgment. The court acknowledged that it "remain[ed] unsure if the [Township] committed the singular wrong of passing a rate disproportionate to costs," explaining that, in the court's estimation, the "wrong" committed by the Township "was wont of clarity" in its "abstruse recondite rates[.]" Based on the caselaw cited by plaintiff, the trial court indicated that it was persuaded that "such wrong of unclarity itself . . . fulfills the element Plaintiff needed to prove that the Defendant's rates were disproportionate to costs in the amount of nonrate revenue and sewer-only receipts[.]"

Thus, the trial court granted plaintiff most of her requested relief, entering an amended judgment awarding plaintiff and the plaintiff class, in sum, approximately $9.58 million (including prejudgment interest) in "refunds," along with the permanent injunctive relief described earlier. The instant appeals ensued.

## II. ANALYSIS

### A. STANDARDS OF REVIEW

On appeal, the parties raise several distinct claims of error, which we review under varying standards. "This Court . . . reviews de novo the proper interpretation of statutes and ordinances," *Gmoser's Septic Serv, LLC v East Bay Charter Twp*, 299 Mich App 504, 509; 831 NW2d 881 (2013), and the legal question of whether a municipal utility charge constitutes an unlawful exaction under § 31 of the Headlee Amendment, *Mapleview Estates, Inc v City of Brown City*, 258 Mich App 412, 413-414; 671 NW2d 572 (2003). As a general rule, this Court also reviews equitable issues de novo, *Sys Soft Technologies, LLC v Artemis Technologies, Inc*, 301 Mich App 642, 650; 837 NW2d 449 (2013), reviewing any related factual findings by the trial court for clear error, *Canjar v Cole*, 283 Mich App 723, 727; 770 NW2d 449 (2009). "A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *In re AGD*, 327 Mich App 332, 338; 933 NW2d 751 (2019). In reviewing a trial court's factual findings, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

However, a trial court's decision to grant equitable relief in the form of an injunction is generally reviewed for an abuse of discretion. *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 33-34 & n 12; 896 NW2d 39 (2016). "A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes, or when it makes an error of law." *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 320; 900 NW2d 680 (2017) (*Planet Bingo*) (quotation marks and citation omitted).

## B. PLAINTIFF'S ASSUMPSIT CLAIMS

The parties disagree whether the trial court's use of its equitable powers was proper here. As appellant, the Township argues that, having found that plaintiff had failed to demonstrate that the disputed rates were disproportionate to the underlying costs, the trial court erred by disregarding the presumption that those rates were reasonable. The Township also argues that the trial court erred by awarding plaintiff and the plaintiff class both the monetary award and permanent injunctive relief that it did. Contrastingly, by way of plaintiff's cross-appeal, she contends that the trial court should have awarded additional refunds related to the disputed OPEB, PFP, and rent charges. We agree with the Township that the trial court erred by failing to apply the presumption that the disputed rates were reasonable and abused its discretion by granting plaintiff permanent injunctive relief despite her failure to demonstrate that doing so was necessary to prevent irreparable harm.[10]

Aside from the claims that plaintiff asserted under the Headlee Amendment—which we analyze later in this opinion—plaintiff's claims in this action were all captioned as claims for "**ASSUMPSIT/MONEY HAD AND RECEIVED**[.]" As our Supreme Court long ago recognized in *Moore v Mandlebaum*, 8 Mich 433, 448 (1860):

> [T]he action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties, and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover. And that, as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action.

[10] Our decision in this regard renders moot the Township's argument that the trial court erred or abused its discretion by amending its initial judgment to award additional "damages." Hence, we decline to decide that issue. See *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016) ("A matter is moot if this Court's ruling cannot for any reason have a practical legal effect on the existing controversy.") (quotation marks and citations omitted).

Accord *Trevor v Fuhrmann*, 338 Mich 219, 224; 61 NW2d 49 (1953), citing *Moore*, 8 Mich at 448. At common law, assumpsit was a proper vehicle for recovering unlawful "fees," "charges," or "exaction[s]"—including unlawful utility charges—that the plaintiff had paid to a municipality under compulsion of local law. See *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 704; 178 NW2d 484 (1970) (quotation marks and citations omitted). Notably, such an action "will not lie against one who has not been personally *enriched* by the transaction" because the fundamental "basis" of the action "is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same." *Trevor*, 338 Mich at 224-225 (quotation marks and citations omitted; emphasis added).

"With the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished. But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved[.]" *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013). Hence, an "assumpsit" claim is modernly treated as a claim arising under "quasi-contractual" principles, which represent "a subset of the law of unjust enrichment." *Wright v Genesee Co*, 504 Mich 410, 421; 934 NW2d 805 (2019).

In contemporary municipal utility ratemaking cases, a similar focus on principles of "unjust enrichment" is encapsulated within the rebuttable presumption that a municipality's utility rates are reasonable. See generally *Novi*, 433 Mich at 428-429; *Trahey*, 311 Mich App at 594, 597-598. In *Novi*, 433 Mich at 417-418, 428, our Supreme Court was charged with deciding whether MCL 123.141 had abrogated "the longstanding principle of presumptive reasonableness of municipal utility rates," had impacted the applicable burden of proof, or had altered the traditionally circumspect scope of judicial review. Ruling in the context of a *municipality's* wholesale-rate challenge under MCL 123.141(2)—not a *ratepayer's* challenge under MCL 123.141(3)—the Supreme Court held that MCL 123.141 had not meaningfully altered the presumption of reasonableness, burden of proof, or scope of judicial review, reasoning, in part, as follows:

> Historically, this Court has accorded great deference to legislatively authorized rate-making authorities when reviewing the validity of municipal water rates. . . .
>
> * * *
>
> [R]ate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates.
>
> * * *
>
> Michigan courts, as well as those in other jurisdictions, have recognized the longstanding principle of presumptive reasonableness of municipal utility rates. These courts have stressed a policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates. As this Court noted in [*Plymouth v Detroit*, 423 Mich 106, 128-129; 377 NW2d 689 (1985)], the Court

in *Federal Power Comm v Hope Natural Gas Co*, 320 US 591, 602; 64 S Ct 281; 88 L Ed 333 (1944) stated:

> We held in [*Federal Power Commission v Natural Gas Pipeline Co*, 315 US 575, 62 S Ct 736, 86 L Ed 1037 (1942)] that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (Citations omitted.)

* * *

The Michigan Legislature's intention that courts refrain from strictly scrutinizing municipal utility rate-making is reflected in several statutory provisions. . . .

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. The decision of the Court of Appeals, however, superimposes Michigan courts as ultimate rate-making authorities despite the absence of any express statutory language or legislative history that would support such a role in the rate-making process.

* * *

The concept of reasonableness, as recognized by the courts of this state and other states in utility rate-making contexts, must remain operable, in order to provide a meaningful and manageable standard of review.

* * *

> For these reasons, we hold that 1981 PA 89 [i.e., the public act that last amended MCL 123.141,] did not render inoperable the concept of reasonableness in the process of judicial review of municipal utility water rates. The burden of proof remains on the plaintiff to show that a given rate or rate-making method does not reasonably reflect the actual cost of service as determined under the utility basis of rate-making pursuant to MCL 123.141(2)[.] [*Novi*, 433 Mich at 425-433 (bracketed alterations added).]

Because *Novi* involved a rate challenge pursued by a municipality under MCL 123.141(2), not a ratepayer challenge pursued under MCL 123.141(3), *Novi*'s statutory analysis focused almost exclusively on MCL 123.141(2). However, in *Trahey*, 311 Mich App at 594, 597-598, this Court expanded the scope of *Novi*'s pertinent holdings, applying them in the context of a resident-ratepayer challenge under MCL 123.141(3). Thus, the presumption of reasonableness was extended to the rates a municipality charges its ratepayers. *Id*. at 594. The plaintiff bears the burden of rebutting the presumption of reasonableness "by a proper showing of evidence." *Id*. "Absent *clear evidence* of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." *Shaw v Dearborn*, 329 Mich App 640, 654; 944 NW2d 153 (2019),[11] quoting *Trahey*, 311 Mich App at 595 (emphasis in *Shaw*).

As authority for its position aside from *Trahey*, *Shaw*, and *Novi*, the Township relies on, among other things, two unpublished decisions of this Court that were decided together in 2019. Plaintiff argues that this Court should disregard those unpublished decisions because they are not binding and "were wrongly decided." Plaintiff is correct that unpublished decisions of this Court are not precedentially binding under MCR 7.215(C)(1), but she fails to recognize that they may nevertheless be considered as "persuasive or instructive" authority.[12] See *Kern v Kern-Koskela*, 320 Mich App 212, 241; 905 NW2d 453 (2017).

In any event, the heart of the parties' dispute regards the manner in which the rule of law set forth in *Trahey* should be applied. Specifically, citing in support *Trahey*, 311 Mich App at 595 ("[a]bsent clear evidence of *illegal or improper expenses* included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable") (emphasis added),

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[11] The pending application for leave to appeal in *Shaw* has been held in abeyance pending our Supreme Court's decision in *Detroit Alliance Against Rain Tax v City of Detroit*, ___ Mich ___; 937 NW2d 120 (2020). *Shaw v Dearborn*, ___ Mich ___; 944 NW2d 720 (2020).

[12] In the context of similar challenges raised under the Headlee Amendment, this Court has recognized that it "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[.]" *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 665-666; 697 NW2d 180 (2005). But because the instant rate challenges are not pursued under the Headlee Amendment, such authority is not dispositive here.

plaintiff argues that in a ratepayer challenge like the one at bar (i.e., one pursued under MCL 123.141(3)), if a plaintiff *does* present clear evidence of either illegal or improper expenses included in a municipal utility's rates, the presumption of reasonableness is no longer a relevant consideration—that is, the plaintiff need not also demonstrate that the rates, viewed as a comprehensive whole, are unreasonable. Put differently, plaintiff argues that *Trahey* stands for the proposition that, in the face of illegal or improper expenses included in the disputed rates, she is not required to demonstrate that the rates actually *overcharged* for the related water and sewer services.

In stark contrast, the Township argues that, under *Trahey*, even if a *specific* expense that is included in formulating a challenged municipal utility rate is shown to be either illegal or improper, the plaintiff nevertheless bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed as a *whole*. In other words, the Township argues that absent a showing that the disputed rates actually overcharged plaintiff and the plaintiff class for the related water and sewer services, plaintiff's challenge to those rates—and her request for monetary "damages" in particular—is fatally flawed. We agree with the Township.

In our view, the flaw in plaintiff's argument rests less on a textual dissection of *Trahey* than it does on the fundamental nature of plaintiff's equitable "assumpsit" claims. "[E]quity regards and treats as done what in good conscience ought to be done." *Allard v Allard (On Remand)*, 318 Mich App 583, 597; 899 NW2d 420 (2017) (quotation marks and citation omitted). Had plaintiff sought a declaratory judgment that certain costs included in the disputed water and sewer rates were improper or illegal, perhaps she would be correct that the presumption of reasonableness would be irrelevant. Instead, however, by asserting her claims for assumpsit, plaintiff sought "restitution"—in the form of a refund to herself and the plaintiff class—of whatever amount was necessary to "correct for the unfairness flowing from" the Township's "benefit received," i.e., its "unjust retention of a benefit owed to another." See *Wright*, 504 Mich at 417-418, 422-423. Whether the Township would receive an unjust "benefit" from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were "excessive," not on whether some aspect of the Township's ratemaking methodology was improper. See *id*. at 419 ("Unjust enrichment . . . doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense. And the correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded *excessive and unjust benefits* to his or her rightful position.") (emphasis added).

Plaintiff's strained interpretation of *Trahey* would permit an order of restitution in this case without any evidence or finding that the Township was enriched, let alone excessively compensated, by collecting and retaining the disputed utility charges. Moreover, even assuming, arguendo, that plaintiff is correct concerning this Court's holding in *Trahey*, she fails to recognize that, to the extent that *Trahey* might be read as inconsistent with our Supreme Court's decisions concerning the essential nature of unjust enrichment and restitution in *Wright*, or with *Novi*'s holding regarding the continued viability of the presumption of reasonableness, *Trahey* must be

ignored under the doctrine of vertical stare decisis. See *In re AGD*, 327 Mich at 339 (noting that, under the doctrine of vertical stare decisis, only our Supreme Court has authority to overrule one of its prior decisions, and until that Court does so, its former decisions remain binding on all lower courts); *Allen v Charlevoix Abstract & Engineering Co*, 326 Mich App 658, 665; 929 NW2d 804 (2019) (noting that this Court is "required to ignore" its former published decisions "in favor of any conflicting Supreme Court precedent").

The application of such principles in this case is straightforward. On several occasions, the trial court explicitly found that plaintiff had failed to rebut the presumption of reasonableness or demonstrate that the disputed rates were excessive in comparison to the associated costs of providing the related water and sewer services. On this record, we perceive no basis to disturb those factual findings. On the contrary, without a comprehensive rate study—or some similar evidence demonstrating that the disputed rates excessively compensated the Township for the related utility services—one can at best speculate about whether the disputed rates were proportional to the underlying costs. And several of the testifying experts at trial specifically indicated that, based on a review of the Township's audited financial statements, its cash inflows and outflows over the disputed period were proportional. Therefore, we are not definitely and firmly convinced that the trial court made a mistake when it found that plaintiff had failed to demonstrate disproportionality in the rates.

In light of that finding, however, the trial court erred by nevertheless ordering defendants to refund more than $9 million to plaintiff and the plaintiff class. Given that plaintiff failed to demonstrate that the Township would be excessively (and thus unjustly) enriched by the retention of such funds, the trial court should not have ordered the refund that it did. See *Wright*, 504 Mich at 417-418, 422-423; *Trahey*, 311 Mich App at 594, 597-598.

We also conclude that the trial court abused its discretion by granting plaintiff a permanent injunction requiring the Township to document its ratemaking efforts in a specified fashion. "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*." *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992) (quotation marks and citation omitted; emphasis added). See also *Royal Oak Sch Dist v State Tenure Comm*, 367 Mich 689, 693; 117 NW2d 181 (1962) ("Equity should not be used to obtain injunctive relief where there is no proof that complainant would suffer irreparable injury."). Moreover, the party seeking injunctive relief has the burden of demonstrating that the requested injunction is appropriate and necessary. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 3; 753 NW2d 595 (2008); *Dutch Cookie Machine Co v Vande Vrede*, 289 Mich 272, 280; 286 NW 612 (1939).

As noted, we find no basis to disturb the trial court's finding that plaintiff failed to demonstrate that the disputed rates were actually disproportionate to the underlying utility costs. Consequently, plaintiff also failed to demonstrate that the injunctive relief ordered by the trial court was necessary to avert irreparable harm. On this record, one cannot tell whether plaintiff or the plaintiff class suffered any harm at all as a result of the disputed rates or ratemaking practices, let

alone an *irreparable* injury or the real and imminent danger of suffering such an injury. By nevertheless granting a permanent injunction against the Township with regard to its ratemaking methodology, the trial court abused its discretion, overstepping the proper bounds of both its injunctive powers and the limited scope of judicial review that is appropriate in ratemaking cases such as this one. See *Dutch Cookie Machine Co*, 289 Mich at 280 (holding that the party seeking an injunction bears the burden of proving that its issuance is warranted); *Novi*, 433 Mich at 428, 431 (discussing "the difficulties inherent in the rate-making process," "the statutory and practical limitations on the scope of judicial review," and the general "policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates").

## C. THE REVENUE BOND ACT OF 1933

As cross-appellant, plaintiff contends that the trial court erred by failing to recognize that the disputed PFP charges are unlawful under the Revenue Bond Act of 1933 (RBA), MCL 141.101 *et seq*. In particular, plaintiff argues that those charges are unlawful because they permit the Township to receive "free service" in contravention of MCL 141.118(1), which provides, in pertinent part:

> Except as provided in subsection (2),[13] free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality. The reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both . . . .

Specifically, plaintiff argues that the Township receives "free" PFP services, in contravention of MCL 141.118(1), because the Township's water and sewer fund, not its general fund, pays for those services by incorporating the PFP expenses into the disputed utility rates.

Assuming, without deciding, that the RBA is applicable here, that plaintiff is entitled to pursue a private cause of action seeking damages for violation of the RBA (which is an issue that she has failed to brief), that such a private action constitutes a valid end-around of the presumption-of-reasonableness standard discussed in *Trahey* and *Novi*, and that plaintiff is correct that it *would* violate MCL 141.118(1) if the Township were to fail to pay for its PFP services in the manner alleged, plaintiff's argument is nevertheless unavailing. Plaintiff ignores the fact that, in the trial court's amended judgment, it expressly found that the Township did, in fact, pay for the disputed PFP expenses by way of in-kind remuneration provided to the water and sewer fund. In plaintiff's

[13] The referenced subsection, MCL 141.118(2), is irrelevant here, given that it applies to "[a] public improvement that is a hospital or other health care facility . . . ."

brief as cross-appellant, she fails to explicitly argue that the trial court's finding in that regard was clearly erroneous, and we discern no basis for disturbing it.

There was extensive evidence at trial concerning the in-kind services the Township renders to its water and sewer fund, with Heffernan estimating their annual value at somewhere around $700,000 or $800,000. On the other hand, there was a relative dearth of evidence concerning the proper value for the trial court to ascribe to the PFP services. Plaintiff's own expert, Heid, admitted that the "preferable" method of assessing the value of such services was to perform "a fully allocated cost of service study" and that he had failed to do so, having instead used the "antiquated" Maine Curve methodology. Therefore, we are not persuaded that the trial court clearly erred when it found that the Township's provision of in-kind services constituted sufficient payment for the disputed PFP services. And in light of the finding that the Township *was* paying for those PFP services, we cannot conclude that the trial court erred by failing to hold that the Township was receiving "free" PFP services in contravention of MCL 141.118(1).

### D. MCL 123.141(3)

Plaintiff also argues that the trial court erred by failing to recognize that the PFP charges are unlawful under MCL 123.141(3) ("The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed *the actual cost of providing the service*.") (emphasis added). But plaintiff fails to explain how even a *proven* violation MCL 123.141(3), standing alone, exempts her instant claim from the presumption-of-reasonableness standard set forth in *Trahey*, 311 Mich App at 594, 597-598, which regarded a rate challenge pursued under the same statute: MCL 123.141(3). In our estimation, the rule of law set forth in *Trahey* concerning the presumption of reasonableness is binding here and that presumption must be applied. See MCR 7.215(J)(1). And for the reasons explained in part II(B) of this opinion, we conclude that plaintiff's assumpsit claims under MCL 123.141(3) are not viable in light of the presumption of reasonableness discussed in *Trahey* and *Novi*. Hence, we reject plaintiff's instant claim of error.

### E. PLAINTIFF'S CLAIMS UNDER HEADLEE § 31

Finally, plaintiff argues that the trial court erred or clearly erred by holding that the disputed OPEB, county drain, and PFP charges were not unlawful exactions under § 31 of the Headlee Amendment. We disagree.

"The Headlee Amendment was adopted by referendum effective December 23, 1978." *Shaw*, 329 Mich App at 652. It was "proposed as part of a nationwide 'taxpayer revolt' in which taxpayers were attempting 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." *Durant v State Bd of Ed*, 424 Mich 364, 378; 381 NW2d 662 (1985). Such purposes "would be thwarted if a local authority could charge higher utility rates to raise revenue and then use some of the excess funds to finance a public-works project." *Shaw*, 329 Mich App at 643. As enacted, the Headlee Amendment "imposes on

state and local government a fairly complex system of revenue and tax limits." *Durant v Michigan*, 456 Mich 175, 182; 566 NW2d 272 (1997).

Plaintiff's claims here are pursued under § 31 of the Headlee Amendment, which provides, in pertinent 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. . . .
>
> The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment. [Const 1963, art 9, § 31.]

As our Supreme Court observed in *Durant*, 456 Mich at 182-183, "Section 31 prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." "Although the levying of a new tax without voter approval violates the Headlee Amendment, a charge that constitutes a user fee does not," and the party challenging a given municipal utility charge under § 31 "bears the burden of establishing the unconstitutionality of the charge at issue." *Shaw*, 329 Mich App at 653.

As authority in support of plaintiff's position, she primarily relies on *Bolt*, 459 Mich 152, which set forth a three-prong test for determining whether a municipal charge represents a permissible "user fee" or an impermissible "tax" under Headlee § 31. In *Shaw*, 329 Mich App at 653, this Court observed that in *Bolt*, our Supreme Court explained that

> "[t]here 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 raise revenue." *Id*. at 161 (cleaned up). Under *Bolt*, courts apply three key criteria when distinguishing between a user fee and a tax: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose"; (2) "user fees must be proportionate to the necessary costs of the service"; and (3) a user fee is voluntary in that users are "able to refuse or limit their use of the commodity or 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) (cleaned up).

Notably, the presumption of reasonableness regarding municipal utility rates is a "pertinent" consideration when considering the second *Bolt* factor. *Shaw*, 329 Mich App at 654.

In *Shaw*, 329 Mich App 650-652, 664-669, this Court recently employed the *Bolt* factors in considering a Headlee challenge somewhat similar to the one now at bar. The *Shaw* Court upheld the challenged water and sewer rates in that case, holding that they were permissible user fees. *Shaw*, 329 Mich App at 669. In part, this Court reasoned:

> [P]laintiff . . . posits that there are embedded taxes within her utility rates, arguing that a charge need not pay for infrastructure to qualify as a disguised tax. . . .
>
> * * *
>
> Under the analysis suggested by plaintiff, a city could never use funds obtained from city-wide water or sewer ratepayers to install, repair, or replace any particular pipe or facility that is part of the overall water or sewer system. Take, for example, a water main that runs beneath a major thoroughfare on the west side of any average city. The water main does not transport water to the residential homes, commercial businesses, or industrial factories on the east side of that city. Yet, when the water main ruptures and must be repaired, the city can use funds obtained from the general pool of water ratepayers to make the repairs—without transforming its water rates into an unconstitutional tax. The city is not constrained by the Headlee Amendment to determine which specific homes, businesses, or factories in the city use water that flows through the specific water main that burst, and then use revenues derived from only those users to pay the cost of repairing that burst pipe. *When the city uses funds paid by water ratepayers throughout the entire city to pay for the repairs to the burst water main, that repair does not transform the city's water rates into an illegal tax on the ratepayers who use water that flows through pipes other than the one that burst. Rather, the water rates are used to operate and maintain a viable water-supply system for the entire city and the revenues used to make the repairs serve a regulatory purpose of providing water to all of the city's residents.* [*Shaw*, 329 Mich App at 663-665 (emphasis added).]

*Shaw*'s analysis of the *Bolt* factors strongly supports the propriety of the trial court's Headlee ruling in this case. Addressing the first factor, in *Shaw*, 329 Mich App at 666, this Court held that it was

> beyond dispute that the city's water and sewer rates comprise a valid user fee because the rates serve the regulatory purpose of providing water and sewer service to the city's residents. Although the rates generate funds to pay for the operation and maintenance of the water and sewer systems in their entirety, this by itself does not establish that the rates serve primarily a revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is

> in support of the underlying regulatory purpose." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999). Further, . . . the cost of operating and maintaining the caissons, is part of the cost of providing sewer service to the city's ratepayers. Dearborn must provide sewer service in conformance with state and federal regulatory requirements, and keeping the caissons functional helps ensure that sewage is properly treated before it is released into the environment.

Similarly, in this case, it is undisputed that the contested rates are assessed to fund the operational and capital expenses of the Township's water and sewer system, which serves the primary function of providing water and sewer services to the Township's ratepayers. Moreover, to the extent that those rates result in surpluses during some fiscal years, Domine indicated that the Township's 20-year capital improvement program was, at least in part, necessitated by the entry of an "abatement order" against the Township, which arose out of litigation with the DEQ and regarded the level of water "infiltration" in the Township's sewer system. Categorically, such obligations arising out of administrative-agency regulations serve a regulatory purpose. On the strength of the entire record, we hold that the Township's act of raising a prudent level of both revenue and capital and operational reserves through the disputed rates—including revenue to fund its OPEB obligations, the costs of providing fire protection services to the community, expenses related to the county storm-drain system, and necessary capital improvements—primarily serves valid regulatory purposes.

Nor are we persuaded by plaintiff's contention that, because some who are not ratepayers may benefit from the water and sewer system, the disputed rates must be an improper tax. By way of example, although county storm-sewer systems certainly benefit the general public when viewed on a macro scale—e.g., by preventing roadways from flooding, limiting soil erosion and the pollution of waterways, and decreasing demand on regional wastewater-treatment facilities—the vast majority of governmental enterprises benefit the general public, rather than just one regional subset of the public, when viewed on such a scale. As in *Shaw*, plaintiff's proposed application of the first *Bolt* factor would effectively hamstring municipal utilities, preventing them from raising the funds necessary to comply with mandatory state and federal regulations if doing so will yield any sort of incidental benefit for society at large. In any event, viewing the disputed rates as a whole, we are persuaded that they primarily serve valid regulatory purposes under the first *Bolt* factor, which favors the determination that they are user fees rather than taxes.

In considering the second *Bolt* factor, in *Shaw*, 329 Mich App at 666-668, this Court reasoned, in pertinent part, that the disputed "water and sewer rates" in that case

> constitute[d] a valid user fee because users pa[id] their proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. Mathematic precision is not required when reviewing the reasonable proportionality of a utility fee. "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." *Bolt*, 459 Mich at 164-165 (cleaned up).
>
> * * *
>
> Plaintiff reasons that the amount of water that a ratepayer withdraws from the tap bears no relation to the amount of stormwater that enters the combined-sewer system, and she argues that funds derived from water ratepayers therefore cannot be used to pay for the construction, operation, or maintenance of anything related to stormwater without transforming the water and sewer rates into an unconstitutional tax. Plaintiff further argues that the city should design a system of charging property owners, rather than ratepayers, for the removal of stormwater that flows across their property before entering the combined-sewer system or the separated-storm system. Yet, under the Headlee Amendment, it is not this Court's role to determine whether a municipal government has chosen the best, wisest, most efficient, or most fair system for funding a municipal improvement or service. This Court's role, rather, is to determine whether a particular charge imposed by a municipal government is a true user fee or a disguised tax. [Quotation marks and citations partially omitted.]

In this case, on several occasions, the trial court expressly found that plaintiff had failed to demonstrate that the disputed utility rates were disproportionate to the underlying utility costs, and as already explained, we see no basis for disturbing that factual finding. Because plaintiff did not carry her burden of demonstrating disproportionality, it necessarily follows that the second *Bolt* factor militates in favor of the Township's position. See *Shaw*, 329 Mich App at 653 (observing that "the plaintiff bears the burden of establishing the unconstitutionality of the charge at issue").

With regard to the final factor, this Court in *Shaw* ruled as follows:

> The third *Bolt* factor also weighs in favor of finding that Dearborn's water and sewer rates constitute a valid user fee. Each individual user decides the amount and frequency of usage, i.e., each user decides how much water to draw from the tap. See *Ripperger v Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585 (1954) (explaining that "[n]o one can be compelled to take water unless he chooses" and that charges for water and sewer services based on water usage do not comprise taxes); *Mapleview Estates, Inc*[, 258 Mich App at 417] (holding that an increased fee for connecting new homes to water and sewer systems was voluntary because, *inter alia*, "those who occupy plaintiff's homes have the ability to choose how much water and sewer they wish to use"). The purported charges at issue in this case are voluntary because each user of the city's water and sewer system can control how much water they use. [*Shaw*, 329 Mich App at 669.]

The instant case is distinguishable from *Shaw* with respect to the third *Bolt* factor. In this case, the parties agree that the disputed water and sewer rates were each comprised of both a

variable rate, which was based on metered water usage, and a fixed rate. Indeed, Theis testified that the fixed portion of the water rate generally represented about 80% of the utility's required revenue stream. Contrastingly, in *Shaw*, it was "uncontested that Dearborn determine[d] its water and sewer rates based on metered-water usage" alone. *Id*. at 667-668 (distinguishing *Bolt* on the basis that the disputed rates in *Bolt* were "flat rates," not variable rates based on "metered-water usage").

On this record, we conclude that use of the Township's water and sewer services cannot be viewed as "voluntary" for purposes of the *Bolt* inquiry. If a charge is "effectively compulsory," it is not voluntary. *Bolt*, 459 Mich at 167. With the exception of those sewer-only customers who have elected not to have a meter installed to track their actual well-water usage, it is technically true that the Township's water and sewer customers can avoid paying the *variable* portion of the disputed rates by refusing to use any water. But the *fixed* portions of those rates constitute flat-rate charges like those in *Bolt*, 459 Mich at 157 n 6, and such flat rates can only be avoided by not being a utility customer in the first instance. To the extent that the Township contends that the fixed rates are nevertheless voluntary because ratepayers can avoid paying them by moving elsewhere, that argument is unavailing. See *id*. at 168 ("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."). In light of *Bolt*, 459 Mich at 167-168, we conclude that at least the fixed portion of the disputed rates here—the most sizable portion—is effectively compulsory. Thus, the third *Bolt* factor weighs in favor of plaintiff's position.

On balance, plaintiff has failed to carry her burden of demonstrating that the disputed rates are impermissible taxes, rather than user fees, for purposes of Headlee § 31. The first and second *Bolt* factors clearly favor the conclusion that the disputed charges are proper user fees, and with regard to the third factor, "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." See *Wheeler*, 265 Mich App at 666. Therefore, the trial court did not err by entering a no-cause judgment against plaintiff with regard to her Headlee claims.

Affirmed in part, reversed in part, and remanded to the trial court for entry of a judgment of no cause of action in the Township's favor. We do not retain jurisdiction.

/s/ Cynthia Diane Stevens
/s/ Christopher M. Murray
/s/ Deborah A. Servitto

# EXHIBIT - 29

# Order

**Michigan Supreme Court**
**Lansing, Michigan**

September 29, 2021



160806

KELLY GOTTESMAN, on Behalf of Himself and All Others Similarly Situated,
Plaintiff-Appellee,

v

SC: 160806
COA: 344568
Wayne CC: 17-014341-CZ

CITY OF HARPER WOODS,
Defendant-Appellant.

_____/

By order of July 28, 2020, the application for leave to appeal the December 3, 2019 judgment of the Court of Appeals was held in abeyance pending the decision in *Detroit Alliance Against the Rain Tax v Detroit* (Docket No. 158852). On order of the Court, the case having been decided on December 11, 2020, 506 Mich 996 (2020), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to that court for further consideration.

The Court of Appeals erred by holding that defendant's impermeable-acreage charge is not a tax authorized before the adoption of the Headlee Amendment, Const 1963, art 9, § 6 and §§ 25 to 34, because "MCL 280.539(4) authorizes various types of *charges*; it does not authorize a *tax*." *Gottesman v Harper Woods*, unpublished per curiam opinion of the Court of Appeals, issued December 3, 2019 (Docket No. 344568), p 11. Assuming that the Court of Appeals was correct that the impermeable-acreage charge is a disguised tax under Headlee, see *Bolt v Lansing*, 459 Mich 152 (1998), the dispositive inquiry under Const 1963, art 9, § 31 is whether MCL 280.539(4) permitted the levying of the impermeable-acreage charge before the ratification of the Headlee Amendment, not whether the statute purports to authorize a "tax" or a "charge."

In addition, the Court of Appeals erred by holding that plaintiff's equitable claims could afford additional relief because "plaintiff would be entitled to recover for several more years under [his equitable claims] than under [the Headlee Amendment.]" *Gottesman*, unpub op at 14. As this Court has recognized, "statutes of limitations may apply by analogy to equitable claims." *Taxpayers Allied for Constitutional Taxation v*

*Wayne Co*, 450 Mich 119, 127 n 9 (1995) *(TACT)*. Thus, the fact that the six-year limitations period for plaintiff's equitable claims, MCL 600.5813, exceeds the one-year limitations period for the Headlee Amendment claim, MCL 600.308a(3), does not necessarily mean that the equitable claims may proceed.

In light of these errors, we REMAND to the Court of Appeals to consider: (1) whether the appellant's impermeable-acreage charges were "service charges" under 1970 CL 280.539, so that they were authorized prior to the ratification of the Headlee Amendment, see Const 1963, art 9, § 31, see *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 357 (2000); and (2) if not, whether plaintiff may seek equitable remedies for the alleged violation of MCL 141.91 beyond the one-year limitations period governing the Headlee Amendment claim, see *TACT*, 450 Mich at 127 n 9. Because the first issue was not previously addressed by the trial court, the Court of Appeals may, in its discretion, remand to the trial court to resolve this issue in the first instance. See *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444 (2005) (holding that an appellate court has the discretion to address "an issue raised before, but not decided by, the trial court" if "the lower court record provides the necessary facts").

We do not retain jurisdiction.


s0922

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 29, 2021

Clerk

# EXHIBIT - 30

# Chapter 33 - STORMWATER SYSTEM

*Footnotes:*
*--- (**1**) ---*
***Editor's note—** Ord. No. 62-92, § 1, adopted Jan. 19, 1993, amended Ch. 33, in its entirety, to read as herein set out. Former Ch. 33 pertained to similar subject matter. Subsequently, Ord. No. 17-07, § 1, adopted July 2, 2007, effective July 18, 2007, repealed Ch. 33, §§ 2:200—2:214. Section 2 of said Ord. No. 17-07 enacted provisions designated as a new Ch. 33, §§ 2:200—2:222, to read as herein set out. See also the Code Comparative Table.*

## 2:200. - Title.

This chapter shall be known as the "Stormwater System Ordinance" of the City of Ann Arbor.

(Ord. No. 17-07, § 2, 7-2-07)

## 2:201. - Purpose.

This chapter establishes a stormwater utility for the purpose of conducting the city's stormwater management program to protect public health, safety, and welfare; provides for the proportional allocation to property owners of the necessary costs of the stormwater utility; permits the establishment and collection of just and equitable rates and charges to fund the stormwater utility; provides for credits, adjustments, exemptions and appeals; establishes regulations for the use of the stormwater system, and prescribes the powers and duties of certain municipal agencies, departments and officials.

(Ord. No. 17-07, § 2, 7-2-07)

## 2:202. - Findings.

The City Council finds all of the following:

(1) The constitution and laws of the State of Michigan authorize local units of government to provide stormwater management services and systems that will contribute to the protection and preservation of the public health, safety and welfare, and to the protection of the state's natural resources.

(2) Property owners influence the quantity, character and quality of stormwater from their property in relation to the nature of the alterations made to property.

(3) Stormwater contributes to the diminution of water quality, adversely impacting the public health, safety and welfare, and endangering natural resources.

(4) Control of the quantity and quality of stormwater from developed and undeveloped property is essential to protect and improve the quality of surface waters and groundwaters, thereby protecting natural resources and public health, safety and welfare.

(5) The Federal Clean Water Act and rules and regulations promulgated thereunder place increased mandates on the city to develop, implement, conduct and make available to its citizens and property owners stormwater management services which address water quality, velocity, and volume impacts of stormwater.

(6) Water quality is improved by stormwater management measures that control the quantity or quality, or b stormwater discharging directly or indirectly to receiving waters, that reduce the velocity of stormwater, o divert stormwater from sanitary sewer systems.

(7) The city, having a responsibility to protect the public health, safety, and welfare, has a major role in ensuring appropriate water quality related to stormwater flow.

(8) Improper management of stormwater runoff causes erosion of lands, threatens businesses and residences and other facilities with water damage from flooding, adversely impact public health, safety, and welfare, and creates environmental damage to rivers, streams and other bodies of water in Michigan, including the Great Lakes.

(9) The public health, safety, and welfare is adversely affected by poor ambient water quality and flooding that results from inadequate management of both the quality and quantity of stormwater.

(10) It is appropriate for the city to establish user charges, fees, or rates to offset entirely or in part the cost of its stormwater management program.

(11) It is in the interest of protecting both the waters of the state from pollution and the public health, safety, and welfare for the city to fund stormwater management with a charge that allocates the costs of these services to property owners within the city based upon the extent to which each parcel of real property contributes to the need for stormwater management.

(Ord. No. 17-07, § 2, 7-2-07)

2:203. - Definitions.

For the purposes of this chapter, the following words and phrases shall have the meanings described in this section:

(1) [*Reserved.*]

(2) *Administrator* is the public services area administrator or such other person as the City Administrator may designate.

(3) *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.

(4) *Discharge permit* is as set forth in section 2:216 of this chapter.

(5) *Footing drain* is a pipe or conduit which is placed around the perimeter of a building foundation for the purpose of admitting ground water.

(6) *Impervious area* means 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.

(7) *Industrial sites* are those sites that contain industrial activities which require NPDES stormwater permits as set forth in regulations promulgated by U.S. EPA and Michigan Department of Environmental Quality.

(8) *Non-stormwater* is all flows to the stormwater system not defined as stormwater in paragraph 2:203(16) of this chapter or 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.

(9) *NPDES* means National Pollutant Discharge Elimination System, a program to issue permits for discharges to receiving waters, established under the Federal Clean Water Act, and administered by the Michigan Department of Environmental Quality.

(10) *Non-stormwater use charge* is the charge applicable to any non-stormwater use of the stormwater system, as defined by the administrator.

(11) *Operation and maintenance* includes any component of a stormwater system 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.

(12) *Operation and maintenance costs* include all costs, direct and indirect, of operation and maintenance of a stormwater system.

(13) *Pervious area* is all land area that is not impervious.

(14) *Pretreated non-stormwater* is non-stormwater that requires, under an NPDES permit or the permit provided by this chapter, pre-treatment (mechanical, physical or chemical) prior to being discharged into the stormwater system.

(15) *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.

(16) *Stormwater* means stormwater runoff, snowmelt runoff, footing drain discharges, surface runoff and drainage, and other discharges allowed by administrative regulations.

(17) *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.

(18) *Stormwater utility charge* means a charge to property pursuant to this chapter and Chapter 29, 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.

(19) *Stormwater management* means 1 or more of the following:

(a) The quantitative control achieved by the stormwater system of the increased volume and rate of surface runoff caused by alterations to the land;

(b) 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

(c) Public education, information, and outreach programs designed to educate and inform the public on the potential impacts of stormwater.

(20) *Stormwater management program* means 1 or more aspects of stormwater management undertaken for the purpose of complying with applicable federal, state and local law and regulation or the protection of the public health, safety, and welfare related to stormwater runoff.

(21) *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.

(22) *User* is a firm, person or property that directly or indirectly contributes stormwater or non-stormwater to the stormwater system.

(Ord. No. 17-07, § 2, 7-2-07)

2:204. - Establishment of a stormwater utility.

A stormwater utility is hereby established under the direction of the administrator to conduct the stormwater management program of the city. The stormwater management program shall include those activities necessary to protect public health, safety, and welfare from stormwater and fulfill the requirements of the City of Ann Arbor's stormwater NPDES permit, and all successor permits, including but not limited to the following activities:

(1) Planning, engineering, acquisition, construction, operation, maintenance, installation and debt service costs to acquire, construct, finance, operate and maintain a stormwater system.

(2) Administering the stormwater management program.

(3) Acquiring, constructing, improving, enlarging, repairing, enhancing, replacing, financing, operating and maintaining the stormwater system, together with such indirect and overhead costs which are fairly chargeable to such activities pursuant to accepted accounting principles and practices applicable to the local unit government, including practices required under the Uniform Budgeting and Accounting Act, 1968 PA 2, as amended, MCL 141.421 through 141.440a, and rules and regulations promulgated thereunder.

(4) Developing a stormwater management plan, as identified in section 2:205 of this chapter.

(5) Undertaking activities required in order to comply with federal and state law and regulations related to stormwater and permits issued thereunder.

(6) Paying drain assessments which are the obligation of the city.

(7) Providing public education, or information, or outreach related to the stormwater management program or required by federal or state regulations, or required by permits issued to the local unit of government by federal or state regulatory bodies.

(Ord. No. 17-07, § 2, 7-2-07)

2:205. - Stormwater management plan.

The administrator may adopt, amend, or extend a stormwater management plan from time to time. Any such adoption, amendment, or extension shall be approved by resolution of the Council.

(Ord. No. 17-07, § 2, 7-2-07)

2:206. - Stormwater utility charges, general.

(1) Subject to the provisions of this chapter, all owners of property in the City of Ann Arbor shall be charged storr utility charges for their use of the stormwater system. The stormwater utility charges shall be proportionate t necessary cost of the stormwater management services provided to each property in the city. The basis for stormwater utility charges shall be computed by the administrator.

(2) The stormwater utility charges shall be a quarterly or a regular interval service charge, shall be determined by the provisions of this chapter, and may be changed from time to time by Council.

(3) Revenue from the stormwater utility charge shall be used solely to defray the city's cost of conducting the stormwater management program defined in section 2.204 and described in the stormwater management plan prepared according to criteria in section 2:205.

(4) Stormwater utility charges are in addition to any special assessment, single lot assessment or public improvement charge that might be or become due for capital improvements to the stormwater system. Special assessments, single lot assessments and public improvement charges for improvements to the stormwater system that are financed in whole or in part by special assessments, single lot assessments or public improvement charges will be calculated and imposed as provided in Chapters 12 and 13.

(Ord. No. 17-07, § 2, 7-2-07)

2:207. - Customer charge.

Each property shall be charged a customer charge proportionate to the city's costs of administering the stormwater utility billing system, providing necessary public engagement services, and conducting other necessary services that are provided equitably to each customer, as defined by the stormwater management plan.

(Ord. No. 17-07, § 2, 7-2-07)

2:208. - Stormwater discharge rate.

(1) Each property discharging stormwater into the city's stormwater system, either directly or indirectly, shall be charged an amount proportionate to the representative quantity of stormwater generated by that property. The principal stormwater generating characteristic of each property is its representative impervious area, which shall be used as the basis for the stormwater discharge rate. The stormwater discharge rate shall be used to fund those elements of the stormwater management program whose cost is directly related to the amount of stormwater managed.

(2) The representative impervious area of a property shall be the measured impervious area of the property except for single-family and 2-family residential properties or properties considered residential for storm and sanitary, which may be grouped into 1 or more representative impervious area rate categories based upon a statistical evaluation of the measured impervious area of a sample of all properties. Each property within a category shall be billed the same stormwater utility charge if such statistical similarity is demonstrated.

(3) The administrator may periodically change the representative impervious area of a property based upon information available to the city and/or provided by a property owner.

(Ord. No. 17-07, § 2, 7-2-07)

2:209. - Charges for non-stormwater discharges.

The administrator may impose fees for the use of the stormwater system for non-stormwater discharges permitted by the city under section 2.216 of this chapter. Charges shall be proportionate to the capacity of the stormwater system that is used by the non-stormwater flow that would otherwise be available for stormwater, and any additional charges related to preparing, monitoring, and enforcing any permits related to non-stormwater discharges.

(Ord. No. 17-07, § 2, 7-2-07)

2:210. - Other charges.

Charges for other services provided by the city shall be on a time and materials basis, including direct and indirect costs, as established by the administrator. The administrator may also set charges for the fair share recovery of the cost, including direct and indirect costs, from users for the implementation and operation of any of the following:

(a) Monitoring, inspection and surveillance procedures;

(b) Reviewing accidental discharge procedures and construction;

(c) Discharge permit applications for stormwater and non-stormwater;

(d) Annual charges for multi-year permits, and

(e) Other charges as the administrator may deem necessary to carry out the requirements of this chapter.

(Ord. No. 17-07, § 2, 7-2-07)

2:211. - Credits.

(1) The purpose of this section is to provide for each property owner's control over contributions of storm flows to the stormwater utility system and the related stormwater utility charges and to advance protection of the public health, safety, and welfare.

(2) The city shall offer credits that will enable any property owner, through voluntary action, to reduce the stormwater utility charges calculated for that property owner's property and will provide a meaningful reduction in the cost of service to the stormwater system, or that shall be reasonably related to a benefit to the stormwater system:

(a) Credits will only be applied if requirements outlined in this Code are met, including, but not limited to: completion of on-going maintenance, guaranteed right-of-entry for inspections, and submittal of annual self-certification reports.

(b) Credits will be defined as either set charge reduction or percent (%) reductions applied as a credit adjustment to the charge calculation equation.

(c) Credits are additive for each credit category.

(d) As long as the stormwater facilities or management practices are functioning as approved, the credit reduction will be applied to the charge. If the approved practice is not functioning as approved or is terminated, the credit reduction will be cancelled and the charge will return to the baseline calculation. Once the credit reduction has been cancelled, a customer may not reapply for credit for a period of 12 months and only then if the deficiency has been corrected, as determined by city inspection.

(e) Credits will be applied to the next complete billing cycle after the application has been approved.

(3) The administrator shall define a method for applying and granting credits, as well as criteria for determining the credits a property owner may receive. The administrator may by regulation establish credits for 1 or more of the following property owner actions:

(a) Installation and maintenance of a stormwater control facility meeting the design standards referenced in Chapter 55;

(b) Installation and maintenance of rain barrels, rain gardens, cisterns, dry wells, bioswales, and other water quality controls in addition to those required of the property owner under Chapter 55;

(c) Property owners that satisfy the requirements of the RiverSafe Homes or the Partners for Clean Streams programs administered by the Washtenaw County Water Resources Commissioner;

(d) Providing a school-based education or information program which has obtained MDEQ approval related to stormwater management and its impacts; and

(e) Other actions of the property owner that, in the judgment of the administrator, result in a measurable reduction in stormwater runoff or pollutant loadings.

(4) The administrator shall define criteria for determining additional credits that lands dedicated for public use may receive. Such credits are appropriate because 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. Lands dedicated for public use are eligible for credits if they provide 1 or more of the following services to the stormwater utility:

(a) Use of the roadway for conveyance and storage of stormwater during major storm events that exceed the capacity of the underground storm drainage system.

(b) Use of right-of-way for retrofit of stormwater quality control systems required under NPDES permits issued to the city.

(c) Access to the stormwater system for operation and maintenance activities, often restricting traffic on the roadway.

(d) Reduced pavement life when stormwater system repairs require open cut excavation of the roadway.

(e) Education provided by storm inlet labeling, stream crossing signage, and other educational signs placed within the right-of-way.

(Ord. No. 17-07, § 2, 7-2-07; Ord. No. 18-09, § 7, 7-16-18)

2:212. - Exemptions.

Except as provided in this section, no public or private property located in a stormwater district shall be exempt from stormwater utility charges.

(1) Properties that do not utilize the public stormwater system shall be exempt from the portion of the charge for stormwater discharge if the property owner follows the procedure detailed by the administrator to qualify for such an exemption.

(Ord. No. 17-07, § 2, 7-2-07)

2:213. - Billing.

The city shall bill property owners and authorized tenants for stormwater systems on a periodic basis under procedures defined in Chapter 29 and by regulations promulgated by the administrator.

(Ord. No. 17-07, § 2, 7-2-07)

2:214. - Stormwater enterprise fund.

(1) All revenues raised from stormwater utility rates, fees, and charges shall be placed in a stormwater enterprise fund together with such other revenues from any source or combinations of sources of revenues otherwise legally available which have been designated to be used for the stormwater management program.

(2) No part of the funds held in the stormwater enterprise fund may be transferred to the general operating fund or used for any purpose other than undertaking the stormwater management program, and operating and maintaining a stormwater system.

(Ord. No. 17-07, § 2, 7-2-07)

2:215. - Use of stormwater system.

(1) The primary use of the stormwater collection system shall be the collection and transportation of stormwater. Non-stormwater use shall be considered a secondary use of the stormwater system.

(2) The discharge of non-stormwater to the stormwater system is prohibited except as allowed under this section. No person shall place or cause to be placed any substance into the stormwater system other than stormwater (except for placement of recreational equipment in the Huron River or its impoundments), except when authorized by a permit granted by the administrator. The administrator may refuse to permit the discharge of non-stormwater into the stormwater system for any reason or combination of reasons that is reasonable.

(3) The following non-stormwater discharges are exempt from discharge prohibitions established in paragraph 2:215(2): water line flushing or other potable water sources, landscape irrigation or lawn watering, diverted stream flows, rising groundwater (permitted after demonstration of acceptability), groundwater infiltration to storm drains, uncontaminated pumped groundwater, foundation or footing drains (not including active groundwater dewatering systems), crawl space pumps, air conditioning condensation, residual street washing waters, springs, non-commercial washing of vehicles, natural riparian habitat or wetland flows, non-residential swimming pools (if de-chlorinated/typically less than 1 PPM chlorine), fire fighting activities, and any other water source not containing pollutants.

(4) Except for natural runoff water or pursuant to agreement approved by the City Council, the city shall not furnish use of the stormwater system to users outside city limits.

(5) Generally, no person, property, or firm shall cause or permit the introduction of any substance into the stormwater system, whether solid, liquid or gaseous, that will cause:

(a) Chemical reaction, either directly or indirectly with the materials of construction used in the stormwater system or that will impair the strength or durability of sewers or structures;

(b) Mechanical action that will destroy or damage sewers or structures;

(c) Restriction of the normal maintenance and inspection of sewers;

(d) Danger to public health and safety or to the environment;

(e) Conditions that create a public nuisance;

(f) An oil sheen or unusual color;

(g) Abnormal demand on the stormwater system capacity; or

(h) The stormwater system to violate its NPDES permit or applicable receiving water standards and all other federal, state, and local regulations.

(6) No person shall discharge into the stormwater system any treated non-stormwater that is subject to a discharge prohibition unless the discharge is authorized under permits issued by MDEQ and the city.

(7) No person shall use the storm water system for discharge from any environmental cleanup that is regulated under the Natural Resources and Environmental Protection Act, Chapter 7, Part 201 of Act 451, P.A. 1994, unless approved by City Council. Approval by City Council must be conditioned upon the discharge meeting all criteria for discharge under this chapter. Approval conditions may provide for measures appropriate to preventing harm due to possible exfiltration into the ground adjacent to the system or failure of any pretreatment system for the discharge.

(Ord. No. 17-07, § 2, 7-2-07)

2:216. - Discharge permits.

(1) A permit is required from the administrator to discharge treated non-stormwater otherwise subject to a discharge prohibition under this chapter into the stormwater system. The administrator may require each person or firm that applies for use or uses of the stormwater system for non-stormwater purposes to obtain a discharge permit on the form prescribed by the administrator, to be subject to all provisions of this chapter. A permit may be issued for a period not to exceed 5 years. The permit shall be subject to modification or revocation for failure to comply or provide safe access or provide accurate reports of the discharge constituents and characteristics. Permits are issued to specific persons or firms for specific operations and are not assignable to another person or firm without the prior written approval of the administrator. Permits are not transferable to another location. Anyone seeking a permit to discharge treated non-stormwater otherwise subject to a discharge prohibition into the stormwater system must do the following:

(a) File a written statement with the administrator setting forth the nature of the enterprise, the amount of water to be discharged with its present or expected bacterial, physical, chemical, radioactive or other pertinent characteristics;

(b) Provide a plan map of the building, works or complex with each outfall to the surface waters, sanitary system, storm sewer, natural watercourse or ground waters noted, described and the discharge stream identified; and

(c) Sample, test and file reports with the administrator and the appropriate federal, state, and county agencies on appropriate characteristics of discharges on a schedule, at locations, and according to methods approved by the administrator.

(2) Every permit to discharge into the stormwater system shall be conditioned upon the permittee providing insu security and/or indemnification satisfactory to the administrator protecting the city, city property and persons city from loss or damages associated with the permit or permit activities.

(3) The administrator or other authorized employees are authorized to obtain information concerning industrial processes which have a direct bearing on the kind and source of the discharge to the stormwater system. The industrial user may withhold or restrict information if it can establish to the satisfaction of the administrator that release of the information would reveal trade secrets or would otherwise provide an advantage to competitors, except discharge constituents will not be recognized as confidential information.

(4) At the permittee's expense, the administrator shall carry out independent surveillance and field monitoring, in addition to the self-monitoring required of certain users to ascertain whether the purpose of this chapter is being met and all requirements are being satisfied.

(5) The method of determining flow of discharge to the stormwater system shall be approved by the administrator.

(6) The user shall acquire and be in full compliance with applicable federal (NPDES), state and county permits for discharge prior to being granted a permit from the administrator.

(Ord. No. 17-07, § 2, 7-2-07)

2:217. - Regulations.

(1) The administrator may adopt regulations implementing this chapter. These regulations may include, but not be limited to, the following topics:

(a) The design, operation, management, and maintenance of the stormwater system and for connections to that system.

(b) Control of the quality and quantity of stormwater from industrial sites by establishing management practices, design and operating criteria.

(c) Criteria used to determine whether the stormwater utility charge will be billed to the property owner or the occupant(s) of a property, including criteria that will be used to determine how to allocate the stormwater utility charge to multiple occupants of a single property.

(d) Procedures for updating billing data based upon changes in property boundaries, ownership, and stormwater runoff characteristics.

(e) Billing and payment procedures of the stormwater utility that define the billing period, and billing methodology.

(f) Policies establishing the type and manner of service delivery that will be provided by the utility.

(g) Regulations governing the resolution of stormwater management issues among several property owners within the district.

(h) Procedures for establishing, evaluating, and refining any credits granted according to criteria in section 2:211, and appeals as defined according to criteria in section 2:219.

(i) Enforcement policies and procedures.

(2) These regulations shall take effect 30 days after being filed with the City Clerk unless modified or disapproved by the City Council. Regulations which are modified by City Council take effect 30 days after

the modification.

(Ord. No. 17-07, § 2, 7-2-07)

2:218. - Stormwater taps.

(1) Except for public services area employees, only City of Ann Arbor registered plumbers, licensed sewer installers and bona fide homeowners, after first obtaining all necessary permits including but not limited to a plumbing permit, street cut permit and sewer tap permit, are authorized to uncover the stormwater system so that existing tees or deep sewer risers installed during public stormwater system construction may be utilized. The connection shall be made only by the public services area employees only upon payment of the required connection fee which shall be fixed by the public services area and shall not be less than the cost of materials, installation and overhead attributable to the installation.

(2) All costs and expense incidental to the installation, connection, and maintenance of the stormwater tap and lead shall be borne by the owner(s).

(3) The public services area will furnish and install stormwater system taps of the size and at the location the applicant requests in writing, provided:

(a) The requests are reasonable;

(b) An adequate stormwater system fronts the premises;

(c) An adequate tee or deep stormwater system riser does not exist for required usage;

(d) A good and safe excavation is provided by the owner(s) or owner's agent for public services area tapping personnel;

(e) The maximum sized direct tapped connection shall not be larger than ½ the nominal diameter of the stormwater main (e.g., a 6-inch maximum tap into a 12-inch stormwater main). Connections greater than ½ the nominal diameter of the stormwater main shall be made in a minimum 3-foot diameter storm sewer structure or with a manufactured tee fitting.

(f) Existing tees and deep risers shall be utilized along with stormwater leads constructed (stubbed) to the property line at the time the stormwater system was constructed.

(Ord. No. 17-07, § 2, 7-2-07)

2:219. - Right of appeal.

The administrator shall establish a procedure for the submission of appeals and the adjustment of the customer's stormwater utility charges. This procedure shall provide the following:

(1) A property owner or occupant liable for a stormwater utility fee shall be provided the right to appeal the stormwater utility charge. Appeals shall be considered on the grounds that the stormwater generated by the property and discharged into the stormwater system is less than estimated by the administrator. No appeal may be brought with respect to a stormwater utility charge more than 1 year after the rendering of the bill for which an appeal is sought.

(2) For an appeal to be successful, the property owner or occupant shall demonstrate that the stormwater generated by the property is less than the amount used by the administrator in the calculation of that property's stormwater utility charge. Factors that will be considered by the administrator include the

impervious area of the property, the activities of the property owner or features of the property that are available for credits, the amount of direct discharge to the stormwater system, or other factors defined by the administrator.

(3) A property owner or occupant must comply with all rules and procedures adopted by the administrator when submitting a request for appeal or adjustment of the stormwater utility charge and must provide all information necessary to make a determination.

(4) Upon a finding that the stormwater generated by a property is less than the amount used by the administrator in the calculation of that property's stormwater utility charge, the sole remedy to the property owner shall be re-calculation of the stormwater utility charge based on the corrected level of stormwater.

(5) A finding that the stormwater generated by a property is not less than the amount used by the administrator in the calculation of that property's stormwater utility charge shall be conclusive with respect to that property and shall remain effective for 7 years, unless the property owner changes the impervious area or the stormwater management practices of the property. The property owner shall remain eligible for credits and exemptions under this chapter.

(Ord. No. 17-07, § 2, 7-2-07)

2:220. - Landlord-tenant.

The property owner may request, subject to the approval of the administrator, that the stormwater utility charge be billed to the owner's designated tenant. The administrator may direct billing to the tenants of a property if the tenants are currently billed for water or sanitary sewer service. The property owner shall be liable for payment even if the stormwater utility charges are billed to the tenant of the property.

(Ord. No. 17-07, § 2, 7-2-07)

2:221. - Enforcement.

(1) No person shall construct or maintain any property, residence or business not in compliance with the standards of this chapter.

(2) The administrator and other authorized employees of the city bearing proper credentials and identification shall be permitted to enter upon all properties for the purposes of inspection, observation, measurement, sampling and testing in accordance with the provisions of this chapter.

(3) No person shall fail to provide any report or other information or perform any duty required by this chapter.

(4) The City Attorney is authorized to take appropriate legal action to require compliance with this chapter.

(5) If, after reasonable notice, a person fails to comply with this chapter, the city may cause the work to be done to obtain compliance and shall charge the cost of that work to the person responsible.

(6) If any person fails to pay any fees or charges required by this chapter, the amount may be assessed against the property involved in accordance with section 1:292 of Chapter 13 of this Code.

(7) In addition to any other remedy, the administrator, after 5 calendar days notice posted on the affected property, is authorized to disconnect water service, sanitary sewer and stormwater sewer services to any

property in violation of this chapter. The notice shall state that persons affected may, within 5 calendar days, provide the administrator with any information or reasons as to why services should not be disconnected.

(8) The administrator is authorized to take all steps necessary to immediately halt any discharge of pollutants which reasonably appears to present an imminent danger to the health or welfare of persons or to the environment.

(9) In case of an emergency involving private stormwater facilities, the administrator may direct that immediate action be taken to correct or abate the condition causing the emergency. City personnel may perform the required work and charge the appropriate owner(s) all such related and provable costs. Such costs (if remaining unpaid for 30 days following a bill being sent for their reimbursement) shall constitute a lien on the real property.

(9) Persons aggrieved by any determination of the Administrator in enforcing this chapter may appeal that determination pursuant to section 1:16 of Chapter 1 of this Code. Prosecution shall be stayed pending such an appeal.

(10) A person who violates any provision of this chapter shall be responsible for a civil infraction for which the court may impose a civil fine of not more than $10,000.00 per day of violation plus all costs, direct or indirect, which the city has incurred in connection with the violation, including but not limited to fines paid by the city. Each day a violation occurs is a separate violation.

(Ord. No. 17-07, § 2, 7-2-07)

2:222. - Conflict.

In the event of a conflict between a provision of this chapter and any other portion of the City Code, the provisions of this chapter shall prevail.

(Ord. No. 17-07, § 2, 7-2-07)

# EXHIBIT - 31

2:69. - Stormwater rates.

(1) Except as provided in this section and Chapter 33, all property shall be subject to the stormwater utility charge.

(2) *Stormwater discharge rate*. Each property shall be billed at a quarterly stormwater discharge rate of $894.01 per acre multiplied by the representative impervious area of the property. The representative impervious area of the property shall be the measured impervious area, rounded to the nearest 0.0001 acre, of the portion of the property discharging to the city's stormwater system.

(3) Properties with a single-family dwelling, a two-family dwelling, or a single-family dwelling with an accessory dwelling unit, all as defined in Chapter 55, are grouped into the following categories for purposes of calculating stormwater charges based upon their measured and representative impervious area:

| **Single-Family and Two-Family Residential** | | |
|---|---|---|
| **Area Measured Impervious** | **Representative Impervious Area** | **Quarterly Charge** |
| Less than or equal to 2,187 square feet | 0.03706 acres | $33.13 |
| Greater than 2,187 square feet to less than or equal to 4,175 square feet | 0.06486 acres | 57.98 |
| Greater than 4,175 square feet to less than or equal to 7,110 square feet | 0.11117 acres | 99.38 |
| Greater than 7,110 square feet | 0.19456 acres | 173.94 |

(4) *Customer charge.* Each property shall be billed a customer charge of $4.23 per quarter.

(5) *Credits to stormwater discharge and customer charges.* The city shall offer the following credits

per quarter to property owners fully satisfying pertinent criteria established in Chapter 33 and in regulations promulgated by the Administrator:

| Single-Family and Two-Family Residential | Reduce Total Charge by |
|---|---|
| Rain barrels (1 or more) | $3.51 |
| Rain gardens/cisterns/dry wells | 7.27 |
| RiverSafe homes | 1.33 |
| Chapter 63—Compliant stormwater control | 19.37 |

| Other Properties | Reduce Stormwater Discharge Rate by | Reduce Customer Charge by |
|---|---|---|
| Community Partners for Clean Streams | 0.0% | 25.83% |
| Chapter 63—Compliant Stormwater Control | 28.87% | 0.0% |
| Other approved stormwater controls | 8.17% | 25.83% |

(5) *Charges for permitted non-stormwater discharges.* The charges for non-stormwater discharges to the stormwater system that are permitted by the Public Services Area Administrator according to Chapter 33, section 2:217, shall be $1.84 per 1,000 gallons. If non-stormwater discharges to the stormwater system are controlled such that the discharges cease during periods of precipitation, then the above rate shall be multiplied by a factor of 0.3. For any

month in which the user discharges into the stormwater system, there shall be a minimum bill for 100,000 gallons. Stormwater discharges exempt from discharge prohibitions under section 2:216(3) are not subject to this charge.

(Ord. No. 18-07, § 1, 7-2-07; Ord. No. 08-20, § 1, 6-21-08, eff. 7-1-08; Ord. No. 09-19, § 1, 6-1-09; Ord. No. 10-15, § 1, 6-7-10; Ord. No. 11-08, § 1, 6-20-11; Ord. No. 12-22, § 1, 6-4-12, eff. 7-1-12; Ord. No. 13-12, § 1, 6-10-13; Ord No. 14-07, § 1, 6-2-14; Ord. No. 15-06, § 1, 5-18-15; Ord. No. 16-07, § 1, 5-16-16; Ord. No. 17-04, § 1, 5-1-17; Ord. No. 17-13, § 1, 7-17-17; Ord. No. 18-12, § 1, 6-18-18; Ord. No. 18-09, § 6, 7-16-18; Ord. No. 19-13, § 1, 5-6-19; Ord. No. 20-16 , § 1, 5-18-20; Ord. No. 21-16 , § 1, 5-3-21, eff. 7-1-21)