

June 6, 2017

MEMORANDUM

A Water Affordability Plan for the City of Detroit does not violate the Headlee Amendment

Art 9, §31 of the Michigan Constitution is commonly referred to as the “Headlee Amendment.” This provision essentially requires voter approval of new taxes. The provision has been a focal point for controversies in cases where local governments have been accused of disguising new taxes as fees of various types and not first seeking voter approval.

In Detroit, requests by community organizations over many years for a water affordability plan with a rate structure that indexes water and sewerage rates to poverty, and that holds poor customers harmless for amounts that exceed 3% of their total household income have been met by assertions that such a plan would violate the Headlee Amendment. The Michigan Supreme Court case of *Bolt v. City of Lansing*, 459 Mich. 152 (1998) has been cited as the basis for this position.

At issue in *Bolt* was the question of whether a storm water service charge imposed by the city of Lansing on all property owners was a fee, or instead a tax that requires voter approval. To resolve this and comparable questions, the court articulated a three-part inquiry: 1) Does the charge serve a regulatory purpose? 2) Is the charge proportionate to the necessary costs of the service? 3) Is payment of the charge voluntary? *Id.* at 161-62.

The court held that if a charge is implemented primarily to generate revenue it does not serve a regulatory purpose. *Id.* at 162. Further, if the charge is designed primarily to benefit the public

at large rather than to provide a particular service to an individual, it is unlikely to be a fee. By contrast: "Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component, sewerage may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax." *Id.* at 164-65.

In addressing the specific question of Lansing's storm water sewerage charge, the Michigan Supreme Court took special note of part of the Court of Appeals *Bolt* dissent:

The extent of any particularized benefit to property owners is considerably outweighed by the general benefit to the citizenry of Lansing as a whole in the form of enhanced environmental quality.... When virtually every person in a community is a "user" of a public improvement, a municipal government's tactic of augmenting its budget by purporting to charge a "fee" for the "service" rendered should be seen for what it is: a subterfuge to evade constitutional limitations on its power to raise taxes. [221 Mich App at 96, 561 NW 2d 423]

Id. at 166.

Finally, the court held the charge was not voluntary because: "The property owner has no choice whether to use the service and is unable to control the extent to which the service is used." *Id.* at 167-68.

The Lansing controversy was not the first "fee versus tax" case to be considered by the court. In fact, in the 1876 case of *Jones v Board of Water Commissioners of Detroit*, 34 Mich 273 (1876), the Michigan Supreme Court held definitively that fees for water service are not a tax. The court explained that a defining characteristic of taxes is that taxes are compelled and user fees are paid voluntarily. "...[W]ater rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity." *Id.* at 275. The court noted: "the citizens may take [water] or not as the price does or does not suit them." *Id.*

In *Ripperger v. City of Grand Rapids*, 338 Mich. 682 (1954) the Michigan Supreme Court followed the reasoning of the *Jones* decision and held that a charge for sewerage services implemented by the city pursuant to a court order was not a tax. Both *Jones* and *Ripperger* were considered in *Bolt* but in deciding there should be a different outcome, the court explained there is no rigid rule that is mechanically applied. Instead, the court considered the referenced three factors as they concern Lansing's charges, and the court concluded the charges were a tax rather than a user fee. It is possible that if the Lansing sewerage fee had been voluntary and not compulsory, the court might not have considered it a tax.

An Affordability Plan for Detroit

Given the disposition of prior cases, including *Bolt*, it is apparent that any fee connected with a water affordability plan for the City of Detroit would be a user fee and not a tax. This is demonstrated by the three criteria established by the court.

A. Regulatory Purpose

Money collected as part of an affordability program is used exclusively by the water provider for the purpose of providing affordable water services. The money does not flow into the city's general fund to be used for services and projects typically financed by taxes. The charges are in every sense a fee for water services and water services only.

Key to appreciating the true nature of charges connected with an affordability plan is the fact that the benefits are not limited to low income water customers. All customers of the utility benefit because the program expands the ranks of paying customers and as a consequence reduces the financial burden currently borne by customers with greater financial resources. Without an affordability plan, paying customers must pick up the slack for water customers who pay nothing. With an affordability plan that allows all water customers to pay what they can

afford, higher income customers pay less to sustain the utility, and with the additional fees for services the water department increases its capacity to maintain and improve the services provided to all customers.

B. Proportionality

Of concern to the courts have been those cases where charges significantly exceeded the actual cost of the service provided, and the extra funds collected have been used to pay costs typically covered by taxes or the general fund. For a charge to be regarded as a user fee, it is not necessary for it to be strictly limited to the actual cost of the service. The court in *Bolt* acknowledged that the actual cost "...including some capital investment component..." is acceptable. (*Bolt* at 164-65) An affordability plan fee is acceptable because it represents an investment in the expansion and financial stability of the customer base, which in turn increases the capacity of the utility to deliver expanded, quality services for all customers.

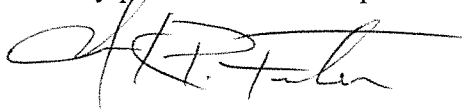
Furthermore, not only are water payments made according to an affordability plan proportionate to the water service provided, they are indexed to actual income making the payments very particular to the water needs of each individual.

C. Voluntariness

Voluntariness was absent in *Bolt* because all Lansing residents were required to pay the sewerage fee. Water service fees on the other hand are always optional. A property owner always has the option of not maintaining a residence on his property and therefore having no need for water service. The voluntary choice of obtaining water and paying for it bears no resemblance to the required payment of taxes. Of the three factors, voluntariness may be the one that most clearly distinguishes taxes from user fees. As recognized by the Michigan Supreme Court in *Jones*, water service has never been, and likely never will be compulsory.

Conclusion

Concern about whether a water affordability plan is prohibited by the Headlee Amendment is misplaced. In fact, when properly read, *Bolt v. Lansing* holds that such a plan is entirely permissible. Prudence and concern for the health, safety and welfare of Detroit's residents compel the adoption of a water affordability plan at the earliest possible date.



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